REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 84 OF 2015

SOUTH NYANZA SUGAR CO. LTD..... APPELLANT

-VERSUS-

DICKSON AORO OWUOR..... RESPONDENT

(Being an appeal from the judgment and decree by Hon. L. K. Sindani Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 147 of 2013 delivered on 18/03/2015).

JUDGMENT

1. One of the hotly contested issues in this appeal is that the **Migori Chief Magistrate's Civil Suit No. 147 of 2013 (**hereinafter referred to as **'the suit"**) was statute-barred from inception and as such the same ought to have been dismissed instead. This is an appeal against the judgment and decree in the suit where the suit was allowed and special damages awarded on a finding of breach of contract.

2. By a Growers Cane Farming and Supply Contract dated 24/06/2005 (hereinafter referred to as **'the Contract'**) the Appellant herein, **SOUTH NYANZA SUGAR CO. LTD,** contracted the Respondent herein **DICKSON AORO OWUOR,** to grow and sell to it sugarcane at the Respondent's parcel of land being Plot No. 1192 measuring 0.5 Hectares in Field No. 117 Kakmasia in Migori County. Clause 2(a) of the Contract however indicated that the contract was deemed to have commenced on 25/06/2004.

3. The Contract was for a period of five years or until one plant crop and two ratoons of the sugarcane were harvested from the subject parcel of land whichever event occured first.

4. By a Plaint dated 28/08/2013 and filed on 03/09/2013, the Respondent claimed for damages for breach of the Contract against the Appellant for failure to harvest the cane at maturity, costs and interest at court rates. The Respondent particularized the loss he suffered from the expected crop yields in the plaint.

5. The Appellant filed a Statement of Defence dated 08/10/2013 which was amended on 09/06/2014 in which the Appellant raised the defence of limitation of action and further that if at all there was any breach on its part then that breach was caused by bad weather which damaged the road networks and that was beyond its control and hence it cannot be held liable.

6. The suit was fully heard where both parties were represented by Counsels. The Appellant called its sole witness and the Respondent called two witnesses. The trial court then delivered its judgment where it allowed the Respondent's claim and awarded a total of **Kshs. 153,205/=** as special damages together with costs and interests.

7. That was the judgment that necessitated the Appellant to file the appeal subject of this judgment.

8. The Appellant proposed eight grounds of appeal in the Memorandum of Appeal dated 16/04/2015 and filed in Court on 17/04/2016. The grounds were tailored as under:

> ***1. The Learned Magistrate erred in fact and in law in failing to consider relevant evidence, in importing evidence into the proceedings and in misconstruing the evidence before him and in failing to consider the evidence in its entirety.***
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> ***2. The Learned Magistrate erred in law amd in fact in failing to find that the Plaintiff had not proved his case on a balance of probability as required by law.***
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> ***3. The Learned Magistrate erred in law and fact in failing to find that the plaintiff's claim was statute barred since the agreement which gave rise to the cause of action was dated 25th June, 2004 and the cause of action in the suit arose 24 months after the said date when the defendant failed to harvest the plant crop that being June 2006 a fact which was confirmed by the plaintiff in evidence.***
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> ***4. The Learned Magistrate erred in law and in fact in failing to find that the plaintiff had breached the contract by failing to employ a farm manager for purposes of managing the farm and coordinating with the possession of the cane and the plaintiff failed to produce any records to confirm that indeed he took good care of the cane as directed by the defendant.***
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> ***5. The Learned Magistrate erred in law and in fact in finding that the plaintiff was entitled to maximum yield yet the plaintiff failed to prove that he took good care of the sugar cane and followed the directions of good agricultural husbandry to entitle him to a maximum yield as awarded by court.***
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> ***6. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the plaintiff failed to prove that there was cane on his farm in the year 2006 when the said plant crop was to be harvested neither did the plaintiff go to court to seek for orders to compel the defendant to harvest the said cane when they were due for harvest.***
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> ***7. The Learned Magistrate erred in law and in fact if awarding costs of the suit to the plaintiff yet the plaintiff failed to prove that he had served the defendant with a demand notice and notice of intention to sue.***
>
> ***8. The Learned Trial Magistrate erred in law and in fact in relying on the evidence of PW2 a witness who failed to produce any documents to confirm his qualifications as an expert.***

9. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions. In its submissions the Appellant condensed the above grounds into only two being that of limitation of action and that the suit was not proved as enquired in law. The Appellant relied on the decisions of **Benjamin Wachira Ndiithi vs. Public Service Service Commission & Another (2014)eKLR, Richard Toroitich vs. Mike K. Lelmet & 3 others (2014)eKLR** and **African Highlands Product Limited vs. Kisorio (2001)172** in support of the appeal.

10. The Respondent supported the trial court's decision. He argued that according to **Section 4(1)(a)** of the **Limitation of Actions Act**, Chapter 22 of the Laws of Kenya **(the Act**), the Respondent was at liberty to file the suit within a period of 6 years from the date of expiry of the contract. He relied on a persuasive decision of the High Court in Kisii High Court Civil Appeal No. 161 of 2005 reported as **South Nyanza Sugar Company Ltd vs. Paul N. Lila (2014)eKLR. T**he Respondent further submitted that he had proved his case in law and relied on the Court of Appeal decision of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR**. He prayed that the appeal be dismissed with costs.

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 carefully and keenly read and understood the proceedings and the judgment of the trial court as well as the grounds and the parties' submissions on appeal. I will first deal with the ground on the defence of limitation of action. The Appellant submitted that since the contract came into force on 25/06/2004 and the main plant crop was expected to be ready for harvesting within 24 months, and which harvest was not done, then the breach occured as from 26/06/2006. That being the position and in accordance with **Section 4(1)(a)** of the Act then the suit was to be filed on or before 26/06/2012. Given that the suit was filed in September 2013 and without the leave of the Court then that denied the court the jurisdiction to deal with the matter as it was so estopped in law.

13. And as stated elsewhere above the Respondent maintained that he remained at liberty to file the suit within a period of 6 years from the date of expiry of the contract.

14. This Court echos the position that a defence of limitation of action when correctly raised goes beyond being a mere technicality and hinges on the jurisdiction of the Court since a Court can only deal with what either the Constitution or the statutes has given it to so handle. Once such an issue is raised a court must deal with it before proceeding further. (See the Court of Appeal case of **Thuranira Karauri vs. Ncheche (1997)eKLR**).

15. On the issue of jurisdiction, t**he Supreme Court** in the decision of **Re: The matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011** *(unreported)* at paragraphs 29 and 30 expressed itself in the following manner:-

> ***"29. Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in***
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> ***Owners of Motor Vessel "Lilian S"vs.Caltex Oil (Kenya) Limited (1989) KLR 1, which bears the following passage (Nyarangi, JA at page 14.):-***
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> *"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step."*
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> ***30. The Lilian 'S' case establishes that jurisdiction flows from the law, and the recipient –Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."***

16. Section 4(1) of the **Act** states as follows:

> ***"4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-***
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> ***(a) actions founded on contract;***
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> ***(b) actions to enforce a recognizance;***
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> ***(c) actions to enforce an award;***

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."

17. 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.

18. According to the Respondent in this case, the alleged breach of the contract arose when the Appellant failed to harvest the sugar cane as stipulated under the contract. **Clause 1(f)** of the contract specified that the first crop was expected to be harvested not later than 24 months from the date of contract. Since the contract was effective as from 25/06/2004 then the first crop was expected to be harvested by June 2006. To me that should be the date on which the cause of action accrued. I therefore respectfully do not agree with Counsel for the Respondent that the cause of action accrued as from the end of the contract period, that is five years from the contract date. My finding is premised on the special nature of the contracts between a farmer and a miller like in this case. All the expected yields heavily depend on precisely how the expected harvests are made. For instance if the main crop plant is not harvested timeously then that compromises the ratoons which are developed once the main crop plant is harvested. To that end a farmer who losses the main crop plant losses all the ratoons. It therefore means that from the time a miller fails to harvest the crop as scheduled there is nothing further expected in terms of the crop yields and that any waiting thereafter is in vain. In essence the farmer continues to count losses thereafter. It would therefore be unreasonable to expect such a farmer to await until the entire contract period lapses and then say that the cause of action starts to accrue.

19. This Court therefore finds that the Respondent was to file the suit within 6 years from June 2006; that is on or before June 2012. The suit was therefore filed out of time and **without the leave of the court**. It so remains statute-barred and hence the trial court lacked the jurisdiction to entertain the suit on its merit. I find the persuasive holding by my sister ***Hon. Ndolo, J*** in **Benjamin Wachira Ndiithi vs. Public Service Commission & Another (2014)eKLR** a good exposition of the correct legal position and I fully associate myself with it.

20. The upshot is that the trial court erred in law in not satisfying itself that there was a proper suit before it for adjudication. As I come to the end of this judgment, I will state that had the appeal not succeeded I would not have interfered with the award of damages made by the trial court since the record has it that the Appellant failed to prove the defence it raised that there was no breach of the contract and if at all the breach was proved then the same was beyond its control.

21. This Court hence makes the following final orders:-

a) The appeal be and is hereby allowed and the judgment and decree in Migori Chief Magistrate's Civil Suit No. 147 of 2013 is hereby set-aside;

b) The Migori Chief Magistrate's Civil Suit No. 147 of 2013 be and is hereby struck out accordingly;

c) Since the Respondent(farmer) lost the expected proceeds from the crops, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **MIGORI** this **17th** day of **February 2017.**

A. C. MRIMA

JUDGE