



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 88 OF 2018

RONALD OBUOGE OINO.....APPELLANT

-VERSUS-

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

(Being an appeal from the ruling and order of Hon. C. K. Kamau, Senior Resident

Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 369 of 2017 delivered on 06/06/2018)

JUDGMENT

1. The Appellant herein, **Ronald Obuoge Oino**, 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. 767A measuring 0.3 Hectares in Ilipashire Sub-Location within Narok County. The Contract was entered into on 24/06/2014 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. 374 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: -

3. ***THAT this application be certified as urgent and service in the first instant be dispensed with.***

4. ***THAT the proceedings in this suit be stayed pending hearing and determination of this application inter partes.***

5. ***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.***

6. ***THAT the dispute between the parties and/or the course of action in this suit be referred to Arbitration.***

7. ***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.***

8. ***THAT the cost of this Application to be provided***

9. 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.

10. 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*

11. 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 inoperational 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.

12. 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.

13. 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.

14. 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**.

15. That is the brief legislative background. I will now turn back to the matter at hand. The Contract was entered into in 2014 which was after the enactment of the **Crops Act** and the **AFFA Act**. Despite the change in law the parties still maintained Clause 9 on disputes resolution through an Arbitration Committee comprised of some members who were non-existent in law. I am alive to the fact that by the time the contract was entered the country's administration had changed and institutions like the Sugar Board and the Sugar Arbitration Tribunal disbanded by the repeal of the law. Therefore, by the time the parties entered into the contract it was clear that some of the parties to the Arbitration Committee were non-existent. I will hence be wrong to assume that the parties intended to have the new institutions in place since the new institutions were already in place and some of the members of the contemplated Committee were non-existent in law. To that end I find that the Appellant is right in contending that the Arbitration Committee is non-functional. Parties cannot be forced into a dispute resolution mechanism which is legally non-existent *ab initio* as that will be a travesty of justice. Had the contract been entered after the promulgation of the **Constitution** but before the enactment of the **AFFA Act** and the **Crops Act** I will have definitely arrived at a different finding on this appeal. In the unique circumstances of this case Clause 9.1 to 9.4 inclusive of the contract is inapplicable and as such severable.

16. The upshot is that the appeal is merited and hereby allowed with costs. The ruling rendered on 06/06/2018 by the Learned Magistrate is, respectfully, set aside and the suit, **Rongo Senior Resident Magistrate's Civil Suit No. 374 of 2017**, be heard on priority basis.

17. 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