IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 251 OF 2006

BETWEEN

JOYCE MORNI..APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD....... RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. A. A. Ingutya, SRM*

dated 19th September 2006 at the Chief Magistrates Court

***at Kisii in Civil Case No. 906 of 2002*)**

JUDGMENT

1. The appellant's case was dismissed because the matter was not referred to arbitration in accordance with Clause 12 of the agreement dated 4th January 1996. I hold, without hesitation, that the trial magistrate erred in declining jurisdiction after he had heard the entire case for two reasons. First, the respondent at paragraph 10 of its statement of defence admitted the jurisdiction of the court. Second, the matter having proceeded for hearing, the respondent is deemed to have waived it objection to any jurisdiction (see ***Kisumuwalla Oil Industries v PAN Asiatic Commodities* [1995 – 1998] EA 153**). It was therefore improper for the trial magistrate to strike out the matter after hearing the entire evidence.

2. I now turn to the substance of the claim. The respondent admitted that it contracted the appellant to grow sugar cane on his land parcel being Plot Number 131 in Field No. 86 in Kakmasia Sub-location measuring 0.3 Hectares. The appellant claimed she planted sugarcane as agreed. It was an express and implied term of the agreement that it would remain in force for a period of 5 years or until one plant crop and two ratoon crops of sugarcane are harvested whichever period is less. She alleged that in breach of the agreement, the respondent failed to harvest the plant crop when the same was mature and ready for harvesting at 22- 24 months of age and the ratoon crops at 16 – 18 months thereafter completely abandoning the same to waste. She claimed the plot was capable of producing an average of 135 tonnes per acre and at the rate of payment then applicable per tonne was Kshs. 1,730/-. He therefore claimed, "*Damages for breach of contract and payment of cane on 0.3 hectares at a rate of Kshs. 1,730/- per tonne at the estimated yield of 65 tonnes per hectare for 2 crops.*"

3. The respondent denied the appellant's allegations. In its defence, it admitted the contract but stated that the appellant failed to develop her cane or even deliver it for milling. It stated that the appellant's plot could only have produced a maximum yield of 60 tonnes per hectare and since it measured 0.3 hectares, she would only have realized a maximum of 30 tonnes. It added that the appellant literally abandoned the plot and left it unattended.

4. At the hearing, the appellant (PW 1) testified and the respondent called Francis Abongo (DW 1), a Harvesting and Transport supervisor. As the trial court did not analyse the evidence and come to a conclusion or make a finding thereon, I am now obliged to do so bearing in mind the duty of the first appellate court. The first appellate court has a duty to re-appraise all the evidence and reach an independent decision bearing in mind that the court neither saw nor heard the witnesses testify so as to be able to make a judgment on the demeanour (see ***Selle and Another v Associated Motor Boat Company Ltd* [1968]EA 123**).

5. PW 1 testified that after the agreement was signed, she cultivated the plant crop. The plant crop was harvested after 4 years and she was given Kshs. 600/- which she refused to take. She stated that she did not maintain the 1st ratoon as she did not have any money. DW 1 testified that PW 1 did not maintain her crop upto maturity and although she availed the plant crop, she neglected the 1st ratoon and failed to develop the 2nd ratoon. In cross-examination DW 1 admitted that the plant crop was harvested in 2000.

6. The thrust of the appellant's claim is at para. 7 of the plaint in which she states;

> *[7] In breach of the agreement, the defendant failed to harvest the plant crop when the same was mature and ready for harvesting at 22-24 months of agreement and the ratoon crops at 16 – 18 months thereafter, completely abandoning the same to waste.*

7. In my analysis of the testimony, DW 1 admitted breach by failing to harvest the plant crop when it was due. In fact, the plant crop was harvested at the tail end of the agreement in 2000 meaning the yield was low and that the appellant could not comply with the agreement by preparing the ratoon crops within the contract period. I therefore find and hold that the respondent breached the agreement hence the appellant is entitled to damages for the two cycles.

8. I now turn to the issue of damages and I adopt the statement of principle ***Martin Akama Lango v South Nyanza Sugar Company Limited*** **KSM HCCA No. 20 of 2000** that:

> *[The Contract] remains in force for a period of five years or until one plant and two ratoon crops are harvested on the plot.*
>
> *To my mind what that means especially the last part is that one plant and two ratoon crops must be harvested in fulfillment of the obligation of the parties agreement………. When the Respondent failed to do the harvesting and waited for until the crop was burnt by arsonists, it was in breach of the terms of the agreement and had the trial magistrate correctly interpreted the provisions of the said agreement, she should have held that the respondent was in breach of the contract and liable to pay damages.*

9. According DW 1 testified that the yield in the area was 70 tonnes per Ha at Kshs. 1,700/- per tonne. The appellant pleaded 65 tonnes per Ha which I shall now award. The quantum of loss is therefore as follows:

- 1st Ratoon 65 tonnes per Ha X 1730 X 0.3 =Kshs. 33,735.00
- 2nd Ratoon 65 tonnes per Ha X 1730 X 0.3 = Kshs. 33,735.00

TOTAL Kshs. 67,479.00

10. I therefore set aside the judgment of the trial court, and substitute it with a judgment for the appellant against the respondent for the sum of Kshs. 67,479/-.

11. I would award interest at court rates from the date of filing suit to the date of judgment before the trial court. However, and as regards interest following this appeal. I note that the appeal was filed in 2006 and was only prosecuted this year. The respondent should not be punished for the appellant's tardiness in disposing of the appeal. I therefore award interest at court rates for one year only from the date of judgment and thereafter from the date of this judgment until payment in full.

12. I award the appellant costs of this appeal assessed at Kshs. 15,000/- exclusive of court fees.

DATED and **DELIVERED** at **KISII** this **13th day of MARCH 2019.**

D.S. MAJANJA

JUDGE

Mr Oduk instructed by Oduk and Company for the appellant.

Mr Odero instructed by Okong'o, Wandago and Company Advocates for the respondent.