



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 106 OF 2012

MATHEWS O. WANAM.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR COMPANY.....RESPONDENT

(An appeal from the judgment and Decree of the Principal Magistrate Mr. Kibet Sambu Esq dated 11th July 2012 in CMCC NO. 540 of 2009.)

JUDGMENT

1. The appellant herein, **Mathews O. Wanam**, was the plaintiff at the Chief Magistrates Court in Kisii in CMCC NO. 540 OF 2009. In the plaint filed in court on the 9th September 2009 and subsequently amended on 10th January 2012, the appellant sued the respondent herein, South Nyanza Sugar Company Limited, seeking the following reliefs:

a) Damages

b) Costs of the suit

c) Interest thereon at court rates from 4th February 2002 until payment in full.

d) Any other relief that the Honourable Court may deem just and expedient to grant.

2. The appellant's claim was that by a written agreement dated 4th February 2002, executed by both parties herein, it was agreed *inter alia* that the appellant would grow sugarcane on his land, being plot no. 79 on field number 20A in Kakmasia sub location measuring 0.2 ha. which he would then sell the respondent company. He stated that it was further agreed that the contract would remain in force for a period of five years or until one plant crop and two ratoon crops of sugarcane were harvested whichever period was to be less.

3. The appellant further claimed that the respondent harvested only one plant crop pursuant to their said contract and later neglected to harvest the subsequent ratoon crops thereby occasioning him loss and damage which were pleaded at paragraph 9(a) and 9(b) of the plaint to amount to a total of Kshs. 108,810/=.

4. The respondent filed its statement of defence on 16th December 2009 in which it denied the appellant's claim in its entirety and stated, on a without prejudice basis, that the appellant was the one to blame for breach of their agreement as he had failed to maintain and/or employ the recommended crop husbandry techniques thereby resulting in cane that was totally destroyed and dwarfed by weeds in which case the respondent could not be expected to harvest cane that was not there in the first place. The

respondent further averred that the applicant's claim was for specific damages which had not been pleaded and further that the court lacked jurisdiction to entertain the suit on the basis that the Sugar Act had created a special tribunal to handle such disputes.

5. At the hearing, the appellant testified as PW1 and confirmed that he indeed entered into a written agreement with the respondent company wherein he had agreed to grow and actually grew sugarcane on his half an acre land hence his claim against the respondent was for the payment for the one ratoon crop which defendant company had failed to harvest . He relied on his written statement.

6. The respondent, on its part, called one witness, its field supervisor one Richard Ruok who admitted that it entered into a written contract with the appellant for growing of sugarcane, which cane crop was harvested on the 12th August 2004 whereupon the appellant was paid Kshs. 11,865/= after the deduction of Kshs. 32,051.70 on account of services rendered and firm inputs supplied. He accused the appellant of abandoning the 1st ratoon and 2nd ratoon thereby leaving the same undeveloped and as such there was nothing to harvest at all.

7. On cross examination, he admitted that he had no document/report to prove that the appellant had abandoned the 1st ratoon thereby causing the death of the 2nd ratoon. He conceded that the respondent did not notify the appellant to make good the abandonment of the 1st ratoon crop. It was however his evidence that ordinarily, 0.2 ha's portion of contracted sugarcane could not produce 135 tonnes from the plant crop.

8. At the close of the case, both parties agreed to file written submissions before judgment.

9. In its judgment, the trial court found that the appellant's suit was statute barred having been filed outside the limitation period envisaged by the Limitation of Actions Act. The trial court also held that the appellant's suit was bad in law as he did not plead the special damages sought and that the court lacked jurisdiction to hear and determine the case by dint of the provisions of Section 31 (1) and (2) of the Sugar Act (now repealed).

10. Aggrieved by the said decision of the trial court, the appellant filed his Memorandum of Appeal dated 24th July 2012 in this court and listed the following grounds of appeal:

1. That the learned magistrate erred in law and fact in holding that the court was not seized with jurisdiction to determine all the issues in the suit and that the Sugar Act was the applicable Act in the case.

2. The learned trial magistrate erred in law and in fact in holding that the suit was filed out of time and was thus statute barred and completely fell in error in failing to compute the running of time correctly, and or properly.

3. The learned trial magistrate erred in law and in fact in holding that the suit was a special damage claim and not a liquidated claim for which it fell on the court to assess the damage(s) awardable.

4. In the alternative, and without prejudice to (3) above, the Trial Magistrate erred in law and in fact in holding that the claim was not specifically pleaded and strictly proved, yet there was adequate pleadings and ample evidence and prove both oral and documentary led to assist the court to properly assess damages.

5. The learned magistrate erred in law in failing to find that the respondent was in breach of the contract between it and the appellant.

11. The appellant sought prayers that the appeal be allowed and the judgment dated 11th July, 2012 be set aside, the suit be remanded to the trial court with an order that the court do assess the damage(s) payable and that the costs of this appeal and the suit be awarded to him.

12. When the appeal came up before me on 1^{7th} October, 2016 for hearing, it was agreed that it be argued by way of written submissions. Both parties then filed their submissions and I have perused them.

13. The duty of this court as first appellate court is to re-evaluate the entire evidence in the trial court and come up with its own independent decision. **See Selle v Associated Motor Boat Company Ltd[1968] E.A123**

14. Having considered the proceedings and judgment in the trial court, the Memorandum of appeal and the written submissions by both parties I note that the issues that require my determination are:

a) Whether the trial court lacked jurisdiction to hear and determine the suit.

b) Whether the appellant's suit was time barred.

c) Whether the special damages were pleaded.

15. I will determine the issue of jurisdiction first before dealing with any other issues noted in this appeal because, as was held in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR:**

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it forms the opinion that it is without jurisdiction."

16. It was the appellant's argument that the Sugar Act that the trial court relied in dismissing his suit did not specifically oust the jurisdiction of the court either by way of repeal or an express ouster. The respondent's counter argument was that in determining whether a court has jurisdiction in particular matter, a court cannot consider the provisions of the Constitution only but regard must also be taken to relevant statutes. The respondent cited the Supreme Court case of **The Matter Of The Interim Independent Electoral Commission [2011] eKLR** in which it was held:

" 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."

17. In the case of **Peter Gichuki Kingara vs IEBC and 20 others Appeal No. 31 of 2013 at Nyeri** the Court of Appeal held that jurisdiction flows from Law and without jurisdiction the court downs its tools.

18. The respondent also relied on the decision in **Eliud Wafula Maelo v Ministry of Agriculture & 3 Others [2016]eKLR** where the Court of Appeal sitting in Kisumu as per Musinga, Gatembu and Murgor JJA held that:

"Section 31 of the Sugar Act established a specific tribunal with the sole purpose of arbitrating disputes arising between any parties under the Act. The parties included millers, growers, out growers and such other relevant institutions in terms of section 29(1)"

19. I have carefully considered the parties respective submissions on the subject of jurisdiction. **Article 159 (1)** of the **Constitution** states that judicial authority is exercised by courts and tribunals established by the Constitution.

20. The court's jurisdiction in certain matters or instances can however be ousted or restricted by statute. **Halsbury's Laws of England, Volume 10 at paragraph 319**,states as follows on this issue:

"The subject's right of access to the courts may be taken away or restricted by statute." ...

Paragraph 723 states:

“Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court’s jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”

21. In the similar case of **Suleiman Ibrahim V Awadh Said [1963] E. A. 179**, Windham, C. J. held that **section 33** of the **Rent Restriction Act** of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.

22. Considering the findings in the above cited authorities, I am of the humble view that the intention of the Legislature in creating the Sugar Arbitration Tribunal was to provide the first port of call for parties with disputes arising in the sugar industry thereby removing such disputes from the mainstream courts of law. **Article 165 (3) (c)** of the Constitution on the other hand grants the High Court the jurisdiction to hear an appeal from a decision of a tribunal.

23. **Section 31** of the **Sugar Act** established a specific tribunal with the sole purpose of arbitrating disputes arising between any parties under the Act. The parties included millers, growers, out-growers and such other relevant institutions as cited in the Act. **Section 32** of the **Sugar (Arbitration Tribunal) Rules, 2008** empowers the tribunal to grant interim and interlocutory relief pending finalization of a substantive case. In my humble view therefore, the instant dispute between the miller and the farmer relating to the sugar growing contract fell within the purview of the Sugar Act.

24. On another score, this court also notes that the Sugar Act 2001, has now been repealed by the **Crops Act, 2013** whose date of commencement was 1st August 2014. The effect of the second schedule to the Crops Act, 2013 was to repeal the Sugar Act, 2001 thereby abolishing the Sugar Arbitration Tribunal.

25. This court however observes that the repeal of the Sugar Act on 1st August 2014 did not affect the jurisdiction of the Sugar Arbitration Tribunal in this case since the appellant's case before the lower court was filed in 2007 and determined on 11th July, 2012 when the Sugar Act 2001 was still in operation.

26. It is therefore it is this court's finding that the trial court lacked jurisdiction to entertain the plaintiff's claim in accordance to section 31 of the Sugar Act 2001(now repealed.) My findings on the jurisdiction of the trial court to hear and determine this case are, in my view, sufficient to determine this appeal as it would be pointless to belabour the other issues raised in the appeal when the court lacked the jurisdiction to entertain the case in the first place.

27. With the above observations and with all due respect to the appellant's counsel's compelling submissions, I find that the trial court lacked jurisdiction to entertain the claim by the appellant as the same should have been referred to the Sugar (Arbitration Tribunal) in accordance with section 31(1) of the Sugar Act. In view of the foregoing, I am satisfied that the learned magistrate did not err in holding that the trial court had no jurisdiction to deal with the matter that was before it. Consequently, I find this appeal lacking in merit and I dismiss it with no orders as to costs.

Dated, signed and delivered in open court this 10th day of April, 2017.

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Nyachae for the Appellant

- Mr. Bosire for the Respondent

- Omwoyo Court Clerk