South Nyanza Sugar Company Limited v Aronga (Civil Appeal 134 of 2019) [2021] KEHC 9760 (KLR) (12 May 2021) (Judgment)

Neutral citation: [2021] KEHC 9760 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 134 OF 2019

RPV WENDOH, J

MAY 12, 2021

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED ..... APPELLANT

AND

GRACE ADOYO ARONGA ..... RESPONDENT

(Being an appeal from the Judgement and Decree of the Principal Magistrate's Court, Rongo (Hon. C.M. Kamau, SRM) dated and delivered on 9/9/2019 in Rongo PMCC No. 169 of 2016 – Grace Adoyo Aronga v South Nyanza Sugar Company Limited)

JUDGMENT

1. This is an appeal by South Nyanza Sugar Company Limited against the judgement and decree of the Hon. C.M. Kamau (SRM) Rongo dated and delivered on 9/9/2019.

2. The appellant is represented by the firm of Okong'o Wandago & Co. Advocates whilst the respondent is represented by the firm of Ochillo & Company Advocates.

3. By a plaint dated 30/5/2016 and filed in court on 31/5/2016, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for damages for breach of contract for loss of sugar cane crop on 0.4 hectares at the rate of 40 tonnes and payment of Kshs. 2,000/= per tonne for the expected three (3) crops.

4. It was the respondent's case that by an agreement dated 30/5/2015, the appellant contracted the deceased to grow and sell to it sugarcane on his land being Plot No. 1221E in G/Konya sub-location measuring 0.4 hectares. The deceased signed the agreement and was assigned Account Number 235760 and planted the cane as agreed.

5. It was pleaded that the terms of the contract, both express and implied would be in force for 5 years or until one plant crop and the two ratoon crops of the cane are harvested on the plot whichever period would be less.

6. It was further pleaded that the appellant would be bound to exercise due care while harvesting and taking delivery of the cane; that in breach of the aforesaid, the appellant failed to harvest the cane when the same was mature and ready for harvesting and the respondent suffered loss and damage. The respondent stated that the plot was capable of producing an average of 40 tonnes and the rate of payment applicable was Kshs. 2,000/= per tonne.

7. The appellant filed a statement of defence dated 27/6/2016 on 28/62018. Liability was denied and the respondent was put to strict proof thereof.

8. The appellant mainly dwelled on the ability of the field to yield the tonnes pleaded by the respondent and averred that the maximum gross yield would be 26 tonnes and no more. The appellant also raised the issue of the trial court's territorial jurisdiction and the dispute resolution mechanism of arbitration which was agreed upon by the parties in the first instance.

9. After the hearing, the trial court entered judgement in favour of the respondent for Kshs. 49, 632/= in damages for breach of contract, costs of the suit and interest at court rates from the date of filing suit.

10. Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 8/10/2019 and filed evenly. It preferred nine (9) grounds of appeal which can be summarized in the following six (6) grounds as follows: -

    i. That the learned trial magistrate erred in both law and in fact in failing to hold that the respondent's suit was statute - barred and failing to strike it out having failed to address the issues of limitation of time and the binding authorities cited to him;

    ii. That the court erred in law and in fact in failing to find and hold that the respondent was in breach of the contract in issue in this cause and in failing to take the respondent's breach of that contract into account, while deciding the merits of the suit before him, thus reached wrong conclusions of fact and law when he awarded him compensation;

    iii. That the trial court erred in law and in fact in failing to hold that the evidence led by the respondent in an attempt to prove his claim was at variance with his plaint in material aspects like the estimated yields and cane prices and in doing so entered judgement for the respondent in error;

    iv. The trial court erred in finding that only the respondent's plot could yield an average of 62 tonnes of sugarcane per hectare, and applying that estimate in reckoning the compensation due to the respondent, which finding and holding were based on no evidence at all and/or the trial court's misapprehension of the evidence at trial;

    v. The trial court erred in law and in fact when it entered judgement for the respondent against the appellant for the principal sum of Kshs. 49,632/= whilst the amount was neither pleaded specifically nor proved strictly as required by law and which award was beyond the scope of the pleadings and far in excess of the sum the respondent would have been entitled to as compensation;

    vi. That the trial court erred in law and in fact in awarding interest on the principal sum of Kshs. 49,632/= from the date of filing suit as opposed to being computed from the date of judgement.

The appellant prayed: -

i. That this appeal be allowed with costs to the appellant.

ii. That this court re-evaluates the evidence and arrive at its own conclusion and findings on the whole of the respondent's suit at the trial court.

iii. The suit in the trial court be dismissed with costs.

This court be pleased to order that any interest on a sum of money awarded as damages if any be calculated from the date of judgement if this court were to find that damages are due.

11. Directions on the appeal were taken that the appeal be canvassed by way of written submissions. Both parties complied.

12. In support of its appeal, the appellant filed its submissions dated 19/7/2021 evenly and further submissions on 9/12/2021 in response to the respondent's submissions dated 15/9/2021 filed on 29/9/2021.

13. The appellant addressed grounds 6 and 9 of the appeal and submitted that the respondent's case before the subordinate court was not proven by evidence; that the appellant pointed out in its submissions that the respondent did not produce the contract in issue, and therefore did not prove the contract in the first place. The respondent did not produce the contract dated 30/5/2005 as an exhibit when she testified on 2/5/2018. The contract between the appellant and the deceased was entered into on 24/2/2006 and the commencement date was on 30/5/2005. Therefore, there is no evidence that any contract was made on 30/5/2005.

14. On the issue of the suit being statute barred, the appellant submitted that in the event this court finds that the contract was entered into on 30/5/2005, the crop could have been planted in the year 2005; that the exact date when the plant crop was planted is unknown; that the plant crop was to be harvested in the year 2007, 24 months after commencement of the contract; that the breach of contract occurred within June 2007 thus the suit should have been filed by the end of July 2013. The suit was filed nearly nine (9) years after the cause of action arose and the suit was filed nearly two (2) years out of time. The appellant submitted that the suit was statute - barred outside the mandatory prescribed period in the *Limitation of Actions Act*, Cap 22. Further, it was submitted that limitation of actions is a jurisdictional issue and can be raised at any time in proceedings even on appeal.

15. On the damages awarded, the appellant submitted that general damages cannot be awarded in breach of a contract claim. The respondent neither pleaded nor prayed for a specific amount in damages; that the character of the plaint removed the respondent's case from the known class of special damages. It was further submitted that since it was not special damages, then interest cannot be awarded from the date of filing suit and only at the time of judgement.

16. On the issue of limitation, the respondent submitted that it was not raised as an issue at the hearing before the trial magistrate and neither was it pleaded in the statement of defence. Reliance was placed on the Court of Appeal case of *Stephen Onyango Achola vs Edward Hongo Sole & Another*.

17. Whether the respondent was in breach of contract, it was submitted that there was no evidence produced in court to show that the respondent did not honour his contractual duties; that the duty to harvest the cane lay with the appellant as per clause 3.1.12.

18. On the testimony and the pleadings being at variance, it was submitted that the respondent produced exhibit 4 being the cane yields in the outgrowers agreement; that in the plaint, the plant crop in Kanyamgony A sublocation is 62.04. The respondent also produced exhibit 3 being the cane produce

price list which indicated the amount payable at that time was Kshs. 2,000/=. Therefore the claim and the evidence were not at variance.

19. On the issue of interest, the respondent relied on Section 26 (1) of the *Civil Procedure Act* and submitted that the court has discretion to award interest at two stages; from the period when the suit was filed and the period from the date of judgement. The respondent asked the court to find the appeal without merit and dismiss the same.

20. In its submissions in response, the appellant reiterated its submissions on the issue of limitation and interest. On limitation, it was submitted that the respondent was not denying that the suit was statue barred but it was raising issue that it was not pleaded in the defence.

21. I have carefully considered the record of appeal, the rival submissions and the proceedings in the trial court. The following are the issues for determination: -

    i. Whether the suit filed in the Lower Court was statute barred.

    ii. Whether the respondent proved her case in the trial court.

    iii. Whether the court awarded the damages based on proper legal principles.

22. This being a first appeal, the court has the duty to re-evaluate, and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bear in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in *Selle & Another vs Associated Motorboat Co Ltd* (1968) EA 123.

23. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* (1988) eKLR where the Court of Appeal held:-

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

24. On the issue of jurisdiction, the appellant submitted that the suit was statue barred as it was filed 2 years outside the limitation period.

25. The respondent's suit being one of breach of contract, the document which would have led the court to determine the dispute was the contract signed by both parties. In the record of appeal, the contract is from pages 13 - 26. This is the same document which formed part of the respondent's list of documents.

26. On the face of the contract at Schedule A, the contract is dated 30/5/2005 but on the first page of the contract, it shows that the agreement is dated 24/12/2006. Certainly, with two different contractual dates, it is impossible to discern when the contract was actually entered into. I have perused the contract. Clause 2 (a) states that the contract is deemed to have commenced on 30/5/2005 notwithstanding that the agreement may have been signed after that date. I therefore find that the contract commenced on or about 30/5/2005.

27. That being the case, the contract was to run for a period of 5 years or until one crop and two ratoons of sugar cane have been harvested, whichever event occurs first. The plant crop was to be harvested on maturity not later than 24 months, the 1st ratoon not later than 22 months after harvest of the plant crop and the 2nd ratoon not later than 22 months after the harvest of the 1st ratoon.

28. Since the contract commenced on 30/5/2005, the plant crop was to be harvested on or about June of 2007. The respondent pleaded at paragraph 7 of her plaint that the appellant failed to harvest the cane when the same was mature therefore it was in breach of the contract.

29. Section 4 (1) of the *Limitation of Actions Act* provides as follows in relation to actions based on contracts, tort and certain other actions: -

> " The following actions may not be brought after the end of six years from the date on which the cause of action accrued –
>
> a) actions founded on contract;
>
> b) ...
>
> c) ...
>
> d) ...
>
> e) ..."

As provided by Statute, actions relating to contracts can only be brought to court before the lapse of six years from the time which the cause of action accrued.

30. According to Black's Law Dictionary (10th Edition) the word "accrue" means "to come into existence as an enforceable claim or right." Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said the time started running.

31. Courts have defined the period when the alleged breach is said to have occurred and/or accrued. In the case of *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* (2019) eKLR the court held that;

> " ...It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period."

32. Going by the averments of the respondent, the sugar cane was to be planted when the parties entered the contract on 30/5/2005 or soon thereafter. The sugar cane was to be harvested on or about June 2007. That is, 24 months after maturity. Therefore, the cause of action arose in the month of June 2007 when the appellant allegedly refused to harvest the sugar cane.

33. According to Section 4 (1) of the *Limitation of Actions Act*, time starts running at the point of breach. The action cannot be brought after the end of six years when the breach occurred. It can only be brought within 6 years from the time when the alleged breach occurred. Thus, any claim for breach of the instant contract should have been filed on or before the end of June 2013. The respondent filed his claim on 23/5/2016 some 2 years after the limitation period.

34. I have considered the arguments by the respondent that the issue of limitations was never raised and neither was it pleaded in the statement of defence. The respondent relied on the Court of Appeal finding in the case of *Stephen Onyango Ochola* (*supra*). I have taken time to consider the findings of that

case. In the aforementioned case, it is true that the learned Judges found that the 2nd respondent did not raise and/or plead the issue of limitation in its defence. The learned Judges referred to the provisions of the then Civil Procedure Rules Order VI Rule 4 (1) and (2) which provided, among other things, a party was required to specifically plead the provisions of the statute to defeat a claim.

35. An equivalent provision is Order 2 Rule 4 of the *Civil Procedure Rules*, 2010 which provides: -

> A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding Pleading.

36. My understanding of the above provision is that a defence should raise even issues of limitations in its defence. This, however, does not defeat the fact that a suit was statute barred ab initio.

37. Jurisprudence on raising objections on limitation of time has developed over the years. Limitation is said to be a jurisdiction issue and must be addressed at whatever stage it is raised. The court cannot arrogate itself jurisdiction if not granted by *the Constitution* or statute. In the Court of Appeal case, *Isaak Aliaza v Samuel Kisiavuki* (2021) eKLR, Nambuye J.A held that:-

> "I wish to reiterate that the position in law is therefore that a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court suo motu, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

38. Therefore, I am inclined to take the later position by Nambuye J and find that the issue of jurisdiction must be addressed first when it is raised at whichever stage by any party. It can even be raised by the court suo moto. An objection to the jurisdiction of court can come in many forms one of them being a plea on limitation of time. If neither of the parties were to raise the issue of limitation, but upon perusal of the pleadings the court notes that the suit is statute barred, it can proceed and make a finding on it. This is because, the court is devoid of jurisdiction; proceeding with an incompetent matter as it is, its decision would amount to nothing.

39. The foregone position is that the suit filed in the trial court was statute - barred. The trial court had no jurisdiction to entertain it. It ought to have downed its tools. See Owners of *Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd* (1989) KLR.

40. I should conclude my judgement at this point but I am inclined to point out a crucial issue which, were it not for the issue of limitation, the appeal would still have succeeded.

41. The respondent testified on 2/5/2018. She produced the grant ad litem as PEXH - 1, demand letter PEXH - 2, cane produce list - PEXH - 3, cane yields in outgrowers - PEXH - 4 and KESREF - PEXH - 5.

42. The contract which was the main document of contention was not produced as an exhibit. The effect thereof was discussed extensively in the Court of Appeal Case in *Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others* (2015) eKLR. The learned Judges considered the issue of a document which has not been produced formally as an exhibit and what weight it carries. It found that a document filed and/or marked for identification by either party passes through stages before it is proved or disproved.

The first stage being the filing of the document; and even though it is filed, it does not become part of judicial record. Secondly, when the document is tendered or produced in evidence as an exhibit, it then becomes part of judicial record. Thirdly, the document becomes proved or disproved when the court is called to examine its admissibility.

43. It went on further to state: -

> " The marking of document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account."

44. Since the document was not formally produced in evidence as an exhibit, it then follows that there was no contract that the trial court could have considered to in rendering its judgement.

45. From the foregone, I make the following orders: -

i. The appeal is merited and allowed as prayed.

ii. The suit in the lower court dated 30/5/2016 and filed on 31/5/2016 be and is hereby dismissed.

iii. The judgement dated and delivered on 9/9/2019 and its decree of 9/10/2019 be and are hereby set aside.

iv. Costs of the lower court suit and this appeal are awarded to appellant.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 12TH DAY OF MAY, 2022.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Odero for the Appellant.

No appearance for the Respondent.

Nyauke Court Assistant.