REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 158 OF 2015

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

VERSUS

RISPER AGUTU AYUGI.....RESPONDENT

(Appeal arising out of the judgment of Hon. Njoroge (Principal Magistrate)

at Kisii dated 3rd August 2015 in Kisii CMCC No 1174 of 2004)

JUDGEMENT

1. The respondent's case before the subordinate court was founded on an agreement dated 20th February 1996 by which the appellant contracted her to grow and sell to it sugarcane on her land; Plot No 503 D 286 in field number 4 situated in North Sakwa Sub-location measuring 0.3Ha. The respondent claimed that the appellant breached the terms of the agreement by failing to harvest cane occasioning the respondent loss. As a result of the breach, the appellant pleaded that she lost 28 tons in respect of each crop cycle. She claimed that the value of the cane at the time was Kshs 1,730/- per ton.

2. The appellant denied the respondent's claim and pleaded in the alternative that the respondent had a duty to mitigate her loss by transporting the cane to the appellant. The appellant alleged that in any case, the respondent's suit was time barred.

3. Risper Agutu Ayugi (PW1) was the sole witness for the respondent and adopted her witness statement at the hearing before the trial court. She testified that the agreement provided that the appellant was to harvest the plant crop, the 1st ratoon and the 2nd ratoon when the cane was mature. According to Pw1 the appellant provided her with farm inputs and other services which would have been deducted from the proceeds after sale.

4. Richard Muok (DW2) testimony was that Pw1 abandoned the plant crop and cane was never availed to the appellant as per their agreement. He claimed that it was the respondent who was in breach of the contract.

5. The trial court after considering the evidence before it awarded the respondent Kshs 69,349/-, costs and interest. The trial court in its judgment held as follows;

> "… *The Defendant concedes that none of the cycles was harvested. I wish to reiterate that it was an obligation of the defendant to harvest, transport and pay for the contracted cane. The defendant never produced evidence such as the harvesting programme (sic) to support the fact that the ratoon were never developed. It is my conclusion that the defendant breached the agreement, and liable* to compensate the plaintiff in respect of the 3 cycles…"

6. Being dissatisfied with the decision of the trial court, the appellant has filed this appeal based on the following grounds:

> *1. The learned Magistrate erred in law and fact in failing to consider that the suit was commenced outside the limitation period prescribed under the Limitations of Actions Act without leave of court to a wrong decision.*
>
> *2. The Learned Magistrate erred in law and in fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion.*

3. The Learned Magistrate erred in law and in fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion.

4. The Learned Magistrate erred in law and in fact in failing to evaluate the duties of parties in the Agreement signed between parties.

7. The parties canvassed the appeal by way of written submissions. The appellant reiterated the ground in his appeal while the respondent aligned herself with the trial court's decision.

ANALYSIS AND DETERMINATION

8. As a first appellate court, it my duty to subject the whole evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand (see ***Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123*****).**

9. I propose to address ground 1 in the memorandum of appeal first as it hinges on the court's jurisdiction for reasons that the court can only hear matters that are filed in compliance with the provisions of **the Limitation of Actions Act.** ***Section 4 (1) (a)*** **of the Limitation of Actions Act** provides that an action may not be brought after the end of six years from the date on which the cause of action accrued where the action is founded on contract.

10. I place reliance on the *locus classica* on jurisdiction, Owners of the Motor Vessel "Lillians" –vs- Caltex Oil (Kenya) Ltd (1989) eKLR where the court stated;

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

11. The court of Appeal sitting in Nairobi in **Alba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR** cited with approval the Ugandan case of **Iga vs. Makerere University [1972] EA** where it was held that**:**

> ***"A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief."***

12. It is common ground that the parties herein entered into an agreement on 20th February 1996. The appellant in its statement of defence before the lower court pleaded that the plant crop matures between the 22nd-24th months after planting. This can only mean that the plant crop was ready for harvest on 20th February 1998 and the alleged breach by the appellant occurred when it neglected to harvest the mature plant crop. In ***South Nyanza Sugar Company Limited v Diskson Aoro Owuor*** **MGR HCCA No. 85 of 2015 [2017] eKLR** the court held that;

> *[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.*

13. It is the respondent's case that the appellant was in breach of its contractual obligation by failing to harvest the plant crop. The respondent was obligated by the Limitations of Actions Act to institute a suit against the appellant within six years from the date of breach. The respondent herein filed her suit against the appellant on 15th September 2004 yet the suit ought to have been filed latest by 20th February 2004. Thus the appeal was filed out of time and this finding disposes off the appeal.

14. Having found that the suit was filed outside the applicable 6 year period of limitation under **Section 4 (1)** of the **Limitations of Actions Act**, the suit was statutorily time-barred and one for dismissal. The appeal hereby succeeds and the appellant shall have costs of the appeal.

Dated, Signed and Delivered at KISII this 14TH day of OCTOBER 2020.

A. K NDUNG'U

JUDGE