**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 159 OF 2015**

**SOUTH NYANZA SUGAR CO. LTD.....APPELLANT**

**VERSUS**

**JAMES GURA MWONYA.....RESPONDENT**

(Being an appeal from the Judgment of Hon. J.M. Njoroge (C.M.)

delivered at Kisii on 3rd August 2015 in CMCC No. 1148 of 2004)

**JUDGEMENT**

1. The respondent's case at trial was that in the year 1993, he entered into an agreement with the appellant to cultivate sugar cane on Plot Number 1***7, Field Number 1**0 vide Account Number 4*****1. In turn, the appellant was to harvest and transport the sugarcane to the factory on its maturity and pay the respondent the value thereof. The respondent claimed that despite growing the cane as agreed and informing the appellant of its maturity, the appellant refused to harvest the plant crop and the 1st and 2nd ratoon thereby causing him loss. He urged the court to issue a declaration that the appellant was in breach of the agreement and also sought compensation for the value of the unharvested cane.

2. The appellant filed a statement of defence denying the existence of the agreement or that the respondent had grown the sugarcane and notified it of its maturity. In the alternative, the appellant stated that if the respondent ever planted the cane as pleaded, then he was the author of his own misfortune as he was under a duty to mitigate his losses by harvesting and transporting the cane to the respondent. In further alternative, the appellant averred that it did harvest the cane as and when the same was ready for harvesting. The appellant also assailed the claim on the ground that it was statute barred.

3. When the matter came up for hearing before the trial court, the respondent testified that his claim was based on the agreement entered into in 1993. He relied on his statement and list of documents in support of his claim for 3 crop cycles plus costs and interest.

4. Richard Muok (DW1), a field supervisor for the appellant, admitted that the appellant had entered into a contract with the respondent. He however testified that the plant crop yield was never availed and that the 1st and 2nd ratoon crops had never been developed. He informed the court that yields had to be subjected to deductions and in this case, the services rendered to the plaintiff was valued at Kshs. 63,366.50/=. DW1 conceded that he did not have a debit advice note with respect to the services or a yields assessment report when questioned about them during cross examination.

5. Thereafter, the trial court proceeded to render judgment for the respondent. The court assessed damages payable as Kshs. 296,014.30/= and also awarded the respondent costs and interest.

6. The appellant, being dissatisfied with the determination of the court, instituted this appeal which is premised on the grounds set out in the memorandum of appeal dated 21st August 2015.

7. Directions were taken to ventilate the appeal by way of written submissions. Both parties filed their submissions which I have duly considered alongside the record of appeal.

8. I am also mindful that as a first appellate Court, this court is empowered to subject the whole evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that the court did not have the opportunity of seeing and hearing the witnesses first hand. (See ***Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others (1968) EA 123***)

9. The appellant raised the following issues in his written submissions;

a. That the suit was statute barred;

b. That the trial court erred by awarding the respondent what had not been prayed for; and

c. That the trial magistrate erred in awarding the respondent damages based on an incomplete contract.

10. On the first issue, it is submitted for the appellant that the suit filed by the respondent was statute barred. The appellant's counsel argues that since the parties entered into the contract in the year 1993 the cause of action arose sometime in the year 1995 as the plant crop takes 24 months to mature. It therefore follows that the suit should have been filed latest in the year 2001 and since the suit was filed in 2004, it was statute barred and should have been struck out.

11. The respondent counters that the contract dated 1993 was to run for a period of 5 years and that time would begin running at the end of 5 years in 1998. Counsel submitted that the latest time the respondent could file his suit was on 4th November 2004 and that having filed his suit on 15th September 2004, the suit was not time barred.

12. The respondent's claim against the respondent was for breach of contract. The time limit for filing of such suits is provided in **Section 4 (1) (a)** of the **Limitation of Actions Act** thus;

*4 (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;*

13. The question this court is tasked with determining is when the cause of action arose. The parties referred this court to two contrasting authorities on this issue. The appellant cited the case of ***South Nyanza Sugar Company Limited v Dickson Aoro Awuor HCCA No. 85 of 2015 [2017]eKLR*** where the court held;

*"17. There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.*

*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 19/11/2003 then the first crop was expected to be harvested by November 2005. To me that should be the date on which the cause of action accrued."*

14. The respondent, on the other hand, relied on the case of ***South Nyanza Sugar Co. Ltd vs Paul N. Lila HCCA No. 161 of 2005*** where the court held as follows;

*12. I do agree with the respondent herein that this case is founded on contract which was to last up to 26th April 2000 and any suit based on that contract was capable of being filed all the way to 26th April 2006. It was agreed that the contract was to last for 5 years that is from 27th April 1995 to 26th April 2000. The cause of action herein arose on the 30th October 1997 when the appellant went to the plaintiff's farm cut the sugarcane but failed to take delivery thereof leaving the sugarcane. The suit herein was filed on 10th September 2003 within the six (6) year limitation period provided under* ***Section 4 (I)*** *of the* ***Limitation of actions Act, Cap 22****.*

15. Although the appellant denied the existence of the contract in its statement of defence, its witness, DW1 admitted that such an agreement was in force between the parties. A copy of the agreement dated 4th November 1993 was produced by the respondent at trial. In clause 1 of that agreement, it was indicated that the agreement would remain in force for a period of 5 years or until one plant and two ratoon crops of sugar cane were harvested on the plot whichever period was less.

16. The respondent also produced a copy of yield assessment report by Kenya Sugar Research foundation which stated that depending on the variety of cane cultivated, the plant crop would mature within 17 to 24 months. The subsequent ratoon crops would then be harvested 2 to 3 months earlier than the plant crop. From that report, it can be surmised that the respondent's first crop cycle would have matured not later than 24 months after the commencement of the agreement.

17. The breach of contract complained of by the respondent was the appellant's failure to harvest the cane upon its maturity. It is this breach that gave rise to the cause of action. The evidence shows that the respondent's plant crop would have matured by November 1995; 24 months after the commencement of the agreement in November 1993. It is from this point that time begun to run. I am in agreement with the persuasive authority of ***South Nyanza Sugar Company Limited v Dickson Aoro Awuor (supra)*** that the respondent did not have to wait to the end of the contract to sue the appellant for the breach.

18. Majanja J. in **B Mathayo Obonyo v South Nyanza Sugar Company Ltd Civil Appeal No. 87 of 2018 [2019]eKLR** was of a similar view. He held;

*14. In my view, the question under* ***section 4(1)*** *of the LAA is when does the cause of action accrue. 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 (10th 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 for breach of contract arose when one of the parties failed to meet its obligations under the contract. In the case at hand this 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.*

*15. I am constrained to disagree with the reasoning in South Nyanza Sugar Company Ltd v Ezekiel Oduk **(Supra)**. To hold that the cause of action accrues at the end of the contract period is inconsistent with the meaning of the legislative language and in particular the ordinary meaning of the term, "accrue." To take an extreme example, it would not make sense for instance, to say that when person is employed on permanent and pensionable time, if he is dismissed, could wait until the time of retirement, which may be 20 or 30 years to pursue a claim. Secondly, decisions cited by the appellant seem to be based on the fact that a grower would be entitled to damages equivalent to the two crop cycles. In my view, this reference is only for purposes of calculating the loss and does not determine the limitation. Lastly, even if the agreement is for five years and is performed in cycles, like any other contract it is terminated by breach. It is the breach that gives rise to the cause of action."*

19. Since the respondent's cause of action arose in November 1995, he was required by statute to file his suit by November 2001. He instead filed his suit on 4th July 2005, outside the stipulated time without the leave of the court. I therefore find that the suit was time barred and should have been struck out.

20. Secondly, the appellant argued that the suit as drafted did not specify the value of the unharvested cane. The appellant contended that it was not clear whether the respondent wanted compensation for all three crop cycles, two or just one cycle. The appellant also submitted that the trial court erred by granting orders that had not been sought.

21. In response to this ground of appeal, the respondent argued that the pleadings were adequate for a claim for special damages. He referred this court to the case of ***John Richard Okuku vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010*** where the Court of Appeal held;

*"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.*

. . .

*In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of land which was 0.2 hectare (paragraph 3 of Plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.*

*The learned judge on first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.*

*We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof."*

22. The respondent similarly set out the nature of the agreement, the breach of the contract and particulars of the loss suffered at paragraphs 6, 7 (b) and 8(a) of his amended plaint. It is sufficiently clear from a reading of paragraph 6, that the respondent's claim was for loss of the plant crop and the 1st and 2nd ratoon crops. The respondent also pleaded the acreage of his plot as 1.269 hectares, his expected yield from the lost crop cycles as 120 tonnes per harvest and stated that he expected to sell the crop at Kshs. 1,730/= per tonne. Evidently, the respondent's pleadings were sufficient to compute the value of unharvested cane sought. Guided by the decision of the Court in ***John Richard Okuku,*** I reject the appellant's argument that the respondent did not properly plead his case.

23. Lastly, the appellant assailed the decision of the trial court on the ground that the contract filed as evidence by the respondent was incomplete and consequently the court was unable to understand the duties of both parties as provided in the agreement.

24. This argument is preposterous. Richard Muok (DW 1) admitted at trial that such an agreement was in force between the parties. The issue of incompleteness was never raised at trial in cross examination. Being a party to the agreement, if what was produced in court did not cover the entire duties and obligations of the parties and the appellant being in possession of a copy of the agreement as a party to it, nothing would have been easier than for the appellant to raise the issue before the trial court.

25. Ultimately, I find that this appeal is merited for the reason that the respondent's suit was statute barred. The judgment and decree in Kisii CMCC No. 1148 of 2004 is hereby set aside and substituted with an order dismissing the suit.

26. The respondent shall bear the costs of this appeal.

**Dated and delivered at Kisii this 14th day of October, 2020.**

**A. K. NDUNG'U**

**JUDGE**