



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 10 OF 2019

BETWEEN

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

AND

NELSON DEDEGE MBAI.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo Senior Principal Magistrate in Migori Magistrate's Civil Suit No. 2698 of 2016 delivered on 5/12/2018)

JUDGMENT

1. **Nelson Dedege Mbai**, the Respondent herein, filed *Migori Chief Magistrate's Court Civil Suit No. 2698 of 2015* (hereinafter referred to as '**the suit**') against **Trans Mara Sugar Co. Ltd**, the Appellant herein. The Respondent claimed that by a Sugarcane Growing and Supply Contract entered into on 22/03/2011 (hereinafter referred to as '**the Contract**') the Appellant contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 210 in Bware Sub-Location measuring 0.4 Hectare within Migori County.

2. The Respondent pleaded that the Contract was for a period of six 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. The Respondent further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting and that the Appellant harvested it. The Respondent was paid for the said cane. That was the case with the first ratoon crop. The problem arose with the second ratoon. The Respondent contended that he took good care of the crop until it also reached maturity but the Appellant refused and/or failed to harvest it. The second ratoon crop dried up. The Appellant posited that he suffered loss.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit. He sought for compensation on the loss of the unharvested one crop cycle of the sugar cane with costs and interest at court rates.

4. The Appellant entered appearance and filed a Statement of Defence dated 05/01/2016. The Appellant denied both the existence of the contract and any breach thereof. It put the Respondent into strict proof thereof. The Appellant pleaded in the alternative that if there was any contract then the Respondent was duly paid for the cane harvested under that contract. It was also further pleaded that if there was any alleged none payment then it must have been as a result of the Respondent's immature cane which was incapable of being harvested. The Appellant prayed for the dismissal of the suit with costs.

5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Respondent was the sole witness who testified and adopted his Statement as part of his testimony. He also produced the documents in his List of Documents as exhibits. The Respondent called three witnesses. DW1 was its Registrar of Farmers. DW2 was its Accountant and DW3 was the Appellant's contracted transporter. The witnesses adopted the necessary statements.

6. The trial court rendered its judgment on 05/12/2018. The suit was allowed at Kshs. 28,061/= with costs and interest from the date of filing of the suit.

7. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and the suit be dismissed with costs the Appellant proposed 12 grounds in the Memorandum of Appeal erroneously dated 02/01/2018 instead of 02/01/2019.

8. Directions were taken, and the appeal was disposed of by way of written submissions. It was also agreed, and so directed, that the findings of the Court in this appeal do apply in **Civil Appeal Nos. 1, 3, 4, 5, 6, 7, 8, 9 and 11** all of **2019** in appropriate instances. Both parties duly complied. The Appellant challenged the finding of the trial court vigorously. He submitted that the court erred in not finding that the contract was unenforceable for it was not signed by the Respondent. It was also contended that the duty to harvest the cane was on the Respondent

under Clause 10(c) of the contract and the court as well erred in holding otherwise. The trial court was further faulted for not subjecting any amounts payable to appropriate value added tax (VAT).

9. The Appellant relied on 19 decisions and 25 written materials in support of the appeal.

10. The Respondent opposed the appeal. It supported the judgment and prayed for the dismissal of the appeal with costs. It also relied on various decisions.

11. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**).

12..This Court nevertheless appreciates 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 the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga – versus- Kiruga & Another (1988) KLR 348**).

13. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

14. I will henceforth deal with the issues seriatim.

15. On the issue of the *execution of the contract*, I must take note that the contract was produced in evidence. It was also heavily admitted by and relied upon by both parties. I have seen and perused the contract. It is an 11-page document. It was signed at the foot of each page by the Respondent (as farmer) and the Appellant. On page 11, the contract was also signed by the Appellant and a witness (Assistant Chief of Bware Sub-Location). The contract was further signed by the Respondent's next of kin and the Respondent himself at the foot of the page.

16. The point of departure was that the contract was not signed by the Respondent on page 11 at the part before witnessing by the Chief but only at the foot of that page.

17. The contract was for all intents and purposes duly executed. All necessary parties appended their signatures accordingly including on the disputed page 11. The argument that the Respondent did not sign at the appropriate part is, respectfully, lacking in substance. Since all the necessary signatures appear on that page then the argument cannot hold.

18. A look at the entire document reveals the intention of the parties to be bound by the contract. As said, the parties signed on each page of the contract. I hence find that the ground is for rejection.

19. The other issue was on the duty to harvest the cane at maturity. The issue was hotly contested. The trial court found that the duty to harvest the cane was on the Appellant.

20. The Appellant was firmly of the contrary position. According to the Appellant, the parties expressly agreed in the contract that the said duty was solely on the Respondent as the farmer. Relying on various decisions including **L'Estrange v F Graucob Ltd (1934) 2 KB 394** and several maxims of equity the Appellant contended that a party signing an agreement cannot contest the contents of the agreement that the contents of the agreement was not what the party bargained for. The Appellant submitted that the intention of the parties was clear and that the freedom of choice must be respected even in the face of the now repealed **Sugar Act**.

21. I have in previous decisions dealt with the duty to harvest mature cane in sugar contracts. In **Migori High Court Civil Appeal No. 86 of 2016 Elena Olola vs. South Nyanza Sugar Co. Ltd (2018) eKLR** I reiterated what I had earlier on held in **Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR** as follows: -

28. Further thereto, there is the Sugar Act (hereinafter referred to as 'the Act'). This Act was the applicable law by the time the contract was entered. The Act stipulated under Section 6(a) of the Second Schedule thereof, which Schedule was a creation of Section 29 of the Act, that: -

'The role of the miller is to -

(a) Harvest, weigh at the farm gate, transport and mill the sugar cane supplied from the growers' field and nucleus estate efficiently and make payments to the sugar cane growers as scheduled in the agreement.' (emphasis added)

29. The Act being an Act of Parliament went through all the stages of law-making until it became law in Kenya. The Act can only be subordinate to the Constitution and/or may in specific and clear instances be ousted by an express provision on another Act of Parliament. In this case there is an attempt by the contract to oust the provision of the Act. The contract is an agreement between the parties herein whereas the Act is an expression of the will of the people of Kenya through Parliament. The contract is hence subordinate to the statutory legislation. Any attempt by parties to an agreement to otherwise oust the provisions of an Act of Parliament can only be void and severable as far the attempt is concerned. The contract therefore offends the express provisions of the Act in respect to the duty to harvest the cane and as such it cannot stand in the face of the Act; it must give way to the Act.

22. The foregone position was re-affirmed by the Court of Appeal in **Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company**

Advocates vs. National Bank of Kenya Limited (2016) eKLR. The matter involved fees agreements entered into between a firm of Advocates and a client in lieu of the Advocates Remuneration Order. The parties later disagreed and the firm of Advocates withdrew its services. It then filed bills of costs under the Advocates Remuneration Order and in disregard of the fees agreements. The taxing officer disallowed the bills. A reference to the High Court was also disallowed.

23. On appeal to the Court of Appeal, the Court restated the legal principle that: -

23. Likewise we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable.

24. I must however disclose that the Court of Appeal eventually also disallowed the appeal. The reason was that the Advocates were the legal experts who knew the law and were advantaged compared to their client. The Advocates could not willingly contravene the law by entering into a void agreement and later seek to go round their actions. The Court stated that since the Advocates had made their bed, they must lie on it.

25. In this case the contract was prepared by the Appellant. It is a standard-form contract. It was dated 22/03/2011. By that time the **Sugar Act** was the law regulating the sugar sector.

26. The Appellant is a fully-fledged enterprise. This Court takes judicial notice that further to its external Advocates the Appellant has its in-house Legal Officer(s) who appear before Court on matters for and against the Appellant.

27. The Respondent has been described as a farmer. There is no indication that the farmer was in any way endowed in law. The Appellant was hence at an advantaged position in coming up with the contract. It definitely had the advantage of legal experts.

28. Guided by the settled legal principle as stated by the Court of Appeal aforesaid and the circumstances of this case, I find that the clause(s) of the contract that placed the duty to harvest the mature cane on the farmer (Respondent) are void *ab initio*. Those clauses are unenforceable since they contravened express provisions of the **Sugar Act**.

29. As I come to the end of this issue I must state that the Appellant and DW3 seemed to be well aware of the foregone legal position. I say so because, first, the Appellant issued a *Consolidated Statement of Accounts as on 01-02-2018* in evidence. The statement made deductions on harvesting and transport charges. One therefore wonders why would the Appellant make the said deductions if the duty to harvest and transport the cane was not upon it. Second, DW3 stated clearly on oath that *'I know that by law it was the Defendant [now Appellant] to harvest and transport the cane to the factory.'*

30. Having so found, it follows that the Appellant was in breach of the contract.

31. In the face of such breach the Respondent is 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.

32. 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).

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

34. The trial court awarded the sum of Kshs. 28,061/= for the second ratoon crop. On the yields, the court used the tonnage yielded on the first ratoon as stated by the Appellant in its *Consolidated Statement of Accounts as on 01-02-2018*. 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 did not therefore err in its computation of the value of the second ratoon crop.

35. There was however the issue of deduction of 16% VAT on transport in respect of the sugar cane harvested and transported in the financial year 2013/14. It was submitted that the tax was not applicable in the preceding years and that upon introduction in 2013/14 it met a lot of resistance such that it was scrapped off in the subsequent financial year 2014/15.

36. The Respondent contended that the issue was not pleaded and proved hence it ought to fail.

37. **Section 59** of the **Evidence Act, Cap. 80** of the Laws of Kenya states that *'No fact of which the court shall take judicial notice need be proved.'* **Section 60(1)(a)** of the **Evidence Act** provides that *'all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya'* are one of the facts to be judicially-noticed.

38. The contention by the Appellant was on the operation of the financial laws during the year 2013/14. Contrary to the submission by the Respondent that the Appellant did not raise the issue during the trial, the evidence of DW2 attests otherwise. The Respondent's Counsel even cross-examined DW2 on the same. DW2 stated categorically that the tax was applicable during that financial year.

39. In such a case therefore, even in the absence of the Court taking judicial notice of the tax, the burden shifted to the Respondent to prove that indeed the tax was not applicable during that financial year. The Respondent did not discharge that burden.

40. This Court therefore agrees with the Appellant that during the financial year 2013/14 the Government introduced 16% VAT on transport which tax was applicable to the cost of transporting the sugar cane in this case. The cost was deductible from the proceeds of the second ratoon crop. Given that the transport charges were Kshs. 12,033/= then the VAT would have been 16% thereof translating to Kshs. 1,925/30.

41. The net proceeds for the second ratoon crop would have instead been Kshs. 26,135/70.

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

a) The appeal hereby succeeds only the extent of revising the sum payable as the value for the second ratoon cane from Kshs. 28,061/= to Kshs. 26,135/70. 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