REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 105 OF 2018

SOUTH NYANZA SUGAR COMPANY LIMITED……APPELLANT

-VERSUS-

SAMWEL NYANDIGA MAC'ONDIWA…….…….....RESPONDENT

(An Appeal from the Judgement and Decree of Hon. M. Maina Wachira Senior Resident Magistrate (SRM) dated and delivered on 24/7/2018 in Migori SPMCC No. 48 of 2005

JUDGMENT

This appeal arose from the judgement and decree of the Hon. M. Maina Wachira Senior Resident Magistrate (SRM) dated and delivered on 24/7/2018.

The appellant is represented by the firm of Okong'o Wandago & Co. Advocates whilst the respondent is represented by the firm of Kerario Marwa & Co. Advocates.

The respondent (formerly the plaintiff) filed a plaint dated 21/1/2005 which was later amended on 20/7/2005. The respondent sued the appellant (formerly the defendant) for damages for negligence and breach of contract entered into on or about year 1996.

It was the respondent's case that on or about the year 1996, the appellant and the respondent entered into a contract to cultivate sugar cane on plot number 129, field number 12 vide account number 430979. The terms of the agreement were that the appellant was to purchase/harvest and transport sugarcane to the factory on its maturity and pay the plaintiff the value thereof.

It was the respondent's further case that the appellant negligently, recklessly, contrary to public policy and common practice refused and or failed to harvest and or purchase the said cane; that the appellant for no apparent reason and contrary to the terms and spirit of the contract refused to harvest and or purchase the respondent's 1st and 2nd ratoons on 0.2 Ha and estimated to weigh 48 tonnes per harvest.

The respondent sought a declaration that the appellant was in breach of the cane contract; the value of the unharvested sugarcane at the rate of Kshs. 1,730 per tonne; costs of the suit and interest at court rates.

Despite a consent entered into by both parties for the appellant to have corresponding leave to reply to the amended plaint, there is no evidence on record of the amended defence. The amended document on record is an amended defendant's witness statement. I will therefore make reference to the appellant's initial statement of defence dated 25/2/2005 and filed in court on 28/2/2005.

The appellant denied the allegations raised by the respondent in their plaint and attributed the alleged loss by the respondent for his own negligence; that it was the respondent who was responsible for taking care of his plot, to protect it against waste and damage under the contract; that the respondent's plot could not have yielded 17 tonnes as pleaded; that the price of raw cane per tonne in the plot at that time was Kshs. 1,553/= gross which price was subject to deductions in respect of Sony Outgrowers Company (SOC) Levy, Presumptive Income Tax, harvesting and transportation charges and cess; that the respondent did not avail to the appellant any cane which could be economically harvested and milled and therefore no damage and/or loss was suffered by the respondent.

The appellant further averred that the suit as filed was statute barred and incompetent and has been filed outside the limitation period without leave of the court. The appellant prayed that the suit be dismissed with costs.

After the hearing, the trial court entered judgement in favour of the respondent for a total sum of Kshs. 69,200 for the 1st and 2nd ratoons plus interest from the date of filing suit until payment in full and costs of the suit.

Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 6/8/2018 on 7/8/2018 on thirteen (13) grounds of appeal which can be summarized as follows;-

a. That the learned trial magistrate erred in law and in fact in awarding damages for the sum of Kshs. 34,600/= each for the 1st and 2nd ratoons which amount had neither been specifically pleaded in the plaint nor strictly proven;

b. That the trial court erred in law when it failed to appreciate that the claim in respect of damages arising from failure to harvest the ratoon crop was statute barred and had been filed outside the period set out in the Limitation of Actions Act;

c. That the trial court erred in law when it relied on documents which did not form part of the evidentiary record in the suit;

d. That the trial court erred in law in awarding damages in respect of alleged breach arising from failure to harvest sugarcane which were never developed and never existed thereby basing his decision on speculation;

e. That the trial court erred in awarding interest on damages from the date of filing suit as opposed from the date of judgment;

f. The trial Magistrate erred in law in failing to take into account the provisions of Section 26 of the Civil Procedure Act which awards interest from the date of the decree, thereby calculating interest for a period close to 14 years, which amount was excess of the decree which was the subject matter of the dispute before him.

The appellant prays: -

a. That this appeal be allowed with costs.

b. The respondent's suit in the trial court be dismissed with costs.

Directions on the appeal were taken on 7/12/2019 before Mrima J. that the appeal be canvassed by way of written submissions. When the matter came before me on 15/4/2021, I noted that the matter had been mentioned severally for submissions but the respondent had never filed his submissions. I shall therefore proceed to consider the appeal based on the grounds of appeal and the appellant's submissions dated 4/11/2020 filed on 5/11/2020.

In support of its appeal, the appellant submitted that there are three (3) issues for determination although only two (2) issues were outlined:-

Whether the respondent proved the pleaded breach of contract.

Whether the principal award of Kshs. 69,200/= was justifiable, right and lawful.

The respondent submitted that in relation to ground 7 of its memorandum of appeal, the respondent failed to produce the contract or a copy thereof in support of his claim for breach; that the contract did not form part of the court record before the trial court hence no proof of his claim; that the learned trial Magistrate based his decision on an imaginary document which the respondent had not produced and did not form part of the court record. The appellant relied on the cases of **Nathan Ayany Wao v South Nyanza Sugar Co. Ltd (2018) eKLR**; **James A. Niala v South Nyanza Sugar Co. Ltd (2019) eKLR** and **Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others (2015) eKLR where the court underscored the need to produce the contract document upon which the claim is based.**

The appellant further submitted that the respondent pleaded loss of two cycles of sugarcane and sought value of unharvested cane; that it was common ground that ratoons are re-growths which arise after the harvesting of a preceding cycle; that it came out clearly and such was proven that failure to harvest the 1st ratoon severely affected the timely development of the 2nd ratoon thus no basis for awarding a crop cycle which never existed; that the respondent would only be entitled to the value of his 1st ratoon crop cycle only. To buttress its submission, the appellant relied on the decisions of **South Nyanza Sugar Company Limited vs Awino Oreko (2016) eKLR**; **John Richard Okuku Oloo vs South Nyanza Sugar Company Limited (2018) eKLR** and **Peter Umbuku Muyaka vs Henry Sitati Mmbasu (2018) eKLR** which referred to the Court of Appeal decision **Kinakie Co-operative Society vs Green Hotel (1998) KLR 42**.

Further to the foregoing, the appellant submitted that it was incumbent upon the respondent to quantify his loss, plead and specifically prove the same; that there is no specific prayer in the amended plaint asking the court to assess and award damages in respect to the 2nd ratoon crop cycle. Reliance was placed on the case of **British Westinghouse Electric Manufacturing Co. Ltd vs Underground Electric Railways Co. of London Ltd (1912) AC 673**. Further, the appellant did not produce any documents as exhibits to support his claim to prove the monetary limb of his case as was held in the cases of **South Nyanza Sugar Co. Ltd vs Mary A. Mwita & Another (2018) eKLR** and **South Nyanza Sugar Company v Phoeby Atieno Oduara (2018) eKLR.**

On the issue of interest awarded, the appellant submitted that interest on the principal sum is an exercise of discretion and ought to be exercised judiciously; that the date when the damages are assessed is the date when the appellant's duty to pay arises and when the damages for breach are determined; that on this basis, the holding of the trial court be set aside and interest on the principal sum do accrue from the date of the judgement hereof; that if the interest was to start running from the date of filing suit, the interest would exceed the principal award and thus the appellant would be condemned to bear costs of close to fourteen (14) years it took the court to adjudge this cause. The appellant relied on the findings in **South Nyanza Sugar Company Limited vs John Chora Omolo (2019) eKLR** and **Kangeta Beer Distributors Limited vs Kubai Kiringo & 2 Others (2018) eKLR**.

The appellant urged this court to find that the respondent's case as was pleaded, was not proved; that the appeal be allowed, set aside the judgement and decree of the subordinate court; That if this court were to find that the respondent was entitled to the award, to take into consideration the foregoing points in assessing it.

This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing 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 Motor Boat Co. Ltd (1968) EA 123.** The court held:-

> **"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally** *(Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."*

After carefully considering the evidence anchored and submissions before this court, the following are the issues for determination: -

> **a. Whether there was a proper contract relied upon by the trial court.**
>
> **b. Whether the suit was statute barred.**
>
> **c. Whether the award by the trial court was founded on proper legal principles.**

I will first address the issue of whether or not there was a proper contract on which the trial court relied on when making its decision as it is from there that the other issues of determination can be addressed.

From the amended plaint, in paragraph 3 it was the respondent's case that: -

> **"On or about the year 1996, the Plaintiff and the Defendant entered into an Agreement/Contract whereby the Plaintiff was to cultivate Sugar Cane on Plot Number 129, Field Number 12 vide Account Number 430979 and by the terms of the said agreement the Defendant was to purchase/harvest and transport Sugarcane to the factory on its maturity and pay the Plaintiff the value thereof."**

In response to the above averment, the appellant in its defence, stated: -

> **"In response to paragraph 3 the Defendant only admits the existence of an outgrower cane development contract between herself and the plaintiff but totally denies each and every other allegation contained thereinafter and calls for the strict proof thereof."**

In the amended witness statement dated 14/6/2018 made by the appellant's witness one Justus Otieno Geroge, the Senior Field Supervisor under the Agriculture Department stated:-

> **"I wish to state that the defendant has a contract with the plaintiff dated 25/4/1996. The Agreement was to last for a period of 5 years or until plant crop and two ratoons were harvested whichever period shall be the less"**

On ground 7 of the appellant's memorandum of appeal and its submissions, the appellant contends that the respondent failed to produce the contract or a copy thereof in support his claim for breach; that the contract did not form part of the court record before the trial court hence no proof of his claim.

A perusal of the entire court record reveals that there is an Outgrowers Cane Agreement dated 25/4/1996 signed between **John O. Adhoga** and the appellant for Plot No. 129, field no. 12 and Account Number 430979.

The contract as it was executed, was not between the appellant and the respondent but the performance of the contractual terms was performed by the appellant a fact which the appellant had not denied all through until at this stage of the proceedings.

The Black's Law Dictionary defines a contract as:-

> **"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."**

The Learned authors, Cheshire, Fifoot and Furmston, in their book, The Law of Contract, (14th Edition) at pages 34 and 35 have stated that: -

> **'The first task of the plaintiff is to prove the presence of a definite offer made…. Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the**

offeror to accept that offer.'

In **Caleb Onyango Adongo vs Benard Ouma Ogur (2020) eKLR** the court cited with approval the case of **Rose and Frank Co. vs. J R Crompton & Bros Ltd (1923) 2 KB** where it was held that: -

> **"To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly."**

In **William Muthee Muthami vs. Bank of Baroda (2014) eKLR** the court observed that: -

> **"…In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."**

Thus, there exists a strong argument that for a contract to exist between, the parties, there must be a common intention between the parties to the exclusion of third parties that is to say, privity of contract.

The doctrine of privity of contract as was authored in **Halsbury's Laws of England**, 4th Edn. Vol. 9 (1) Para. 749 as follows:-

> ***The general rule**: the doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose strangers to it. That is, persons who are not parties to it. The parties to a contract are those persons who reach an agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuation."*

The doctrine of privity of contract was addressed by the Court of Appeal in **Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) eKLR**. The Court rendered itself as under: -

> **"In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principles thus:**
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> **"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."**
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> **In this jurisdiction, that proposition has been affirmed in a line of decisions of this Court, among them AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD (1985), KLR 765 quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:**
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> **"As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."**
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> **Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter.**
>
> **While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In DARLINGTON BOUROUGH COUNCIL v WITSHIRE NORTHEN LTD [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms.**
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> **"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract." (Emphasis)**

In **Aineah Liluyani Njirah vs Aga Khan Health Services (2013) eKLR** the Court of Appeal rendered itself on the doctrine of privity of contract as thus:-

"There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. <u>When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement.</u> However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so.

<u>These presumptions can be rebutted by the contracting parties (or rather, the promisor) if they can show that they did not intend for the third party to have any such a right."</u> <u>(Emphasis)</u>

Further, in **<u>Ali Abdi Mohamed vs. Kenya Shell & Company Limited (2017) eKLR</u>** stated that: -

"It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded…."

From the foregoing, analysis it is clear that a contract is specific between parties to the exclusion of third parties. However, a contract may exist where it can be inferred from the conduct of the parties.

The foregone crystalizes the position in this case: there was no express agreement between the appellant and the respondent; There was no collateral agreement to the one in question in which the respondent was a party; There was no agency agreement in which John O. Adhoga delegated his obligations to the respondent and/or an express term in the contract made for the benefit of the respondent. The Respondent never bothered to explain who John O. Adhoga was to him and how he came to be the party to the contract.

Be as it may, this court is enjoined to ascertain from the conduct of the parties herein, the pleadings and communication between the parties in this appeal on the performance of the terms of the contract signed between John O. Adhoga and the appellant. If the analysis yields in the affirmative, then a contract may be implied.

As outlined above, the appellant up until this point did not dispute the existence of a contract between itself and the respondent, neither did it during the hearing contest, the validity of the contract produced in court. I do note in its list of documents, the appellant attached in support of its case a warning notice dated 25/6/2000 directed to the respondent and job completion certificate dated 15/2/1998 for payment of the number of sugarcane tonnes realised from plot number 12. The above notwithstanding the Law requires that he who alleges must prove and to prove this case on a balance of probabilities it was the duty of the Respondent to produce the contract made between the parties. The court had the duty to make reference to the terms of the said contract. The court did not question the different parties to the contract. In the judgment the court found that the first ratoon would have been developed and matured within 24 months ie. 6/12/2000 is silent on the time ratoon would mature. There was no such provision in the document produced before the court. The Respondent has specifically pleaded breach of terms of the contract at paragraphs 3 – 6 of the amended plaint. The court should have been availed the said contract to apreciate whether the Respondent had proved their claim. The court cannot imply evidence of a contract when one actually existed and has not been produced before the court. Failure to produce the contract renders the Respondent's claim unproved.

The facts herein and the decisions relied upon by the appellant in the case of **James Niala (supra)** are distinguishable from this case. In this case, the issue was the legality of the contract produced before court. The respondent denied its existence and submitted evidence to that effect. In the case of **Nathan Ayany Wao (supra)** the issue was production of a copy of the contract as opposed to the original which the respondent did not object to. The contract was in fact admitted in evidence by parties.

A thorough perusal of the document before court, it does not reveal any other period of time, apart from the five (5) years. Although the trial Magistrate stated that the 1st ratoon would have been matured within 24 months i.e by 6/12/2000, there is no clause in the document to support this. Besides, the Magistrate thereafter stated, "**Contract is silent on the time the ratoon would mature."**

On whether the suit was statute barred, the appellant raised the issue in ground 2 of its memorandum of appeal but chose not to address the court on it. It is imperative to address the issue of a suit being statute barred as it goes to the root of the court's jurisdiction.

It was a term of the agreement that the contract was for a period of five (5) years or until one plant or two ratoon crops of sugar cane are harvested on the plot whichever period was less.

The only supporting document that would have guided the court on when a breach would have occurred is the warning notice sent to the respondent dated 25/6/2000. Time started running therefrom and a suit relating to a dispute arising from the performance of the contract ought to have been filed on or before 25/6/2006.

The suit by the respondent was filed on 26/1/2005. I therefore find that the suit was not statute barred.

The appellant also faulted the learned trial Magistrate's for awarding interest from the time of filing suit as opposed to from the date of the judgment.

Interest in civil claims/judgements is provided for in **Section 26(1) of the Civil Procedure Act** which states as follows: -

"Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rates the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit with further interest at such rate

as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

The provision gives the court a wide discretion in awarding interest from the time of pre - institution of the suit, at the time of the institution of the suit, pre - judgement, post-judgement period to the conclusion of the suit.

Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR the court outlines three principles to consider in the award of interest:

First, it is a discretion of the trial court to fix the rates and interests provided that the discretion must be used judiciously.

Secondly under Section 26 (1) of the Civil Procedure Act, the court has discretion to fix the rate of interest to cover two stages namely: -

The period from the date the suit is filed to the date when the court gives judgement.

The period from the date of the judgement to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.

Third, when it comes to the period before the filing the suit, Section 26 of the Civil Procedure Act has no application. Interest prior to filing of suit is a matter of substantive law and is only claimable under an agreement which must be pleaded and proved.

The Court of Appeal in **New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd[1988] eKLR observed:-**

"In the present case the liability of the respondent to pay for the appellant's loss was not determined until the date of judgment and that is the date from which interest should be payable. I am satisfied that the judge's order is perfectly in consonance with the normal practice and was a proper and fair exercise of his discretion."

I would associate myself with that reasoning therefore the interest would have been awarded from the date of judgement as it is from then was the respondent's loss was quantifiable.

Consequently, I make the following orders;

i) **The Respondent claim is dismissed and the appeal is hereby allowed;**

ii) The judgment of the trial court delivered on 24/7/2018 is hereby set aside;

iv) Cost in the trial court and on appeal to the appellant.

Dated, signed, delivered on 6th day of October, 2021.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Ms. Otieno for Odero Marvin for the appellant.

Mr. Nyangi for the respondent.

Evelyne Nyauke Court Assistant.