REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 155 OF 2015

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

VERSUS

MANASSE OGARO OTIEKO.....RESPONDENT

(Being an appeal from the Judgment of Hon. J.M. Njoroge (Senior Principal

Magistrate) delivered at Kisii on 3rd August 2015 in CMCC No. 1159 of 2004)

JUDGEMENT

1. The trial court's finding that the appellant had breached an Outgrowers Cane Agreement and was liable to pay the respondent a sum of Kshs. 277,200/= as compensation is what triggered the instant appeal.

2. In his suit against the appellant, the respondent claimed that he had entered into an agreement with the appellant to cultivate sugarcane on Plot No. 888, Field No. 82 Account Number 450164. In turn the appellant agreed to purchase, harvest and transport the cane to the factory upon its maturity. The respondent claimed that when the cane matured, the appellant refused to harvest it despite being informed of its maturity. He therefore sought a declaration that the appellant's actions amounted to breach of contract and also sought compensation for the unharvested sugarcane.

3. The appellant denied the existence of the agreement in its amended statement of defence. It also denied that the respondent ever planted sugarcane as alleged or that he notified it of the cane's maturity. It averred that if the respondent ever cultivated any crop as pleaded, he was obliged to mitigate his losses by harvesting the cane and transporting it to the appellant. In the alternative, the appellant pleaded that it had harvested the cane when it was ready for harvesting. The appellant also raised the defence of limitation and urged the court to strike out the suit for being statute barred.

4. When the matter came up for hearing before the trial court, the respondent testified that the plant crop had been harvested and his claim was for 2 ratoons. He also stated that the agreement was dated 1994. The respondent's witness, Richard Awouk (DW1) adopted his statement as his evidence in chief. In it, he insisted that there had been no contract between the appellant and the respondent.

5. This appeal was canvassed by way of written submissions. In his submissions, the appellant's counsel argued that the respondent had not proved the existence of an agreement between him and the appellant. He submitted that since the respondent did not produce the contract book, there was no proof that the contract ever existed. He argued that the farmer's statements referred to in the trial court's judgment did not belong to the respondent as the respondent merely produced a bunch of statements which did not bear his name.

6. Secondly, the appellant's counsel submitted that the respondent had claimed that he entered into a contract with the appellant in the year 1994, but admitted during cross examination that the contract was dated 4th November 1993 and that the plant crop was harvested sometime in 1996. The appellant's counsel contended that since ratoons take 18 months to mature, the respondent's cause of action would arise in March 1998, when the 1st ratoon was supposed to be ready for harvesting. According to the appellant's counsel, the respondent was supposed to file his claim by March 2004. He however filed his suit on 15th September 2004 outside the limitation period. Counsel relied on the case of ***South Nyanza Sugar Company Limited v Dickson Aoro Awuor HCCA No. 85 of 2015 [2017]eKLR*** in support of this position.

7. Citing the case of ***South Nyanza Sugar Co. Ltd. Vs Paul N. Lila HCCA No. 161 of 2005*** the respondent's counsel countered that since the contract commenced in 1994 and was to be in force for a period of 5 years, time would begin running from 1999. Six years would have ended in 2005 which meant that the suit had been filed within time. Counsel also argued that the respondent had produced a copy of the Outgrowers Cane Agreement thus its existence could not be denied.

8. Before I proceed with the determination of the two issues raised in this appeal, I must remind myself of the duty of this court. On a first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123*** and ***Kiruga v Kiruga & Another [1988] KLR 348***).

9. This Court has considered the positions of the appellant and the respondent as advanced in the submissions, pleadings and in the hearing before the trial court. It is the appellant's contention that the respondent failed to prove the existence of the contract for cane harvesting and delivery to the company. In civil cases, the onus is always upon the plaintiff to prove his case on a balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. (See ***Samuel Ndegwa Waithaka v Agnes Wangui Mathenge & 2 others Civil Appeal No. 15 of 2016 [2017] eKLR***)

10. The record shows that the respondent's case had been dismissed for want of prosecution and the suit had to start afresh upon its reinstatement by the trial court. When the matter came up for hearing, on 14th April 2015, the respondent relied on his statement and his list of documents as exhibits. The appellant did not annex a copy of the contract or other documents to prove the existence of the contract between him and the appellant in his said list of documents. The farmers' statements attached to the list of documents had no relation to the respondent.

11. Since the appellant's witness denied the existence of a contract between it and the respondent, it was incumbent upon the respondent to prove its existence. The respondent was required to adduce evidence to tilt the balance of probabilities in his favour but he failed to do so. As a result, I find that he did not prove the existence of the contract between him and the appellant.

12. I now turn to the question of whether the suit was statute barred by limitation. The respondent's claim against the respondent was for breach of contract. The time limit for the 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 parties referred this court to two contrasting authorities on when the cause of action accrued. In the case of ***South Nyanza Sugar Company Limited v Dickson Aoro Awuor HCCA No. 85 of 2015 [2017]eKLR*** which was cited by the appellant, the court was of the view that time should be computed from the time of breach. 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 upto 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. The respondent's claim against the appellant was that the appellant had acted in breach of contract by failing to harvest the 1st and 2nd ratoon when they matured. He claimed that the agreement commenced in 1994. He 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, which is between 14 to 22 months. Taking all this into account it can be said that the 1st ratoon crop was supposed to be harvested not later than November 1997 when it matured.

16. The claim was based on a breach of the contract by the appellant which occurred when the respondent failed to harvest the 1st ratoon crop upon its maturity. The breach of the contract is what gave rise to the cause of action. 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.

17. 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."*

18. Given that the cause of action arose in November 1997, the respondent was expected to file his suit by November 2003. By the time he filed his suit in September 2004, his claim was statute barred and the trial court lacked jurisdiction to handle the matter.

19. For the foregoing reasons, I find that this appeal is merited. The judgment and decree of the trial court in Kisii CMCC No. 1159 of 2004 is hereby set aside and substituted with an order dismissing the suit.

20. 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