REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: A.K. NDUNG'U J.)

CIVIL APPEAL NO. 160 OF 2015

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

VERSUS

WILLIAM MAINGO suing through next of kin

JENIPHER ADHIAMBO MAINGO.....RESPONDENT

(Being an appeal from the Judgment of Hon. J.M. Njoroge (S.P.M.) delivered at Kisii on 3rd August 2015 in CMCC No. 1156 of 2004)

JUDGEMENT

1. Aggrieved by the trial court's decision to allow the respondent's claim against it, the appellant filed the instant appeal vide its memorandum of appeal dated 21st August 2015. The following are the grounds of appeal raised by the appellant;

a. The learned magistrate erred in law and in fact in failing to consider that the suit was commenced outside the limitation period prescribed under the Limitation of Actions Act without leave of court hence arriving at a wrong decision;

b. The learned magistrate erred in law and in fact by wrongly evaluating the evidence on record and particularly that there was no contract between the parties hence coming to a wrong conclusion;

c. The learned magistrate erred in finding for and further awarding the plaintiff what the plaintiff had not prayed for; and

d. The learned magistrate erred in law and fact in failing to evaluate the duties of parties in the agreement signed between parties.

2. Being a first appeal, this court is required to analyse and re-assess the evidence on record and reach its own conclusions taking into account the fact that it neither saw nor heard the witnesses testify (see ***Peters v Sunday Post Ltd [1958] EA 424***).

3. The respondent's claim against the appellant was for breach of an agreement to purchase, harvest and transport sugarcane from Plot No. 130A, Field No. 94 vide account number 450244. The respondent averred that he grew sugarcane on his plot measuring 1.4Ha but when the cane matured, the appellant declined to harvest it. He claimed that the appellant's failure to harvest the plant crop and the 1st and 2nd ratoon crops had caused him great loss. He therefore prayed for a declaration that the appellant was in breach of the cane contract and sought compensation for the value of the unharvested sugarcane.

4. The appellant refuted the claim vide its amended statement of defence. It denied entering into the agreement or being notified of the maturity of the cane as pleaded by the respondent. In the alternative, the appellant averred that it had harvested the cane when it was ready for harvesting and the respondent's suit was only meant to vex it. The appellant also averred that the suit was statute barred and should have been struck out with costs.

5. When the matter came up for hearing before the trial court, the respondent's representative Jenipher Adhiambo Maingo (PW1) testified that she was claiming compensation for 3 crop cycles plus costs on behalf of the plaintiff who was deceased. She referred the court to her statement and list of documents in support of her claim. The appellant's field supervisor, Richard Muok (DW1) told the trial court that there had been no contract between the parties.

6. After analyzing the evidence before it, the trial court came to the conclusion that the respondent had proved the existence of the agreement. He also found the appellant liable for breach of contract and ordered it to pay the respondent a sum of Kshs. 485,100/= plus costs and

interest.

7. This appeal was argued by way of written submissions. The main issues raised by the appellant's counsel in his submissions are threefold.

8. Firstly, the appellant contends that the respondent did not prove the existence of the contract. The appellant's counsel submits that contrary to the practice in such cases, the contract book had not been produced as evidence and this substantiated DW1's testimony that there was no such agreement. In response to this, the respondent's counsel referred the court to the respondent's list of documents. He submits that the respondent annexed a copy of the Out Growers Cane agreement to his list of documents and its existence can therefore not be denied.

9. I have perused the list of documents referred to by the respondent's counsel. Admittedly a copy, albeit an incomplete one, of an Outgrowers Cane Agreement is annexed thereto. When the matter came up for hearing, PW1 testified as follows;

> *PW1- JENIPHER ADHIAMBO MAINGO SWORN STATES IN DHOLUO:-*
>
> *I stay at Kamagambo and I am a farmer. I represent William Maingo. I have filed my statement and list of statements (sic). I claim for 3 cycles plus costs.*
>
> *CROSS EXAMINATION BY YOGO*
>
> *William is dead. The defendant supplied seeds and ploughed on credit.*
>
> *Cross examination (sic) by Marwa- Nil*

10. The Court of Appeal in ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others Civil Appeal No. 140 of 2008 [2015] eKLR*** had this to say on production of documents;

> *"18. … How does a document become part of the evidence for the case? Any document* ***filed*** *and/or marked for identification by either party, passes through three stages before it is held proved or disproved.* ***First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence****; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case.*
>
> ….
>
> *20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record.* ***If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.*** *" [Emphasis added]*

11. It is also settled and indeed elementary that the standard of proof in civil cases is on a balance of probabilities. Denning J. in ***Miller v. Minister of Pensions [1947] All ER 373***, defined this burden of proof as follows;

> *"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; we think it more probable than not, the burden is discharged, but if the probabilities are equal it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanation save equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."*

12. When called upon to testify in support of the respondent's case, PW1 simply stated that she had filed her statement and list of documents. She did not adopt the list of documents as her evidence or produce the agreement as an exhibit. Guided by the foregoing authorities, I am constrained to agree with the appellant that the respondent did not prove the existence of the contract. Without being produced as exhibits, the documents annexed to the list of documents did not form part of the evidence.

13. The onus was always upon the respondent to prove the claim against the appellant. Since she failed to produce documents in support of her claim, her evidence and that of the appellant that there was no contract between the parties were equally probable. The respondent did not tilt the balance of probabilities in her favour. Consequently, I find that the trial court erred in finding that the respondent had proved the existence of the contract.

14. Secondly, the appellant argues that the respondent's suit was filed outside the limitation period. The appellant's counsel is of the view that since the respondent entered into the agreement in July 1996 and was claiming compensation for loss of the plant crop, his cause of action arose in July 1998 because the plant crop would take 24 months to mature. Counsel contends that the suit should have been filed by July 2004. He argues that since the suit was filed in September 2004, it was filed two months outside the stipulated time and should have been struck out.

15. He relied on the case of ***South Nyanza Sugar Company Limited v Dickson Aoro Awuor HCCA No. 85 of 2015 [2017]eKLR*** where the court held;

> *"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."*

16. For his part, the respondent's counsel argues that since the contract was to run for a period of 5 years from July 1997, time would begin running from July 2002. Six years would have ended on 6th July 2008 hence the claim was filed within time. He referred to the case of ***South Nyanza Sugar Co. Ltd vs Paul N. Lila HCCA No. 161 of 2005*** in support of this submissions. In that case, the court held;

> *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****.*

17. The cause of action in this matter is based on a breach contract. **Section 4 (1) (a)** of the **Limitation of Actions Act** provides that actions founded on contract *"may not be brought after the end of six years from the date on which the cause of action accrued."* To determine whether the respondent's suit was filed outside the limitation period, this court has to establish when the cause of action arose.

18. I am persuaded by the sentiments of the court in ***South Nyanza Sugar Company Limited v Dickson Aoro Awuor (supra)*** that the cause of action arises when the purported breach of contract takes place. The respondent would not have to wait for the contract to come to an end in order to file the suit. 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. In her plaint, the respondent indicated that the contract commenced in 1997 but failed to specify the time within which the crop cycles were to be harvested. As I have already held above, the parties did not produce the agreement or any documents to prove the terms of agreement. This court cannot therefore speculate on when the agreement came into force or when the crop cycles were supposed to be harvested. If I nevertheless accept the appellant's argument that the cause of action arose 24 months after the contract came into force, I would find that the suit was filed within time.

20. The respondent's claim was that the breach of the contract occurred when the appellant failed to harvest all the crop cycles. She pleaded that the contract was entered into in 1997. If I adopt the appellant's argument that the plant crop was to mature within 24 months, I would find that the breach of the contract occurred in 1999. This would be the time when the cause of action arose. The respondent was therefore required to file her suit by 2005. The respondent filed her suit on 15th September 2004, which was well within the time prescribed by statute. I therefore respectfully disagree with the appellant's argument that the suit was statute barred.

21. Lastly, it is argued for the appellant that the respondent's suit was not properly pleaded. The appellant submits that the value of the unharvested cane was not specified and that it was not clear what cycle of cane the respondent wanted compensation for.

22. The particulars of negligence and breach of contract against the appellant were set out at paragraph 7 of the amended plaint in the following terms;

> *7(a) The defendant for no apparent reason and contrary to the terms and spirit of the contract refused to harvest and or purchase the plaintiff's plant crop, 1st ratoon and 2nd ratoon which was due for harvest on the 1.4 (Ha) and estimated to weigh 150 tones per harvest.*
>
> *(b) The defendant negligently and recklessly and contrary to Public policy and common practice refused and or failed to harvest and or purchase the said plant crop, 1st ratoon and 2nd ratoon even when it was evident and obvious that the refusal would cause great*

loss to the plaintiff at Kshs. 1,730/= per tone.

23. Other than seeking a declaration that the appellant was in breach of contract the respondent also sought judgment against the appellant thus;

> *"(b) The value of unharvested sugarcane at the rate of Kshs. 1,730/= per tone."*

24. It is clear from the above excerpts of the respondent's amended plaint that her claim was for compensation for loss of all three crop cycles. I am also convinced that the value of the unharvested cane was pleaded with sufficient detail. Although, the respondent did not state the amount she sought in figures, she specified the number of crop cycles, the acreage of the plot, the price of the cane and tones per hectare which could be computed to give the value of the unharvested sugarcane.

25. To reaffirm this position, I rely on the case of ***John Richard Okuku Oloo v South Nyanza Sugar Company Limited Civil Appeal No. 278 of 2010 [2013]eKLR***, 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."*

26. In the end, I find this appeal merited for the reason that the respondent failed to prove her case. The judgment and decree in Kisii CMCC No. 1156 of 2004 is hereby set aside and substituted with an order dismissing the suit.

27. 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