



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 91 OF 2018

RICHARD THOMAS.....APPELLANT

-VERSUS-

TRANS MARA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the ruling and order of Hon. C. K. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 368 of 2017 delivered on 06/06/2018)

JUDGMENT

1. The Appellant herein, **Richard Thomas**, is a sugar cane farmer who entered into a **Sugarcane Growing and Supply Contract** (hereinafter referred to as '**the Contract**') with the Respondent herein, **Trans Mara Sugar Co. Ltd**, to grow and sell to the Respondent sugarcane on his parcel of land known as Plot No. 636 measuring 0.8 Hectares in Botabori Sub-Location within Kisii County. The Contract was entered into on 08/08/2011 and it was to be in force for a period of six years or until one plant crop and two ratoon crops of the sugarcane were harvested whichever event occurred first.

2. Alleging breach of the contract, the Appellant filed **Rongo Senior Resident Magistrate's Civil Suit No. 368 of 2017** in which he claimed for compensation. The Respondent entered appearance and contemporaneously filed a Notice of Motion dated 27/02/2018 (hereinafter referred to as '**the Application**') where it sought the following orders: -

- 1. THAT this application be certified as urgent and service in the first instant be dispensed with.**
- 2. THAT the proceedings in this suit be stayed pending hearing and determination of this application inter partes.**
- 3. THAT the proceedings in this suit be stayed pending hearing and determination of the claims therein through Arbitration between the parties and as provided in the Sugarcane Growing and Supply dated 27th September 2011.**
- 4. THAT the dispute between the parties and/or the course of action in this suit be referred to Arbitration.**
- 5. THAT the defendant /applicant be at liberty to apply for such further or other Orders and direction as court may deem fit and just to grant in the circumstances.**
- 6. THAT the cost of this Application to be provided**

3. The Application was strenuously opposed and the court allowed the application vide a ruling rendered on 06/06/2018. It is that ruling which prompted the appeal subject of this judgment.

4. The Appellant in praying that the appeal be allowed, the lower court ruling be set-aside and the matter be referred back to the lower court for hearing and determination preferred the following 5 grounds of appeal: -

- 1. The learned magistrate erred in law and fact in failing to consider that the enactment of the new legislation did substantially change the Contract.**
- 2. The learned trial magistrate erred in law and in fact when he failed to consider certain clauses of the contract were compromised by operation of the law.**

3. The learned trial magistrate erred in fact and law in failing to consider that the appeals if are to preferred on the Sugar Arbitration Tribunal when the same has ceased to exist.

4. The learned trial magistrate erred in law and in fact when he failed to consider that when the parties were making the agreement they did so in contemplation of the terms under the Old Act (repealed Sugar Act 2001).

5. The finding is against the weight of evidence and law

5. Directions were taken and the appeal was disposed of by way of written submissions where both parties complied. The Appellant mainly contend that the arbitration procedure which was provided for in the Contract has since become in operational by dint of the enactment of the **Crops Act No. 16 of 2013** (hereinafter referred to as '**the Crops Act**') which repealed the **Sugar Act, No. 10 of 2001** (hereinafter referred to as '**the Sugar Act**'). The Appellant further contends that as a result of the change in the law the Arbitration Committee cannot be properly constituted since some of its members are no longer known in law and that any party aggrieved by the decision of the Arbitration Committee has no right of appeal to the Sugar Arbitration Tribunal which has so far become defunct. The Appellant therefore submit that parties cannot be forced to a non-existent and imaginary procedure in attempting to resolve the dispute. The Appellant further contends that the dispute does not fall within Clause 9.1 of the Contract and as such cannot be referred to arbitration and relied on **Nairobi HCCC No. 487 of 2013 Nanchang Foreign Engineering Company Limited (K) Ltd vs. Easy Properties Kenya Ltd** in support. It is on that background that the Appellant prays that the appeal be sustained.

6. The appeal is opposed and the Respondent is of the contrary position. According to the Respondent the change in law did not occasion any lacuna and the Arbitration Committee provided for in the Contract is properly and duly constituted and that any party aggrieved by the decision of the Arbitration Committee has a recourse to the **Arbitration Act**. The Respondent referred to the provisions of **the Constitution, the Crops Act, the Arbitration Act No. 4 of 1995** (hereinafter referred to as '**the Arbitration Act**') and to the persuasive decision in **Jimmy Mutuku Murithi t/a Oasis Farm vs. Eric Okondo Omanga t/a Cidai Farm (2016) eKLR** in support of its position. The Respondent prayed that the appeal be dismissed with costs.

7. I shall, for purposes of understanding where this matter has come from, briefly revisit the history of the current legislation governing the sugar sector. Following the promulgation of the **Constitution** in 2010 the Country's legal regime underwent a turn-around courtesy of the transformational nature of the **Constitution**. By dint of **Article 261(1)** and the **Fifth Schedule** of the **Constitution** Parliament was tasked to come up with various pieces of legislation within prescribed timelines towards the implementation of the **Constitution**. Pending the foregone, **Article 262** and the **Sixth Schedule** of the **Constitution** availed the transitional and consequential provisions.

8. In 2013 among the various pieces of legislations passed by Parliament included the **Agriculture, Fisheries and Food Authority Act, No. 13 of 2013** (hereinafter referred to as '**the AFFA Act**') and the **Crops Act**. **The AFFA Act as an Act of Parliament on one hand provided for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purpose.** The **Crops Act** on the other hand provided for the consolidation and repeal of various statutes relating to crops; growth and development of agricultural crops and for connected purposes. One of the statutes repealed by the enactment of the **Crops Act** was the **Sugar Act** which established the **Kenya Sugar Board** under **Section 3** and the **Sugar Arbitration Tribunal** under **Section 31**.

9. That is the brief legislative background. I will now turn back to the matter at hand. The Contract was entered into in 2011 which was during the constitutional transition period. It was the period after the promulgation of the **Constitution** but before the enactment of the **AFFA Act** and the **Crops Act**. The parties therefore entered into the Contract while alive to the fact that there were several oncoming legislations and that the country's governance structure had changed. The Contract as expected of a forward looking one and in line with **Article 159(2)(c)** of the **Constitution** provided for an alternative mode of dispute resolution under **Clauses 9.1, 9.2, 9.3 and 9.4**. For ease of this discussion I will reproduce verbatim the said provisions: -

9.1 All questions or differences which at any time hereafter arise between the parties hereto touching or concerning this Agreement or the construction hereof or as to the rights, duties obligations of either party hereto or as to any subject matter in any way arising out of or connected with the committee of five people comprising:-

a) **The District Officer in whose area the land on which the cane supply contracted is situated.**

b) **One person representing the Kenya Sugar Board.**

c) **One nominee of the TRANSMARA SUGAR CO; KTD**

d) **One nominee of the Transmara Out Growers Company Limited.**

e) **The Divisional Agriculture Officer of the area where the cane in question is still or in his absence an Agricultural Officer holding the rank of Divisional Agriculture Officer or above appointed by the District Agricultural Officer for that purposes.**

9.2 The District Officer shall preside over the meeting of this Arbitration committee.

9.3 The Arbitration Committee shall have powers to receive evidence from any source including summoning witnesses to testify before it and will have all the powers conferred on arbitrators by the Arbitration Act or any statutory Legislation

thereof for the time being in force in Kenya.

9.4 Any party not satisfied with the decision of the Arbitration Committee may refer the dispute to the Sugar Arbitration Tribunal established under the Sugar Act, 2001 whose decision shall be final and binding on all the parties involved.

The main argument which now presents itself for resolution is in respect of the composition of the Arbitration Committee and the parties' right of appeal. The Appellant contend that some of the five members of the Arbitration Committee are no longer in existence and as such there can be no valid reference to the Arbitration Committee. The members are the District Officer who is the presiding officer, the representative from the Kenya Sugar Board, the representative from the Trans Mara Outgrowers Company Limited and the Divisional Agricultural Officer.

10. It is true that among the changes brought about by the **Constitution** include the governance of our country. These changes are contained in the **Constitution** and the various laws in force by dint of **Article 2** of the **Constitution** for which I must take judicial notice of under **Section 60** of the **Evidence Act, Cap. 80** of the Laws of Kenya. For instance, the former provincial administration gave way to a new outfit. Under the new structure the former Provincial Commissioner became the Regional Commissioner, the then District Commissioner became the County Commissioner and the District Officer became the Assistant County Commissioner. Therefore, the presiding officer of the Arbitration Committee who was the District Officer became the Assistant County Commissioner in whose area the land on which the Contract relates is situated.

11. As to the representative of the defunct Kenya Sugar Board (hereinafter referred to as '**the Board**') the provisions of the **AFFA Act** come into play. **Section 3** of the **AFFA Act** established the **Agriculture, Fisheries and Food Authority** (hereinafter referred to as '**the Authority**') as a body corporate with perpetual succession and a common seal. **Section 3(3)** of the **AFFA Act** provides as follows: -

The Authority shall be the successor to the institutions established by the Acts repealed under Section 41 existing immediately before the commencement of this Act, the Crops Act, the Livestock Act and Fisheries Act respectively.

12. Transitional Provision 1 of the **First Schedule** of the **AFFA Act** defines a '**former institution**' to mean '*any institution established by a repealed Act, or a revoked legal notice, existing immediately before the appointed day*' and those institutions include the Board. Therefore, the functions of the defunct Board were taken over by the Authority. That being the case, the representative of the Board in the Arbitration Committee was hence replaced by a representative of the Authority.

13. On the nominee of the Trans Mara Outgrowers Company Limited, the Appellant submits that the entity was a creation of the **Sugar Act** and is no more and as such no one can attempt to be such a nominee. In answer to the dilemma, the interpretation of who an '**out-grower**' is under **Section 2** of the **Sugar Act** is paramount. The provision defines an '*out-grower*' to mean: -

An out-grower institution registered under the Companies Act (Cap. 486), the Co-operative Societies Act (Cap. 490), Trade Unions Act (Cap. 233) or any other organization registered under any other law the annual general meeting may approve.

14. From the definition of an 'out-grower' it is clear that the **Sugar Act** was not the creator of the out-grower associations. The **Sugar Act** only recognized those institutions which had specific mandates in the implementation of the **Sugar Act**. I therefore find and hold that the Trans Mara Outgrowers Company Limited which was not a creation of the **Sugar Act** was not terminated by the repeal of the **Sugar Act** and has the capacity to nominate one of its members to the Arbitration Committee.

15. There is also the issue of the Divisional Agricultural Officer. Agreed, as a result of the devolved governance structure under the **Constitution**, agriculture as a function was majorly devolved to the County Governments. I say so because there are some other aspects touching on agriculture which remained as a function of the national government. Those functions include the Agriculture Policy, Veterinary Policy, National Economic Policy and Planning, General principles of land planning and the co-ordination of planning by the counties, Protection of the environment and natural resources among others. Resulting from the foregone, it is therefore not foreign to have representatives from both forms of Government on matters touching on agriculture in the Counties since each has clear and defined mandate.

16. In our case, the ideal officer to the Arbitration Committee must be the one dealing with crop husbandry and in view of the distribution of the functions between the governments under the **Constitution** that officer shall be from the respective County Government and shall be the Agricultural Officer in charge of the administrative division or the equivalent thereof where the land on which the Contract relates is situated.

17. In view of the foregone analysis, I now find and hold that the Arbitration Committee in this case is validly in place with requisite capacity to discharge its mandate.

18. There is also the other issue of the right of appeal. The Appellant submits that since the **Sugar Arbitration Tribunal** (hereinafter referred to as '**the Tribunal**') is no longer in existence then a party aggrieved by the decision of the Arbitration Committee will not have an avenue of redress on appeal and that renders the arbitration process contemplated in the Contract inapplicable.

19. It is true that no other entity was created in place of the Tribunal. That is the reason why all the sugar cases which were pending before the Tribunal have found their way to the mainstream courts. In this case I have demonstrated that the Arbitration Committee is still validly in place despite the change in the legal regime. The Tribunal now only comes in as an appellate entity. That being the case a look at the general law on arbitration is important.

20. The arbitration processes in Kenya are provided for and regulated by the **Constitution** and the **Arbitration Act**. Whereas the **Constitution** calls for the use of alternative forms of dispute resolution including arbitration on one hand, the **Arbitration Act** on the other

hand oversees the arbitral processes more so given that most of the arbitration agreements are self-regulating. Of much importance is the fact that the **Arbitration Act** *inter alia* provides for the enforcement and setting-aside of arbitral awards and appeals.

21. It is hence apparent that since the change in the law removed the Tribunal from the dispute resolution processes, the parties to the Contract were brought into the ambit of the **Arbitration Act** and consequently lost their consensual right of appeal to the Tribunal. That is however not to say that the arbitral process was compromised and rendered inoperative as the parties are still within the protection of the law and as such I am not persuaded that a party aggrieved by the arbitral award will stand prejudiced.

22. There is also the argument that the dispute herein is not among those contemplated under Clause 9.1 of the Contract hence it cannot be referred for arbitration. I have already reproduced Clause 9.1 of the Contract above. A careful reading of Clause 9.1 of the Contract reveal that the same is couched in a manner to include all possible disputes between the parties. I therefore do not agree with the argument and the ground fails.

23. Having considered all the grounds of appeal, I also come to a similar finding as the Learned Magistrate that the arbitration clause in the Contract is still operative even after the change in the legal regime in the sugar sector.

24. As I come to the end of this judgment I must draw the attention of the parties herein to the fact that it remains the desire of Parliament that disputes in the larger crops sector between farmers and other crop dealers be dealt with by way of arbitration. That is so expressly provided for under **Section 41** of the **Crops Act** which states as follows: -

For the purposes of ensuring expeditious resolution of disputes arising between farmers and other crop dealers, the Cabinet Secretary shall make rules to provide the procedure for arbitration of such disputes.

25. The upshot upon consideration of this appeal is that the same is unsuccessful and is hereby dismissed with costs. The ruling rendered on 06/06/2018 by the Learned Magistrate is hereby affirmed.

26. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of September 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

P.D. Onyango Counsel instructed by the firm of Messrs. P.D. Onyango & Company Advocates for the Appellant.

Mr. Ole Seriani Counsel instructed by the firm of Messrs. Kuyioni, Seriani & Associates Advocates for the Respondent.

Evelyne Nyauke – Court Assistant