



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 92 OF 2019**

**ENOS ATIENO MIKWANGA ..... APPELLANT**

**VERSUS**

**SOUTH NYANZA SUGAR CO. LTD ..... RESPONDENT**

**JUDGEMENT**

(Being an appeal from the judgment and decree of the Senior Principal Magistrate, Hon. Nathan S. Lutta dated 23<sup>rd</sup> July 2019 in Kisii, CMCC No.1512 of 2004)

1. This appeal stems from a suit filed by the appellant against the respondent for breach of an Outgrowers Cane Agreement dated 3<sup>rd</sup> June 1996. The appellant claimed that the respondent had contracted him to grow and sell to it sugarcane on his plot number 282 B in field number 17 B, in Kakmasia Sub location measuring 0.8 hectares. He claimed that it was an express and implied term of the contract that the agreement would commence on 3<sup>rd</sup> June 1996 and would remain in force for a period of five years or until one plant crop and two ratoon crops of sugarcane were harvested on the plot whichever period was less. Within the five-year period or less, the plant crop and ratoon crops would be harvested at the ages of 22-24 months and 16-18 months after planting and subsequent harvest respectively. However, the respondent, in breach of the contract, failed to harvest the three crop cycles causing the crop to go to waste.
2. The appellant pleaded that his plot was capable of producing an average of 135 tonnes per hectare and the rate of payment applicable per tonne was Kshs. 1,730/=. Therefore, his total loss as a consequence of the respondent's breach of the contract was Kshs. 560,520/= which he claimed as damages.
3. The respondent denied all the assertions made by the appellant in its amended statement of defence. It also claimed that if indeed the 1<sup>st</sup> ratoon ever matured, it was abandoned and the 2<sup>nd</sup> ratoon was never developed. The respondent also claimed that the appellant had failed to employ the recommended crop husbandry to an extent that the cane was overshadowed by weeds and was totally destroyed hence the respondent was entitled to refuse to cut or harvest the cane.
4. It was pleaded in the alternative that if the appellant's cane was well maintained, it was incapable of yielding 135 tonnes per hectare based on the harvest from neighbouring crops. The appellant was also accused of failing to mitigate his own losses by neglecting to harvest and deliver the cane. The respondent denied that the appellant was entitled to general damages and also claimed that special damages had not been pleaded according to the law.
5. At the hearing of the matter, the appellant adopted his statement and the documents annexed to his list of documents as his evidence. He reiterated that he was claiming 3 harvests.
6. The respondent's senior field supervisor, Richard Muok, also adopted his statement and listed documents as his evidence. He confirmed that there had been a contract between the parties and added that the plant crop took 2 years to mature. He however urged the court to dismiss the suit as it was statute barred.
7. In cross examination, Richard stated that the contract was for a period of five years. He admitted that the contract could be terminated but stated that he did not have a notice of termination. He further admitted that no crop had been harvested.
8. Having heard both parties, the trial court found that the suit was in fact statute barred and dismissed it with costs.
9. The appellant challenged the decision of the trial court on the three grounds of appeal. First, he contended that the trial magistrate computed the time and duration of the contract incorrectly; closely related to that was his contention that the magistrate erred in coming to a finding that the suit was barred by limitation of time. Lastly, the appellant claimed that the magistrate erred in his evaluation of the evidence thereby denying him compensation.

10. Directions were taken to dispose of the appeal by way of written submissions. Counsel for the appellant filed his submissions but none were filed for the respondent.

11. Having had regard to the record of appeal in its entirety and the submissions filed by the appellant, I discern one main issue for determination: whether the suit filed by the appellant was statute barred.

12. The purpose of the law of limitation of actions is not to extinguish a cause of action but to bar a claimant from pursuing remedies regardless of the merits of his case due to time lapse. It protects the defendant from being disturbed after he has lost evidence for his defence or lulled into a false sense of security due to the passage of time. (See *Mehta v Shah [1965] EA 32*, *Masulal Maganlal Rawat vs. Maneklal Maganlal Rawal [1989] eKLR*, *Kenya Civil Aviation Authority v WK & 2 others Civil Appeal No. 252 of 2012 [2019] eKLR*)

13. The limitation period for causes of action based on contract is provided for under **Section 4** of the **Limitation of Actions Act** which stipulates;

#### **4. Actions of contract and tort and certain other actions**

*(1) 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;*

14. According to above provision, the time limit for filing a suit based on contract begins to run from the date the cause of action accrues. The appellant contests the trial court's finding that the cause of action arose when the respondent failed to harvest the first crop cycle known as the plant crop. He maintains that the cause of action arose at the end of the contract period.

15. He urged that the trial magistrate erred by treating the periods of 22 to 24 months or 16 to 18 months as cast in stone as these timelines for harvest of the plant crop and the ratoon crops respectively were discretionary. He submitted that the trial court should have relied on the 5-year period expressly set out in the contract in determining when the cause of action arose. Since the contract period lasted up to 3<sup>rd</sup> June 2001 the limitation period would run up to 3<sup>rd</sup> June 2007.

16. The appellant submitted that this case was distinguishable from the case of *Dickson Aoro Owuor v South Nyanza Sugar Co. Ltd No. 86 of 2016* relied on by the trial court as, clause 1(1) of the contract in that case stated that the first crop was expected to be harvested "not later than 24 months from the date of contract," which clause was not included in the contract before the trial court.

17. This court was urged to follow the finding of the court in *Zadock N. Danda v South Nyanza Sugar Co. Ltd [2018] eKLR* where the learned Judge held, as follows;

*13. I will first deal with the issue of limitation since it hinges on the jurisdiction of the trial court as well as this Court. There is consensus on the existence of the contract. From the records of the trial court and this Court, there is only one contract document which was produced. It was the one produced by the Appellant and appears on his list of documents. Whereas the contract was dated 27/03/2006 Clause 2(a) thereof stipulated that its commencement date was 13/08/2003 and that the contract period was five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first.*

*14. Clause 1(f) of the contract provided for the maturity periods for the plant crop and the two ratoon crops. The plant crop was expected to be mature not later than 24 months from planting whereas the first ratoon crop was expected to be mature not later than 22 months after the harvest of the plant crop and the second ratoon crop was expected to be mature not later than 22 months after the harvest of the first ratoon crop. The duration of the contract was however subject to Clause 2(b)(iii) which provided as follows: -*

*'The duration of the agreement may by written notice be extended by the Miller at its sole discretion and without reference to the Grower.'*

*15. It therefore means that the Respondent was at liberty to at any time alter any of the durations in the contract without reference to the Appellant.*

*16. Section 4(1)(a) of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya (hereinafter referred to as 'the Act') provides the limitation period for instituting claims based on breach of contracts as six years from the date on which the cause of action accrues. In this case there is contention on when the cause of action accrued from. According to the Respondent the cause of action accrued from the time the Appellant contended that the Respondent failed to harvest the plant crop; that is 24 months from 13/08/2003 which is 13/08/2005 hence the suit was to be filed by 12/08/2011. The Appellant contended that cause of action accrued from the time the entire contract period lapsed that is as from 13/08/2008.*

*17. As said, the contract period was subject to change by the Respondent at its own and sole discretion. That is exactly what happened to the contract herein. The contract commenced on 13/08/2003 but it was formally executed on 27/03/2006 which was a period of around 31 months from the commencement date. Going by Clause 1(f) of the contract by the time the contract was executed the maturity period for the plant crop had long lapsed. It also means that the other periods were equally interfered with.*

*18. It will therefore be without any basis to hold to the argument that the cause of action arose 24 months post the commencement of the contract since by then the contract had not been formally executed. The date a cause of action accrues depends on the nature*

and the provisions of that contract. There are some straight forward and clear contracts which speaks for themselves on such an issue. A case at hand are the monthly tenancies alluded to by the Respondent herein. Such contracts even if they are for ten years still their terms are so clear that failure to pay any due single monthly rent leads to execution and the cause of action immediately therefrom accrues. But that is not the position in this matter; the Respondent herein reserved the absolute right to not only change the expected maturity periods but even the entire contract period. In the circumstances of this case one can only allude to a breach of the contract upon the expiry of the entire contract period and only if the contract period is not extended by the Respondent. It is on that basis that I hold the position that the cause of action could only accrue five years from the commencement of the contract unless the Respondent confirmed extension of the contract duration. In the absence of such extension in this case, I find and hold that the cause of action herein arose as from 13/08/2008 and that the Appellant was at liberty to institute competent proceedings on breach of contract up to 12/08/2014.

19. Therefore, having filed the suit on 04/06/2014 the Appellant was well within time and as such the contention that the suit was time-barred hereby fails.

18. The appellant also referred to the case of **South Nyanza Sugar Co Ltd v Ezekiel Oduk CIVIL APPEAL NO. 81 OF 2017 [2019] eKLR** where the court held as follows;

20. On whether the suit was statute-bared by limitation, I must say that I have previously dealt with the issue and held that sugar contracts are different from other forms of contracts. To understand that differential context one must appreciate how sugar farming is undertaken. It all starts with the planting of the cane seed. At maturity, when the first harvest (usually referred to as 'the plant crop') is harvested that gives way to the regeneration of the second cycle of the cane (usually referred to as 'the first ratoon crop'). That cycle once harvested gives way to another one and it so continues depending on the application of the best agricultural husbandry on the cane crop. It is for that reason the sugar contracts usually specify the crop cycles and as such a farmer is in a position to know of the expected earnings from the contracted cycles.

21. Therefore, if the plant crop is not harvested then the chances of the farmer reaping from the ratoon crops or the contracted cycles, as the case may be, are certainly curtailed and the farmer loses all the expected proceeds of the cane crops. In other words, when the plant crop is not harvested then the farmer cannot develop the first ratoon crop and the subsequent ratoon crops as well. It is for that reason that I have always been of the considered position in sugar contracts, that in any instance of breach unless the breach is remedied, the farmer is entitled to be compensated for all pending cane crop cycles under the contract and as such the limitation of time starts running from the end of the contract period. That is because if the farmer is to be compensated for the loss occasioned in the entire contract period on one hand and on the other hand time starts running from the breach, then the farmer shall benefit twice; from the breach of the contract and from the use of the land as the contract will be deemed to have been terminated. Another reason is that under the sugar contracts the miller has the sole discretion to extend the contract period and to only notify the farmer of its decision. Therefore, despite breach the miller can extend the contract period and take care of any loss occasioned to a farmer.

22. From the foregone, given that the contract was allegedly entered into 10/10/1994 and it was for a period of 5 years, then the limitation time started running from 09/10/1999. That being so, the Respondent had up to 08/10/2005 to file the suit. As the suit was filed on 14/07/2005 then it was within time and the objection on limitation of time is for rejection.

23. The upshot is that the ground of jurisdiction fails on its twin-fold and is hereby dismissed.

19. Having considered the cases relied on by the appellant I find them distinguishable from the present case for various reasons. Firstly, the copy of the contract furnished by the appellant during trial did not indicate the period within which the contract was to remain in force unlike the contract in the case of **Zadock N. Danda (supra)**. Clauses similar to clause 2(a) and clause 2(b) of the contract in the case of **Zadock N. Danda (supra)** were also not included in the copy of the contract produced by the appellant. In that case, clause 2(b) of the contract provided that the Miller had the sole discretion to extend the duration of the agreement. A similar clause was also incorporated in the contract in **South Nyanza Sugar Co Ltd v Ezekiel Oduk (supra)**, but not the contract produced before the trial court.

20. This court notes with concern that the copy of the contract produced before the trial court was incomplete. It is therefore likely that the clauses setting out the commencement date of the contract and the timelines for harvest of the various crop cycles were omitted from the copy of the contract produced by the appellant. This observation is strengthened by the fact that the appellant's submissions referred to clause 4 of the agreement the recourse to early termination of the contract in case of breach, yet the copy produced before the trial court only begins at clause 5.

21. Although the contract produced by the appellant did not indicate the commencement date of the contract or the timelines for harvest of the crop cycles, it was common ground that the contract commenced on 3<sup>rd</sup> June 1996. The appellant and the respondent's witness were also in agreement that the contract was to last for a period of 5 years. In addition, the appellant did not refute the respondent's claim that the plant crop took 2 years to mature. The appellant averred in his pleadings that the plant crop was to be harvested at the ages of 22 to 24 months and the ratoon crops at 16 to 18 months after planting and subsequent harvest.

22. The trial court relied on the case of **South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor CIVIL APPEAL NO. 86 OF 2015 [2017] eKLR** in coming to the finding that the cause of action did not arise at the end of the contract but at the time when the Miller failed to harvest the crop at the prescribed time. The court in that case expressed itself thus;

"18. According to the Respondent in this case, the alleged breach of the contract arose when the Appellant failed to harvest the sugar cane as stipulated under the contract. Clause 1(f) of the contract specified that the first crop was expected to be harvested not later than 24 months from the date of contract. Since the contract was effective as from 14/07/2004 then the first crop was expected to be harvested by July 2006. To me that should be the date on which the cause of action accrued. I therefore respectfully do not agree with Counsel for the Respondent that the cause of action accrued as from the end of the contract period, that is five years from

the contract date. My finding is premised on the special nature of the contracts between a farmer and a miller like in this case. All the expected yields heavily depend on precisely how the expected harvests are made. For instance if the main crop plant is not harvested timeously then that compromises the ratoons which are developed once the main crop plant is harvested. To that end a farmer who losses the main crop plant losses all the ratoons. It therefore means that from the time a miller fails to harvest the crop as scheduled there is nothing further expected in terms of the crop yields and that any waiting thereafter is in vain. In essence the farmer continues to count losses thereafter. It would therefore be unreasonable to expect such a farmer to await until the entire contract period lapses and then say that the cause of action starts to accrue.”

23. Similarly, the court in the case of **Joseph Odira Ombok v South Nyanza Sugar Company Ltd CIVIL APPEAL NO. 83 OF 2018[2018] eKLR** contrasted the decisions of the courts in **South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor [2017] eKLR** and **South Nyanza Sugar Company Limited v Paul N. Lila KSI HCCA No. 161 of 2005 [2014] eKLR** and held as follows;

“15. I adopt the position taken in *South Nyanza Sugar Company Limited v Diskson Aoro Owuor (Supra)* in determining when the cause of action accrues. According to *Black’s Law Dictionary (10<sup>th</sup> Edition)* the word “accrue” means “to come into existence as an enforceable claim or right.” Thus under the outgrowers cane agreement, such as the one subject to the suit, the right to sue could only arise when the respondent failed to harvest the plant crop. This is when the cause of action accrued and when, in terms of section 4(1)(a) of the LAA, the time begins to run.”

24. A cause of action was defined by the Court of Appeal in the case of **Attorney General & another v Andrew Maina Githinji & another CIVIL APPEAL NO. 21 OF 2015 [2016] eKLR** as “an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

25. In **Letang vs. Cooper [1964] 2 All ER 929 at 934** Lord Diplock, defined a cause of action as “a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

26. **Halsbury’s Laws (4th Edition) Vol 28 paragraph 662 (page 298)** states: -

“A cause of action arises in instances of breach of contract, upon the breach, and ... if a contract is to do something at a particular time or upon the happening of a contingency and the thing contracted for is not done, the cause of action arises at the time specified, or upon the contingency happening...”

27. With the above exposition in mind, I find that I am inclined towards the position taken by the courts in **Joseph Odira Ombok (Supra)** and **South Nyanza Sugar Company Limited v Diskson Aoro Owuor (Supra)**. The appellant’s claim centered around the failure by the respondent to harvest the cane as agreed. It was a term of the contract that the respondent was to harvest 3 crop cycles including the plant crop and 2 ratoon crops but the respondent failed to harvest any of the 3 crop cycles. The breach of contract by the respondent first occurred when it failed to harvest the plant crop cycle as agreed and the appellant was entitled to commence a suit against the respondent at that point.

28. The evidence presented before the trial court was to the effect that the respondent was required to harvest the plant crop by 3<sup>rd</sup> June 1998; within 24 months of the commencement of the contract. Therefore the time for bringing an action in contract began to run from 3<sup>rd</sup> June 1998. By the time the appellant filed his suit on 22<sup>nd</sup> November 2004, the suit was statute barred as he was required to have filed his suit by 3<sup>rd</sup> June 2004.

29. I therefore find that the trial court properly dismissed the suit for being time barred. This appeal is found to be lacking in merit and is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Kisii this 17<sup>th</sup> day of June 2021.**

**A. K. NDUNG’U**

**JUDGE**