REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 254 OF 2006

SAMSON OKENGO OLIK.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. By a written agreement dated 6th January 1996, the Respondent contracted the Appellant to grow and sell to it sugarcane on his land parcel being Plot No. 84 in plot number 575C in Kakmasia Sub-location measuring 0.2 Hectares.

2. The appellant alleged that the respondent neglected to harvest the plant crop when it was mature and ready for harvesting leading to loss and waste. He claimed damages as follows;

> a. Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of three (3) crops on 0.2 hectares of land at the rate of 135 tons per hectare and payment of Kshs. 1,730/- per tonne.

3. The respondent denied the appellant's claim but claimed in the alternative that the average cane yield for the area is 65 tonnes per acre and since the Appellant's plot only measured 0.2 hectares it would have produced only 13 tones and the income would be subject to Sony Out Growers Levy, presumptive income tax, harvesting and transport charges and Cess.

4. The Respondent also averred that the Appellant's suit was statute barred and subsequently filed a preliminary objection. The trial court dismissed the appellant's case and in its judgement the court held as follows:

> ***"My attention is drawn at clause 13 of the agreement part in evidence. In so far as it provides that the parties hereto are bound in the first instance or refer any dispute to the decision of arbitration. The suit is premature; on the other hand the plaintiff does not particularize the plaintiff's claim. In essence, the claim is not specifically pleaded as it ought to, given that it is a claim for special damages. For this reason the plaintiff's suit is bad at law and premature and I dismiss it with costs.***

5. It is this judgment that triggered this appeal. As this is the first appeal, I am called upon to analyse and re-assess the evidence on record and reach my own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

6. Samson Okong'o Olik (Pw1) testified that the plant crop was not harvested by the Respondent. He produced a job completion certificate dated 20/01/1996 which is evidence that planting was completed in January of 1996.The respondent however failed to harvest the plant crop after it matured. That he received instructions from the respondent to cut the dried cane and that he proceeds to plant the first ratoon. He proceeded to plant the 1st ratoon and was expecting to harvest 32 tonnes per ratoon.

7. Francis Abong'o (Dw1) testified that after doing cane census, they concluded that the Appellant failed to maintain the cane/crop and that the Respondent could only harvest well husbanded crops. On cross examination it was established that the respondent was required to communicate to the applicant its findings from the census. There was no evidence that a written notice in regard to the census was issued to the Appellant.

8. It was the appellant's case that 1 tonne of cane was going for Kshs 1,732/- while Dw1 testified that the price per tonne was Kshs. 1,553/-.

9. This court has to determine whether the trial court had jurisdiction to entertain the appellant's claim or whether the same ought to have been referred to arbitration as provided by clause 13 of the parties' agreement. The respondent in its defence filed before the trial court admitted to jurisdiction of the court at paragraph 12 and fully participated during the hearing of the case. The admission of the court's

jurisdiction by the respondent and secondly, the respondent participation in the full hearing of the appellant's claim before the trial court can only mean that the respondent waived its objection to the issue of jurisdiction of the trial court. (**See *Kisumuwalla Oil Industries v PAN Asiatic Commodities PTE Limited & Another [1995 – 1998] EA 153***).

10. From the foregoing I find that the trial magistrate erred in declining jurisdiction because the Respondent waived his right to arbitration. Having found so, this court will now proceed to determine whether the claim of the Appellant was statute barred. The proceedings reveal that the respondent raised the defence of limitations in their statement of defence and further filed a preliminary objection on the same. The cause of action in this matter was based on contract. Section 4 of the **Limitation of Actions Act** provides that:

> *"(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;*
>
> ...
>
> *(3) An action for an account may not be brought in respect of any matter in which arose more than six years before the commencement of action."*

11. The basis for limitation period is intended to protect defendants against unreasonable delay in bringing of suits against them, the plaintiff is expected to exercise reasonable diligence and take reasonable steps in his own interest (**See Gathoni vs Kenya Co-operative Creameries Limited (1982) KLR 104**). The next issue to determine is when the appellant's cause of action accrued for purposes of **section 4(1)(a)** of the ***Limitations of Actions Act***. In the case of ***South Nyanza Sugar Company Limited v Diskson Aoro Owuor*** **MGR HCCA No. 85 of 2015 [2017] eKLR** the court held that;

> *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.*

12. The agreement between the parties was signed on 6th January 1996 and as earlier observed, this was not in dispute. The plant crop having been planted in January 1996 would mean that the first breach would have occurred at least 2 years into the agreement when the plant crop was expected to have been harvested. The applicant during the hearing before the trial court testified that he received instructions from the respondent to cut the dry plant and proceed to plant the 1st ratoon crop, however, no evidence of such communication was availed by the appellants. This therefore means that the appellants claim before the trial magistrate court should have been filed at the very least by January 2004. The appellants claim was filed in November 2004 and the suit was therefore time barred. Had the Appellant been successful I would have made an award of Kshs. 140,130/- made up as follows:

> The plant crop Kshs. 1730 X 0.2 Ha X 135 – Kshs 46,710
>
> 1st Ratoon crop I Kshs. 1730 X 0.2 Ha X 135 – Kshs 46,710
>
> 2nd Ratoon II crop Kshs. 1730 X 0.2 Ha X 135 – Kshs 46,710

13. In conclusion, I dismiss the appeal and award costs of the appeal to the respondent.

Dated, **signed** and **delivered** at Kisii this **8th** day of **March 2019.**

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyangacha h/b for Mr. Okuk For the Appellant

Respondent Absent

Rael Court clerk