REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 11 OF 2017

ZADOCK N. DANDA…….....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 138 of 2014 delivered on 17/01/2017)

JUDGMENT

1. One of the hotly contested issues in this appeal is whether the suit was time-barred such that it ought to have instead been dismissed. By a Growers Cane Farming and Supply Contract dated 27/03/2006 (hereinafter referred to as **'the Contract'**) the Respondent herein, **South Nyanza Sugar Co. Ltd,** contracted the Appellant herein, **Zadok N. Danda,** to grow and sell to it sugarcane at the appellant's parcel of land Plot No. 1017 Field No. 11C in South Kabuoch Sub-Location within Migori County.

2. The Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first. The contract however commenced from 13/08/2003 as per **Clause 2(a)** thereof.

3. Aggrieved by alleged breach of the contract the Appellant filed **Rongo Senior Resident Magistrate's Court Civil Suit No. 138 of 2014** (hereinafter referred to as '**the suit'**) on the 04/06/2014 claiming damages for breach of contract, compensation for the loss of three crops, costs and interest at court rates from 13/08/2005.

4. The Respondent entered appearance and filed a Statement of Defence dated 30/06/2014 denying the claim. However, the Respondent pleaded in the alternative that it performed its part of the contract by providing the Appellant with seed cane and fertilizers further to harrowing and planting the land, but the Appellant instead harvested the cane without its knowledge thereby breaching the contract and as such the Appellant was estopped from making any claim against the Respondent. The Respondent enumerated six particulars of breach on the part of the Appellant.

5. The suit was finally settled down for hearing. Both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted his Statement as part of his testimony. He also produced the documents in his List of Documents as exhibits. The Respondent called its Senior Field Supervisor as its sole witness.

6. The trial court rendered its judgment and dismissed the suit with costs on 17/01/2017 since the Appellant failed to harvest the cane as required under the contract. That is the judgment subject of this appeal.

7. The Appellant in praying that the appeal be allowed, and appropriate compensation be awarded proposed the following five grounds in the Memorandum of Appeal dated 05/02/2017 and filed in Court on 07/02/2017:

> ***1. The learned trial magistrate erred magistrate erred in law and in fact by completely misinterpreting the provision of the contract as regards the duties and responsibilities of the Respondent to harvest the sugar cane subject matter of an outgrower agreement between the parties.***
>
> ***2. The learned trial magistrates erred in law and in fact by failing to appreciate that the duty to harvest sugar cane as in the contract between the appellant and that the defendant, was a statutory as well as contractual duty and that in all circumstances of the case the statutory duty and obligations prevailed.***
>
> ***3. The learned magistrate erred in law and in fact deciding on issued not raise in the trial and even then ended up deciding on the issue wrongly both against the law, contract and custom.***

4. The learned trial magistrate exhibited actual and extreme bias in the suit by adopting a guillotine approach to this suit and others then to be decided by rendering "cut and paste judgment" to the detriment of the appellant and other litigants.

5. The learned trial magistrate erred in failing to assess the damages that would have been awarded had the appellant succeeded in the suit.

8. Directions were taken, and the appeal was disposed of by way of written submissions where the parties duly complied.

9. The Appellant challenged the finding of the trial court vigorously and more so claiming that the court wrongly interpreted Clause 3.1.2 of the contract, did not consider the entire contract document, determined the suit on an unpleaded issue by finding that the Appellant was in breach of the contract by not harvesting the plant crop and hence compromising the development of the ratoon crops and also failed to follow the custom in the sugar industry and that the court failed to assess damages even after it had formed the judicial opinion in dismissing the suit. Counsel relied on various decisions in his quest to have the appeal allowed.

10. The Respondent opposed the appeal. It strenuously submitted that the suit was time-barred and as such the trial court lacked any judicial and legal basis to entertain it and that it instead ought to have dismissed it. It further submitted that the Appellant did not prove the claim and if any compensation is to be awarded then it ought to be based on the Respondent's Yield Assessment Report.

11. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

12. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. I must acknowledge that I have in the past dealt with like appeals and settled some of the issues raised in this appeal. I will therefore benefit from such decisions since I have not changed my position on any of the issues which I have previously expressed my position on.

13. I will first deal with the issue of limitation since it hinges on the jurisdiction of the trial court as well as this Court. There is consensus on the existence of the contract. From the records of the trial court and this Court, there is only one contract document which was produced. It was the one produced by the Appellant and appears on his list of documents. Whereas the contract was dated 27/03/2006 **Clause 2(a)** thereof stipulated that its commencement date was 13/08/2003 and that the contract period was five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first.

14. **Clause 1(f)** of the contract provided for the maturity periods for the plant crop and the two ratoon crops. The plant crop was expected to be mature not later than 24 months from planting whereas the first ratoon crop was expected to be mature not later than 22 months after the harvest of the plant crop and the second ratoon crop was expected to be mature not later than 22 months after the harvest of the first ratoon crop. The duration of the contract was however subject to **Clause 2(b)(iii)** which provided as follows: -

'The duration of the agreement may by written notice be extended by the Miller at its sole discretion and without reference to the Grower.'

15. It therefore means that the Respondent was at liberty to at any time alter any of the durations in the contract without reference to the Appellant.

16. **Section 4(1)(a)** of the **Limitation of Actions Act,** Cap. 22 of the Laws of Kenya (hereinafter referred to as '**the Act'**) provides the limitation period for instituting claims based on breach of contracts as six years from the date on which the cause of action accrues. In this case there is contention on when the cause of action accrued from. According to the Respondent the cause of action accrued from the time the Appellant contended that the Respondent failed to harvest the plant crop; that is 24 months from 13/08/2003 which is 13/08/2005 hence the suit was to be filed by 12/08/2011. The Appellant contended that cause of action accrued from the time the entire contract period lapsed that is as from 13/08/2008.

17. As said, the contract period was subject to change by the Respondent at its own and sole discretion. That is exactly what happened to the contract herein. The contract commenced on 13/08/2003 but it was formally executed on 27/03/2006 which was a period of around 31 months from the commencement date. Going by **Clause 1(f)** of the contract by the time the contract was executed the maturity period for the plant crop had long lapsed. It also means that the other periods were equally interfered with.

18. It will therefore be without any basis to hold to the argument that the cause of action arose 24 months post the commencement of the contract since by then the contract had not been formally executed. The date a cause of action accrues depends on the nature and the provisions of that contract. There are some straight forward and clear contracts which speaks for themselves on such an issue. A case at hand are the monthly tenancies alluded to by the Respondent herein. Such contracts even if they are for ten years still their terms are so clear that failure to pay any due single monthly rent leads to execution and the cause of action immediately therefrom accrues. But that is not the position in this matter; the Respondent herein reserved the absolute right to not only change the expected maturity periods but even the entire contract period. In the circumstances of this case one can only allude to a breach of the contract upon the expiry of the entire contract period and only if the contract period is not extended by the Respondent. It is on that basis that I hold the position that the cause of action could only accrue five years from the commencement of the contract unless the Respondent confirmed extension of the contract duration. In the absence of such extension in this case, I find and hold that the cause of action herein arose as from 13/08/2008 and that the Appellant was at liberty to institute competent proceedings on breach of contract up to 12/08/2014.

19. Therefore, having filed the suit on 04/06/2014 the Appellant was well within time and as such the contention that the suit was time-barred hereby fails.

20. There was also the contention that the suit was determined on an unpleaded issue. From the judgment, the suit was unsuccessful because the Appellant failed to harvest the cane and avail it to the Respondent. The court stated that: -

> ***'The foundation of the plaintiff's claim is the assertion that the defendant failed in its contractual duty to harvest the subject cane. The important of clause 3.1.2 of the contract is that the suit's foundation is built on quicksand. Simply put, the defendant cannot be blamed for failure to harvest or transport the cane. The defendant therefore did not breach the contract. The legal obligation to harvest and transport cane is contractually upon the plaintiff. According to the contract, after authorizing harvest, the defendant's responsibility for the harvested cane begins once it arrives at its weighbridge.'***

21. A look at the pleadings is hence necessary. The Appellant's claim is anchored on the allegation that the Respondent failed to harvest the cane which it had contracted him to plant upon maturity and as a result he suffered loss and was entitled to appropriate compensation. The Respondent in its defence denied ever contracting the Appellant as alleged and further denied occasioning him any loss. However, on a without prejudice, the Respondent pleaded that it performed its part of the contract by providing the Appellant with seed cane and fertilizers further to harrowing and planting the land, but the Appellant instead went ahead to harvest the cane without its knowledge thereby breaching the contract and as such the Appellant was estopped from making any claim against the Respondent. The Respondent enumerated six particulars of breach on the part of the Appellant.

22. On the evidence by the parties, the Appellant in his testimony reiterated the contents of his plaint. He also adopted his filed written statement which corroborated his evidence as well the documents in his filed List of Documents that included the Contract, Demand letter and a Cane Yield Production Guide.

23. The Respondent tendered evidence through its Senior Field Supervisor. The witness reiterated the contents of the Defence in his testimony to wit that the Appellant harvested the cane without its knowledge and did not avail it to the Respondent.

24. That was the evidence that backed the pleadings. From the foregone it is settled that the issue for determination by the trial court was whether the Appellant harvested the cane without the knowledge of the Respondent and did not avail it to the Respondent thereby breaching the contract hence estopped from making any claim against the Respondent. As said, the suit was determined on the alleged failure by the Appellant to harvest and deliver the cane to the Respondent. In that case therefore the trial court rightly framed the issue for determination. The contention that the suit was decided on an unpleaded issue is without merit and is hereby dismissed.

25. Having found that the suit was timeously filed and that it was not determined on an unpleaded issue, it is now for this Court to ascertain whether the Appellant's case was proved as required in law. The Appellant's case is that he discharged his part of the contract by ensuring that the plant crop was ready for harvesting but the Respondent failed to harvest it. As admitted by the Appellant the contract was in the category of company-developed contracts since the Respondent undertook all the preliminary steps including ploughing, furrowing and harrowing of the land and supplied the Appellant with seed cane and fertilizers. The Appellant contended that he further undertook all reasonable care and crop husbandry on the plant crop until maturity, but the Respondent despite repeated requests to harvest the cane, failed.

26. The Respondent is however of the contrary position. It contended that the Appellant harvested the cane without its knowledge and never availed it to it. I have carefully perused the contract which spells out the various obligations of the parties. **Clause 3** thereof stipulates the obligations of the Appellant as well as of the Respondent. **Clause 6.2** deals with what happens when there is some default on the part of the Appellant likely to affect the crop. It states as follows: -

> ***'6.2 The Miller shall be entitled to upon expiry of a fourteen day notice and at its own discretion and without relieving the Grower of the obligations under this agreement, in the event that the Grower does not prepare, plant and maintain the plot and the cane in accordance with his obligations under this agreement and/or instructions and advise issued by the Miller to (but not limited to) carry out such operations on the plot which the Miller shall in its sole discretion deem necessary to ensure satisfactory yield and quality."***

27. It was hence an express provision of the contract that upon any default on the part of the Appellant likely to affect the crop or the contract that the Respondent was to issue a 14 days' notice to the Appellant to remedy the default. The notice was to be served upon the Appellant as provided for under **Clause 9**. There is no doubt the notice was to be in writing. Having taken the position that it was the Appellant who defaulted in his contractual obligations by harvesting the cane without its knowledge and failed to avail the cane to it, it was imperative that the Respondent proves at least two issues. First, prove that it issued actual notice or notices to the Appellant and second, that the notice(s) were served in accordance with the contract. However, no such evidence was availed by the Respondent.

28. The analysis leads me to the only reasonable finding, which I hereby find and hold, that the Appellant was not in breach of his contractual obligations as alleged by the Respondent. Going by the Respondent's position in its pleading that the Appellant harvested the plant crop without its knowledge and having failed to prove such allegation, it goes without say that the Respondent did not harvest the cane.

29. But was it the responsibility of the Respondent to harvest the cane? I have in previous decisions considered the duty to harvest the cane under such a contract. Since I still hold that position I reproduce what I partly stated in the **Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR** thus: -

> *'18. That now brings me to the finding by the trial court that the Appellant failed to adhere to **Clause 3.1.2** of the Contract in not harvesting and delivering the cane to the Respondent. A contract document must always be considered in its entirety. The good reason for that lies in the truism that clauses in a contract tend to complement one another and one risks not getting the whole intention of the parties if a consideration or reference is put on just a portion of the document. Had the learned trial court done so, it*

would have come across ***Clause 3.1.12*** *which requires the Miller (Respondent) to: -*

'Prepare the harvesting program setting out the approximate expected time of harvesting which program will be subject to changes necessitated by factors beyond the control of the Miller.'

19. A look at ***Clauses 3.1.2*** *and* ***3.1.12*** *of the contract places a duty upon the Respondent before the actual harvesting of the cane. That duty is for the Respondent to* ***'inspect the cane and determine its maturity and to prepare the harvesting program setting out the approximate expected time of harvesting'.*** *There is no evidence that the Respondent discharged that contractual duty in the first instance. That failure, in the face of the fact that the cane had matured, can only mean that it is the Respondent who was in breach of the contract. With tremendous respect, the finding of the learned trial Magistrate that the Appellant failed to harvest and deliver the cane to the Respondent was not only unsupported by evidence but also arrived at without a full consideration of the contract and was therefore erroneous. That finding must be interfered with.*

30. Needless to say, there are several other clauses in the contract which when cumulatively taken buttress the position that the duty to harvest the cane is the Respondent's. Further thereto, there is the Sugar Act (hereinafter referred to as **'the Act'**). This **Act** was the applicable law by the time the contract was entered. The **Act** stipulated under **Section 6(a)** of the **Second Schedule** thereof, which Schedule was a creation of **Section 29** of the **Act**, that: -

'The role of the miller is to -

(a) Harvest, weigh at the farm gate, transport and mill the sugar cane supplied from the growers' field and nucleus estate efficiently and make payments to the sugar cane growers as scheduled in the agreement.' (emphasis added)

31. The **Act** being an Act of Parliament went through all the stages of law-making until it became law in Kenya. The **Act** can only be subordinate to the Constitution and/or may in specific and clear instances be ousted by an express provision on another Act of Parliament. In this case there is an attempt by the contract to oust the provision of the **Act**. The contract is an agreement between the parties herein whereas the **Act** is an expression of the will of the people of Kenya through Parliament. The contract is hence subordinate to the statutory legislation. Any attempt by parties to an agreement to otherwise oust the provisions of an Act of Parliament can only be void and severable as far the attempt is concerned. The contract therefore offends the express provisions of the **Act i**n respect to the duty to harvest the cane and as such it cannot stand in the face of the **Act**; it must give way to the **Act**.

32. Having found that it was the Respondent who breached the contract by not harvesting the plant crop after the Appellant had fully developed it to maturity, I must now consider if the Appellant is entitled to any remedy in law. I previously dealt with this aspect in the case of **Migori High Court Civil Appeal No. 138 of 2015 South Nyanza Sugar Co. Ltd vs. Hilary M. Marwa (2017) eKLR** when I expressed myself as follows: -

'15. I recall having dealt with this issue at length in ***Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited****. In that case I found that there can be no award of general damages for a claim on breach of contract. However, the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (restitution in integrum'). The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. I substantiated those findings with various case law. I must say that I am still of that position.'*

33. In **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited (2017) eKLR** I also dealt with how special damages ought to be ascertained in cases of contracts like the one before this Court. This is what I stated: -

"22. I am therefore of the very considered view that looking at the nature of the Contract and how the loss occurred, the above Appellant's averment was adequate to make a court assess the special damages accordingly. In affirming the position, the Court in the ***John Richard Okuku Oloo*** *(supra) had the following to say:*

"In case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.

The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.

We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.

Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit."

34. The Appellant particularized his claim under paragraph 7 of the Plaint based on the acreage of 0.4 hectare, the expected yield of 135

tonnes per hectare and the price of Kshs. 2,500/= per hectare. The Respondent took the position that the expected yield for the plant crop was 64.53 tonnes per hectare and the ratoon crops were to yield 50.49 tonnes per hectare.

35. The acreage of the land is not contested as 0.4 hectare. On the price of the cane, the Appellant did not provide any evidence thereof. On its part, the Respondent relied on its Cane Produce Prices Schedule which will be the guide herein. On the expected yield the Appellant relied on a document he claimed to be the Respondent's Sugar Cane Productivity Schedule. The Respondent relied on its Cane Yields in Out Growers Schedule. I have considered the document relied upon by the Appellant and I cannot agree to be guided by it. I say so because the document does not disclose its source; it contains some schedules on a plain paper. As such Its source cannot be verified as well as its contents. I will therefore be guided by the Respondent's Cane Yields in Out Growers Schedule.

36. According to the contract the plant crop was expected to be ready for harvesting by August 2005 at most. By that time the price was Kshs. 2,000/= per tonne and the expected yield was 64.53 tonnes per hectare. The expected income was therefore Kshs. 51,624/=. Out of this amount the expenses incurred by the Respondent for fertilizer supply, seed cane supply, transport and harvesting charges amounted to Kshs. 17,840/= thereby rendering a net income of **Kshs. 33.784/=**. The first ratoon crop was expected to be harvested in June 2006. By then the price was Kshs. 2,000/= per tonne and the expected yield was 50.49 tonnes per hectare. The net earnings stand at **Kshs. 40,392/=.** And lastly the second ratoon crop was expected to be harvested by April 2009. By then the price was Kshs. 2,500/= per tonne and the expected yield was 50.49 tonnes per hectare. The net income stood at **Kshs. 50,490/=.** The total earnings from the contract were **Kshs. 124,666/=** for which I hereby enter judgment for the Appellant as against the Respondent. This sum shall attract interest from the date of filing of the Plaint.

37. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. Kshs. Kshs. Kshs. 124,666/= which amount shall attract interest at court rates from the date of filing of the Plaint;

c) The Appellant shall have costs of the suit as well as costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of May 2018.

A. C. MRIMA

JUDGE

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

Mr. Ezekiel Oduk instructed by the firm of Oduk & Co. Advocates for the Appellant.

Messrs. Otieno, Ragot & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant