**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 135 OF 2019**

**JOSHUA BUAGE AYANY.....APPELLANT**

**VERSUS**

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

*(Being an appeal from the judgment and decree of the Senior Resident Magistrate Hon. E.A Obina dated 26th November 2019 in CMCC No 921 of 2004)*

**JUDGEMENT**

1. The appellant herein entered into an agreement with the respondent on 30th January 1993 to grow and sell sugarcane on his parcel of land being Plot Number 112B IN Field Number 167 measuring 0.85 Ha within Kanyamamba sub-location. The contract was to remain in force for a period of 5 years or until one plant and two ratoon crops of sugarcane were harvested whichever period was less.

2. The appellant averred that the respondent failed to harvest the plant and the 1st ratoon crops when the same was mature. The appellant alleged that when the ratoon crop was 32 months old the defendant entered the appellant's parcel of land and cut the crop but abandoned it on the field causing it to dry up. According to the appellant, the plot was capable of producing an average of 135 tonnes per hectare at the rate of Kshs 1,730 per tonne. The appellant claimed to have suffered loss and damage and sued for breach of contract, interest thereon and cost of the suit.

3. In its defence, the respondent denied the existence of any agreement between itself and the appellant and advanced that it owed no duty to the appellant. In the alternative, the respondent pleaded that it was the respondent's policy not harvest poorly developed cane and that the appellant had failed to employ the recommended crop husbandry. The respondent further pleaded that the appellant's land was incapable of yielding 135 tonnes per hectare. They advanced that the court lacked jurisdiction to entertain the matter for reason that the suit was statute barred.

4. When the matter was set down for hearing before the subordinate court, Joshua Buage Ayany (Pw1) adopted his witness statement. In his statement Pw1 had stated that the respondent harvested the plant crop, failed to take delivery of the 1st ratoon but harvested the 2nd ratoon. In his examination in chief he testified that the respondent should pay him for the 1st ratoon. On cross examination he testified that he was paid for the plant crop and the 2nd ratoon.

5. Richard Muok (Dw1) testified for the respondent. He testified that the respondent had no contract with the appellant but with Hazaris O. Abande as per the written agreement produced by the respondent. He testified that the appellant was thus a stranger and urged the trial court to dismiss the suit. He testified that the respondent on 8th October 1994 harvested the plant crop from Hazaris O. Abande and paid him Kshs 93,526.45/-; the 1st ratoon was subsequently harvested on 14th April 1997 and a payment of Kshs 3,238.65/- made; and finally the 2nd ratoon was harvested on 14th February 1999 and the final payment of Kshs 62,550.90 also made.

6. At the end of the hearing the trial magistrate found that the appellant had failed to prove that it entered into an agreement with the respondent and thus held that the appellant had not proved its case on a balance of probabilities.

7. The appellant dissatisfied with the judgment the appellant filed this instant appeal raising the following grounds;

> *1. The learned trial magistrate erred in law and in fact in holding as he did that the plaintiff was not a lawfully contracted farmer to the Respondent in the face of the overwhelming evidence to prove the fact.*
>
> *2. The learned trial magistrate erred in law and in fact in failing to find that the respondent had not proved the existence of any other contract or superior contract or contracted farmer and further erred in shifting the incidence and burden of proof to the appellant.*

*3. The trial magistrate's finding was contrary to the evidence, and he fell short of properly evaluating the evidence on record and the law.*

8. I directed parties to file written submissions, the appellant complied with the orders, the respondent on the other hand failed to comply despite being given the opportunity.

9. The appellant submitted that his claim was in regard to the 1st ratoon which was cut and abandoned by the respondent. The appellant argued that he presented a written contract signed by the respondent's officers and the assistant chief and the same was not discredited by the respondent. He further submitted that Dw1 admitted that is the responsibility of the respondent to draft documents. It was submitted that there was therefore no need for the trial magistrate to disregard the plaintiff's evidence when there was no finding that the documents were forged. They further submitted that there were no contradictions pertaining to the appellant's pleading or evidence.

10. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see **Selle and Another v Associated Motor Boat Company Ltd [1968] EA 123**).

11. The burden of proof lay with the appellant to prove his case. He was required to prove his case on a balance of probabilities. That duty entailed proving that an agreement existed between him and the respondent. Salient facts in respect of that agreement including the identities of the parties, the size of land, the duration of contract and amount payable needed prove to the required threshold. This is in line with the provision of **Section 107 of the Evidence Act (Cap 80) Laws of Kenya** which provides that '*whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*.' The appellant claim is clear from paragraph 3 and 7 of the plaint which states as follows;

*"3. By a written agreement dated 30th day of January 1993, the defendant contracted the plaintiff to grow an sell to it sugarcane at his land parcel being plot number 112B in field 167 of Kanyamamba Sublocation measuring 0.85 hectares.*

...

*7. In breach of the agreement, the defendant failed to harvest the plant and the 1st ratoon crops when the same was mature and ready for harvesting at 18-24 and at 16-18 months of age and they became overaged."*

12. Having considered the pleadings alongside the evidence presented by the appellant, two major contradictions are blatantly apparent. The first contradiction is in regard to the land owned by the appellant. The appellant in his pleadings claims to be the owner of the land being Plot Number 112B in field 167 of Kanyamamba Sublocation, however according to the agreement he adduced as his evidence, he is the owner of Plot No. 507 situate in Kimamba sub-location. According to clause 11 (a) of the agreement produced by the appellant, it was his duty to:

*"(a) Cultivate an area of 0.6 hectares of sugarcane on the plot in accordance with the terms hereof for this purpose clear such an area for planting within 6 months from the date hereof and it is hereby further agreed that the area shown in the sub-clause is subject to amendment following the final survey carried out by the Company of the land to be cultivated."*

13. This could only mean that the appellant's land under the contract was only 06. Ha. Interestingly, the particulars of the land described in the plaint resemble that of the parcel of land belonging to Hazaris O. Abande as per the agreement produced by the respondent.

14. The second variance in the appellant's pleadings and his evidence is similarly crucial as it regards the harvest that was abandoned by the respondent causing the appellant the alleged loss. It is clear from paragraph 7 of the plaint that the appellant alleged that both the plant crop and the 1st ratoon were never harvested. However, according to Pw1's statement which was adopted as his evidence in chief, Pw1 acknowledged that the pant crop was harvested. On cross examination he also admits to have been paid for the plant crop.

15. In ***Independent Electoral and Boundaries Commission &Anor v Stephen Mutinda Mule & 3 Others*** **NRB CA Civil Appeal No. 219 of 2013 [2014]** the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in ***Adetoun Oladeji (NIG) Limited v Nigeria Breweries*** **PLCSC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings:

*[I]t is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.*

In the same case William, JSC also stated:

*In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.*

16. Although the appellant in his pleadings alleges that his claim for damages arose from non-payment after cultivation of sugarcane on plot number 112B in field 167 of Kanyamamba Sublocation measuring 0.85 hectares, the said property belongs to Hazaris O. Abande. The appellant produced an agreement which clearly indicated that his Plot No. was 507 however this evidence was at variance with his own pleadings. It was also crucial for the appellant to clearly indicate the parcel of land which he owned as it gave him the locus to institute the suit. The appellant had no locus to institute a suit in regard to land which he had no propriety interest.

17. Consequently, I find no merit in the appeal and the same is hereby dismissed. There shall be no orders as to cost.

**DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF JUNE, 2021.**

**A. K. NDUNG'U**

**JUDGE**