REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 3 OF 2019

BETWEEN

TRANS MARA SUGAR CO. LTD...................................APPELLANT

AND

JOSEPHAT MAROVA..RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo Senior Principal

Magistrate in Migori Magistrate's Civil Suit No. 2705 of 2015 delivered on 5/12/2018)

JUDGMENT

1. On 17/09/2019 this Court gave directions in **Migori High Court Civil Appeal No. 10 of 2019 Trans Mara Sugar Co. Ltd vs. Nelson Dedege Mbai.** One of those directions was that the judgment in the said appeal do apply to this appeal on similar issues. The judgment dealt with three issues.

2. The first issue was the effect of a contract not signed by the farmer on the execution part which was on the last page although the contract was signed by both the farmer and the miller at the foot of every single page. The second issue was the interplay between the contract and the **Sugar Act** on the duty of harvest the cane. The contract vested that duty on the farmer whereas the **Sugar Act** vested the duty to harvest the cane on the miller. The third issue was whether transport charges attracted 16% VAT in the financial year 2013/2014.

3. This Court found the contract valid. It also found that the miller had the duty to harvest the cane since the contract could not override a statute. On the third issue this Court found that the 16% VAT on transport charges was applicable in the financial year 2013/2014. I hence incorporate the said judgement herein by reference.

4. In this appeal, the issue of the unsigned contract was raised. The issue of the duty to harvest the cane was also raised. As stated, the first two issues in this appeal were settled in **Migori High Court Civil Appeal No. 10 of 2019** (supra).

5. The contract between the parties herein was entered on 22/03/2011. The Respondent contended that the Appellant failed to harvest the first ratoon crop thereby compromising the second ratoon crop. Given that the plant crop was harvested in December 2012 then the first ratoon crop was expected to be harvested from April 2014 and the second ratoon crop was expected to be ready for harvesting anytime from July 2015. That is in accordance with Clause 1 of the contract. The transport costs in respect to the first ratoon crop which was due in April 2014 was subject to 16% VAT.

6. The Appellant defended the Respondent's claim. It called adopted its evidence in *Migori Chief Magistrate's Court Civil Suit No. 2698 of 2015* which was the subject of **Migori High Court Civil Appeal No. 10 of 2019** (supra). The Appellant had taken the position that it was not duty-bound to harvest the cane but the Respondent.

7. In view of the decision in **Migori High Court Civil Appeal No. 10 of 2019** (supra) the Appellant was in breach of the contract by not harvesting the first ratoon crop.

8. In the face of such breach the Respondent was entitled to compensation. In **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** I found that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. Equally, when a Miller fails to harvest the first ratoon crop then the farmer is entitled to compensation for the first and second ratoon crops subject to the contract.

9. The foregone is however subject to the legal position that disputes based on breach of contracts are subject to the principles of ***remoteness***, ***causation*** and ***mitigation***. However, the principles must be proved for applicability. (See **Migori High Court Civil Appeal No. 74 of 2018 South Nyanza Sugar Co. Ltd vs. Rehema Joseph Nkonya** (unreported).

10. In this case the Respondent prayed for the proceeds of the first and second ratoon crops. Accordingly, and in view of the breach of the contract, the Respondent was entitled to such compensation.

11. The trial court awarded the sum of Kshs. 124, 416/= for each ratoon crop. It translated to Kshs. 248,832/=. On the yields, the court was rightly guided by the expert report on yields prepared by the KESREF. There was no dispute on the size of the land. The price of the cane was as per the Cane Schedule prepared by the Sugar Directorate and which was produced in evidence. The court took into account the relevant deductions save the 16% VAT on transport charges for the first ratoon crop. The relevant tax would have been Kshs. 6,912/=.

12. The net proceeds for the first and second ratoon crops would have instead been Kshs. 241,920/=.

13. Having dealt with the issues raised in this appeal, the following final orders do hereby issue: -

a) The appeal hereby succeeds only to the extent of deducting the 16% VAT on transport charges for the first ratoon cane crop. The net sum payable shall henceforth be Kshs. 241,920/= instead of Kshs. 248, 832/=. For clarity, the rest of the appeal is unsuccessful;

b) Since the appeal has partially succeeded each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 5th day of March 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Oyagi, Counsel instructed by the firm of Oyagi, Ong'uti, Magiya & Co. Advocates for the Appellant.

Mr. Odhiambo Kanyangi, Counsel instructed by the firm of Messrs. Odhiambo Kanyangi & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant