**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

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

**CIVIL APPEAL NO 119 OF 2018**

**JAEL A. OMOLO.....APPELLANT**

**VERSUS**

**SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT**

***(*Being an appeal from the judgment and decree of Hon. S.N Makila – SRM dated 9th November 2018 in Kisii CMCC No. 551 of 2009*)***

**JUDGEMENT**

1. The Appellant filed a suit against the Respondent in the Chief Magistrate's Court at Kisii being Kisii CMCC No 551 of 2009 alleging inter alia breach of contract. She pleaded that by a written contract dated 14th July 2005 the respondent contracted her to grow and sell to it sugar cane on her Plot No. 357A measuring 0.4 hectares in field number 85 Kakmasia sub-location. The respondent failed to harvest the plant crop within 24 months as agreed causing the over mature crop to catch fire and burn. The appellant as a result suffered loss and damage. The appellant supplied the respondent with a sample of the burnt cane for tests to be carried out in the respondent's laboratory before the burnt cane could be harvested. After the appellant complied with the respondent's aforesaid requirement, the respondent failed to harvest the cane.

2. In paragraph 12 of the plaint, the appellant pleaded as hereunder:

> "The average cane proceeds per hectare was 135 tonnes and the plaintiff's claim against the defendant was for payment of pro-rata tonnes of cane on 0.40 hectares at the rate of Kshs. 2015/= per tonne being the average yield unharvested by the defendant together with punitive damages as particularized:
>
> a. Expected yield for plant crop 135 tonnes x 0.4 ha x 2,015 = 108,810
>
> b. Expected yield for 1st ratoon crop 135 tonnes x 0.4 ha x 2,015 = 108,810
>
> c. Expected yield for 2nd ratoon crop 135 tonnes x 0.4 ha x 2,015 = 108,810
>
> **TOTAL 326, 810**"

2. In its statement of defence, the respondent denied having a contract with the appellant and that it failed to harvest any plant or ratoon crop. In the alternative the defendant pleaded that it was not its policy to harvest poorly maintained cane. The respondent pleaded that the agreement executed by the plaintiff was for purposes of obtaining inputs and services on credit from the respondent.

4. At the hearing before the trial court the appellant testified as Pw1. She adopted her statement as her examination in chief which reiterates her claim as per her pleadings. The respondent called Richard Muok (Dw1) as its witness. Dw1 adopted his witness statement dated 13th May 2018 as his evidence in chief. According to his statement the cane price was Kshs 1,800 per tonne. He pointed out that the respondent was not bound to purchase burnt cane because in the event of a force majeure parties are relieved of their obligation. In his testimony before court he listed the services which they offered to the appellant.

5. After considering the evidence, the trial magistrate concluded as follows:

> **"It is not in dispute that the defendant failed to harvest the three crop cycles due to the crop getting burnt. Clause 6.2 of the contract provides that the defendant was not obliged to harvest burnt cane. It is not contested that the cane got burnt. In the absence of any proof of breach by the defendant, I find that the plaintiff has not proved its case on a balance of probabilities against the defendant. The plaintiff is thus not entitled to any compensation and the suit is hereby dismissed with costs to the defendant."**

6. The appellant being aggrieved by the lower court's judgment and decree filed the appeal herein setting out the following grounds of appeal:-

> 1. The learned trial magistrate erred in law in failing to disregard evidence led on an unpleaded issue i.e the burning of sugarcane, and relied on it, when it was not permissible to do so.
>
> 2. The learned trial magistrate erred in law in treating the contract requiring the defendant to harvest the sugar cane on the due date as frustrated, when, the defendant neither pleaded it or proved it and in any event, when the same was not permissible in law (sic).
>
> 3. The learned trial magistrate ignored judicial precedent and brought the practice of the law into disrepute.

7. When the appeal came for hearing, the court directed that the appeal be canvassed by way of written submissions. The appellant argued that the respondent gave evidence that under the contract it was not bound to harvest burnt cane but did not plead the defence in its statement of claim. It relied on the case of ***James Mahanga Mwita v South Nyanza Sugar Co. Ltd HCCA No 92 of 2015*** and ***David Sironga Ole Tukai v Francis Arap Muge and others CA No 76 of 2014.*** The appellant also cited the case of ***Martin Akama v South Nyanza Sugar Co. Ltd HCCA No 2000*** Kisumu where the court held that the burning of sugar cane did not afford the respondent refuge, it was a supervening event occurring long after the breach had taken place. The respondent in their submission contend that the appellant did not tender evidence proving that the plant crop had matured. They submitted that DW1 testified that they were not bound to harvest burnt cane as per their contract.

8. As this is a first appeal, I will proceed to analyze and re-assess the evidence afresh and reach my own conclusion, bearing in mind that I did not have the benefit of seeing the witnesses testify. (See ***Selle v Associated Motor Boat Company Ltd. [1968] EA 123***).

9. It is not in dispute that there was an agreement between the appellant and respondent where the appellant was to grow sugar cane and the respondent to purchase the said sugar cane from the appellant's land over a period of 5 years.

**10.** The evidence by the respondent is through the witness statement by Richard Muok which was adopted as his evidence in chief. The mainstay of the respondent's case as put by Richard is;

> "The cane got burnt and the defendant is not bound to purchase burnt cane as per Clause 6.2. In the event of **"a force majeure"** both parties are relieved of their obligations."

**11.** I have perused the defence dated 10/12/09. The fact of the cane being burnt (if at all) is not pleaded. This is contrary to the express provisions of **Order 2 Rule 4** of the **Civil Procedure Rules.**

> Rule 4(1) provides; "A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading."

**12.** It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by 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*** 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."

**13.** The foregoing position was also reiterated in the case of ***Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others Civil Appeal No. 219 of 2013 [2014] eKLR.***

**14.** In the present case DW 1's testimony is that the cane got burnt and the defendant was not bound to purchase burnt cane as per Clause 6.2 of the Contract. This fact was not pleaded.

**15.** What was pleaded was that the appellant had failed to properly maintain the crop undertaking no husbandry of the crop which got over shadowed by weeds and was totally destroyed and the defendant was entitled contractually not to harvest.

**16.** That evidence having not been pleaded ought to have been disregarded by the trial court.

**17.** I concur with the persuasive decision of the court in ***Susan Onyango Ngaji v South Nyanza Sugar Company Limited Civil Appeal No. 112 of 2018 [2019] eKLR*** where Majanja J. held;

> 12 ... Although it purported to rely on the force majeure, I find and hold that the evidence of DW 1 was inconsistent with its pleaded defence. As I have set out above, the defendant's defence was that the plaintiff employed poor husbandry and the crop was so neglected that the defendant could not contractually harvest the cane. It also alleged that the contract was procured for a fraudulent purpose yet the claim of fraud was not pleaded. It is thus clear that the evidence of DW 1 was not only inconsistent with the statement of defence but the defence of force majeure was not pleaded.

**18.** Having so found, it is important at this stage to note that the burden of proof in this case lay with the appellant and that the principle binding parties by their pleadings applies across board.

**19.** The issue for determination is whether the respondent breached the contract between it and the appellant.

**20.** The Law is that whoever alleges must prove. **Section 107** of the **Evidence Act** puts to rest the issue of where the burden of proof lies. It provides;

> **"S 107** *(1) Whoever desires any court to give judgment as to any legal right or liability* dependent on the existence of facts which he asserts must prove that those facts *exist.*
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

**21.** In our instant suit, the burden of proof lay on the plaintiff. This being a civil case the standard of proof applicable was on a balance of probabilities.

**22.** Her evidence as laid out in her witness statement that was adopted as her examination in chief is brief. She states;

> "I am a farmer at Kakmasia sub location. On 14/7/2005, I was contracted by South Nyanza Sugar Co. Ltd to grow sugarcane and sell to them. It was for 5 years. They were to harvest the sugarcane 5 times, at interval of 22-24 months for plant crop and 16-18 months for the Ratoon crops. They failed to harvest the sugarcane. When it was 36 months old, the sugar cane accidently caught fire. I reported to Sony. The sugar content was ok but they did not harvest it. It dried up. They also neglected the ratoon crops which went to waste. I expected 135 tonnes per hectares. Sony was then paying Kshs. 2,500 per tonne. I demand damages."

**23.** For the appellant to succeed in her claim, evidence was necessary to show that she planted the sugar cane. Since the plant crop was to be harvested within 24 months, it was incumbent upon the appellant to provide evidence that the cane planted (if at all) matured and the respondent failed to harvest it in 24 months. She was also to tender evidence that it got burnt when it was 36 months.

**24.** It is apparent that the trial magistrate misapprehended the issue for determination when she stated;

> "It is not disputed that the defendant failed to harvest the three crop cycles due to the crop getting burnt. Clause 6.2 of the contract provides that the defendant was not obligated to harvest burnt cane. It is not contested that the cane got burnt. In absence of any proof of breach by the defendant, I find that the plaintiff has not proved its case on a balance of probabilities against the defendant. The plaintiff is thus not entitled to any compensation and the suit is hereby dismissed with costs to the defendant."

**25.** As I understand it, the plaintiff's case is that the breach is at the failure by the respondent to harvest the cane when it was 24 months. That failure led to the cane remaining on the farm and as per the plaintiff, *"accidentally caught fire"*.

**26.** Evidence by way of an agricultural expert report, photographs, eye witnesses or any other form of evidence available to the plaintiff was necessary to show the existence of the mature cane that the respondent failed to harvest.

**27.** The appellant is also in breach of Order 2 Rule 4(1) as the fact of the cane getting burnt when it was 36 months is not specifically pleaded, yet the appellant's evidence indicates the cane was burnt when 36 months old.

**28.** From the foregoing, it is thus clear that the plaintiff failed to prove her case on a balance of probability the shortcomings of the defence case notwithstanding. She was therefore not entitled to the relief sought.

**29.** Consequently, the appeal is dismissed with costs to the respondent.

**Dated** and **Delivered** at **KISII** this **11th** day of **December, 2019.**

**A. K. NDUNG'U**

**JUDGE**