**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO 156 OF 2015**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT**

**VERSUS**

**SHADRACK OGANGA ONYIMBI.....RESPONDENT**

*(Appeal arising out of the judgment of Hon. Njoroge (Senior Principal Magistrate) at Kisii dated 3rd August 2015 in Kisii CMCC 1319 OF 2004)*

**JUDGEMENT**

**1.** The appellant is aggrieved by the judgment of the subordinate court awarding the respondent Kshs 46,200/-, costs plus interest. It challenges the decision based on the memorandum of appeal dated 21st August 2015 as follows;

> *1. The learned Magistrate erred in law and fact by wrongly evaluating the evidence on record and particularly that there was no contract between the parties hence coming to a wrong conclusion.*
>
> *2. The Learned Magistrate erred in finding for and further awarding the plaintiff what the plaintiff had not prayed for.*
>
> *3. 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.*
>
> *4. The Learned Magistrate erred in law and in fact in failing to evaluate the duties of parties in the agreement signed between parties.*

**2.** Before considering the facts and the parties' submissions I must first recognize that the duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

**3.** The suit at the trial court was initiated by the respondent herein against the appellant on grounds of breach of contract. According to the respondent, the parties had entered into an agreement sometime in 2002 by which the appellant contracted him to grow and sell to it sugarcane. The respondent averred that the appellant harvested the 1st ratoon but failed to harvest the 2nd ratoon which dried up causing him loss. The respondent alleged that the appellant was in breach of contract by failing to harvest and purchase the cane from the 2nd ratoon and he is thus entitled to damages for breach of contract.

**4.** The suit was defended by the appellant who denied entering into any agreement with the respondent. It alleged that the respondent did not own any parcel of land and that he never planted the cane. The defendant pleaded in the alternative that if the respondent planted cane then the earliest maturity date ought to have been in 2004, while the 1st and 2nd ratoon ought to have matured in 2006 and 2008 respectively and the suit against them was filed prematurely.

**5.** At the hearing before the trial court Shardrack Onyimbo (Pw1) testified that the appellant cut the cane but failed to transport it. He testified on cross examination that harvest took place in December 2002 and that he estimated the tonnage to be 40 tons.

**6.** Richard Muok (Dw1) testified for the appellant and adopted his witness statement. He gave evidence that the appellant did not have a contract for cane harvesting and delivery in respect to account No. 804426. He faulted the contract (P. Exh 1) as it did not have the plot number on which the cane was planted.

**7.** Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied and relied on various decisions in support of their rival positions.

**8.** The appellants submitted that there was no agreement entered into between itself and the respondent and that the respondent never produced the purported contract before the trial court. They also took issue with the respondents pleading arguing that it did not clearly bring out the issues that were being raised by the respondent. They contend that the value of un-harvested cane has not been pleaded with sufficient particularity and that the respondent's assertion/claim that the 2nd ratoon was not harvested contradicts the terms of the contract.

**9.** The respondent contends that the terms of the contract was that the contract was to ran for 5 years or until one plant crop and two ratoon crops of sugarcane are harvested. The respondent advanced that since he entered into the agreement with the appellant on 12th February 2002 and having filed the plaint in 2004, the suit was not statute barred. On the issue of pleadings he submitted that the acreage was 0.4 ha was expected to yield 34 tons of sugar which was to be sold at Kshs 1,730 per ton and thus the pleadings on damages were clear and sufficient.

**DETERMINATION**

**10.** After going through the parties' pleadings and submissions, I find the issues for determination are threefold: firstly, whether there was an agreement between the parties; secondly, whether the suit was barred pursuant to the Limitation of Actions Act; and thirdly, whether the respondent is entitled to damages for breach of contract.

**11.** On the first issue, the respondent produced an agreement titled '*SOUTH NYANZA SUGAR COMPANY LIMITED, APPLICATION FORM FOR TEMPORARY NCC AGREEMENT*' signed by both parties and it is my finding that there was a valid agreement between the appellant and respondent.

**12.** I now turn to whether the suit was statute barred. I note that the agreement in question is dated 28th August 2002 and the suit was filed on 4th October 2004 thus the issue of limitation does not arise as the suit was filed **before the expiry of the 6 years prescribed under *Section 4 (1) (a)*** of the **Limitation of Actions Act.**

**13.** The main issue before this court is whether the respondent is entitled to the orders sought. The respondent contends that the appellant failed to transport cane after it was harvested. The respondent at paragraph 5 of the plaint alleges as follows;

> "***5. PARTICULARS OF NEGLIGENECE AND BREACH OF CONTRACT***
>
> *(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 Second Ratoon when it was due for Harvest on the 0.4 (Ha) and estimated to weigh 34 tonnes.*
>
> *(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 Second Ratoon even when it was evident and obvious that the refusal would cause great loss to the Plaintiff at Kshs. 1,730/- per tonne."*

**14.** The contract between the parties on the other hand reads;

> "*I SHADRACK ONGAGA ONYIMBO the owner of the above mentioned I.D Number, do hereby enter into a temporary agreement with Sony Sugar Company Limited hereinafter called the "company", in that I shall avail my mature standing Non contracted cane of 18 months for purposes of sugar processing from the above stated plot…"*

**15.** It is clear that the agreement between the parties does not include the sale of the plant crop or 1st and 2nd ratoon crops but relates to the respondent's mature standing cane of 18 months. The respondent gave evidence before the trial court that at the time he entered into an agreement with the appellant the cane was already 18 months. The evidence led by the respondent is that the appellant was to harvest his already grown cane which was 18 months at the time of the agreement, however, according to his pleadings he claimed that the appellant was in breach of contract for failing to harvest and purchase cane from the 2nd ratoon.

**16.** It is now a settled law that *a party cannot be allowed to raise a different case from that which he has pleaded without due amendment being made.* The Court of Appeal in the case of ***David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR*** held thus;

> "*In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."*

The Supreme Court of Kenya in its ruling in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings in an election petition:

> "*In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that*

*no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…..'"*

**17.** I have carefully perused the entire plaint and outlined paragraph 5 which relates to breach of the contract and note that the appellant's alleged breach of contract was for the failure to harvest and purchase 2nd ratoon crop. The agreement titled '*SOUTH NYANZA SUGAR COMPANY LIMITED, APPLICATION FORM FOR TEMPORARY NCC AGREEMENT*' and the respondent's oral testimony on the other hand reveal that the agreement was for the sale of the respondent's mature cane of 18 months and not for the 2nd ratoon crop as claimed in his plaint. The evidence presented by the respondent is thus at variance with his pleadings.

**18. In the end,** I find merit in the appeal. The judgment and decree of the subordinate court is set aside and substituted with an order dismissing the suit with costs to the appellant. **The Appellant shall have costs of the appeal.**

**Dated and Delivered at KISII this 14th day of October 2020.**

**A. K. NDUNG'U**

**JUDGE**