REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 297 of 2006

SOUTH NYANZA SUGAR COMPANY LIMITED……...….APPELLANT

VERSUS

PETER AKANDA OKECH…….....…RESPONDENT

(An appeal from the judgment and Decree of J.M.SEREM Esq.

the Resident Magistrate and delivered on the 11th day of August, 2006

in KEHANCHA RMCC.NO. 101 OF 2007)

BETWEEN

PETER AKANDA OKECH…….....……...PLAINTIFF

AND

SOUTH NYANZA SUGAR COMPANY LIMITED….....…….DEFENDANT

JUDGMENT

1. The Respondent was the plaintiff in RMCC.NO. 101 OF 2007 at Kehancha. He stated in his plaint dated 4th August, 2007 and filed and in court through M/s Kerario Marwa & Co. Advocates that in 1996 the plaintiff and defendant(**now Appellant**) entered into a contract whereby the plaintiff was to cultivate sugarcane on plot No. 1605B, Field No.20 vide A/C No. 480175 measuring o.5Ha and on maturity of the sugarcane, the appellant was to purchase/harvest the cane and pay the plaintiff the value thereof. The Respondent averred that contrary to the said agreement and in total breach of the contract the appellant refused to harvest the sugarcane which got abandoned, damaged and dried up which in turn caused loss to the respondent.

2. The respondent set out particulars of negligence as follows:-

- *The defendant for no apparent reason and contrary to terms and spirit of the contract refused to harvest and or pursue the plaintiff's sugarcane when it was due for harvest on 0.5Ha estimated to weigh 42tones.*

- *The defendant negligently and recklessly and contrary to public policy and common practice refused and or failed to harvest and or purchase the sugarcane even when it was evident and obvious that the refusal would cause great loss to the plaintiff at kshs.1,730/- per tone.*

3. The defence on their part filed a written statement of defence dated 12th October, 2007 through M/s Okongo & Co. Advocates and though they admitted the existence of an outgrower cane development contract between themselves and the plaintiff, they however averred the following:-

- *No cane was cultivated by the plaintiff in a manner that could achieve a satisfactory yield in total breach and complete disregard to the provision of the contract and hence no liability accrued to the plaintiff against the defendant in respect thereof.*

- *The plaintiff's suit as filed is statute barred and incompete and has been filed outside the limitation period without leave.*

- *The cause of action arose in Migori District outside the local limits of the jurisdiction of this court but within the local limits of the court at either Migori or Rongo.*

4. The respondent did not bother to file a reply to the defence.

Upon hearing of the matter interpartes, the plaintiff testified that:-

- *He entered into an agreement with the defendant for the growth of sugarcane in field No. 20 Plot No.1605B, A/C.No.480175 on 24th May, 1995. His plot was 0.5Ha and he produced the agreement as an exhibit.*

- *The defendant surveyed the plot and that was confirmed by the existence of a survey report.*

- *The 1st crop was not harvested. The defendant was to harvest cane three times. The cane was mature at between 18-20months (his opinion). The 1st crop was not harvested at all. He expected 42tonnes and from information he got from the agricultural department he would get kshs.1,730 per tone.*

- *He prayed for the value of the unharvested crop and costs of the suit. On cross examination it was revealed that:-*

- *The agreement did not indicate that the cane crop matured between 18-20months.*

- *He planted cane on 23/9/95 and not 25/5/95 as earlier indicated.*

- *The defendant breached the agreement in 1997. It is now 9 years since the defendant breached the contract.*

- *Field officers visited his plot from the defendant company. He did not have the job completion certificate.*

5. The defendants never offered any oral defence at all nor did they file any written submissions.

6. In his judgment the learned resident magistrate held that:

- *The plaintiff never maintained the 1st and 2nd ratoons at all since he had left the unharvested plant crop on the farm till the time of hearing the suit.*

- *The contract provided for 3 harvests or that it would remain in force for a period of 5yrs whichever came first.*

- *The defendants were in breach of contract for not harvesting the plaintiff's plant crop. There was no evidence on record to the contrary since the defendant never tendered any evidence at all.*

7. The learned magistrate then took evidence from RMCC.NO.80 of 2004 where in that case had PW2 had estimated optimum style yields on outgrower farms at 42tonnes and awarded the plaintiff 42 x 1,730=Kshs.72,660 and interest at courts rate.

8. It is against this judgment that the appeal lies. In their memorandum of appeal the Appellant contends that:-

1. The learned Trial Magistrate erred in both law and in fact in failing to appreciate that there having been no reply to the defence, the respondent was deemed to have admitted all the matters of fact pleaded in the defence and on the basis of such admission no findings could be made against the Appellant in favour of the Respondent.

2. The learned Trial Magistrate erred in both law and in fact when he awarded to the Respondent as against the Appellant as damages for an alleged breach of contract a sum of Kshs.72,660/- which amount had neither been pleaded specifically and or proved strictly at the trial.

3. The Learned Trial Magistrate erred in both law and in fact when he entered judgment against the appellant in favour of the Respondent on the basis of an alleged estimated yield.

4. The Learned Trial Magistrate erred in both law and infact when he failed to appreciate the fact that the plaintiffs own evidence ran counter to his pleadings and in further failing to appreciate the fact that a party is bound by his pleadings.

5. The learned Trial magistrate erred in both law and in fact when he held that he had jurisdiction to try and determine the suit despite the clear mandatory provision of the sugar Act, Act No. 10 of 2001 which vests such jurisdiction on the Sugar Arbitration Tribunal.

6. The Learned Trial magistrate erred in both law and in fact when he failed to decide and hold that the Respondents suit had been filed outside the period of limitation and without leave of the court.

7. The Learned Trial Magistrate erred in both law and in fact when he held that the Appellant was in breach of contract when there was no credible consent(sic) and consistent evidence that could lead him to such finding.

8. The Learned Trial Magistrate erred in both law and in fact when he dated his judgment and purported to have delivered it on the 11th August, 2006 when infact it was delivered on 26th October, 2006.

9. I have read through the grounds of appeal and I think they can be narrowed down to 4 questions.

- *Is the respondent deemed to have admitted all matters of fact pleaded in the defence there having been no reply to the defence?*
- *Was the award of kshs.72,660 pleaded specifically and proved strictly?*
- *Did this case fall under the clear mandate of the Sugar Act No. 10 of 2004 which vests such jurisdiction on the sugar Arbitration Tribunal?*
- *Was the respondent's suit filed outside the period of limitation without leave?*

10. When the appeal came up for directions, it was decided amongst other directions that the appeal be argued by way of written submissions. As fate would have in it is only the appellant who ended up filing his submission. The respondent did not apparently, see the need to file the submissions. I have carefully

read and considered appellant submissions and cited authorities.

11. In regard to the first question the respondent indeed did not reply to the appellants defence to the fact that he did not take care of his farm and therefore they did not harvest the cane from his farm because it was of a substandard nature. Furthermore, this position was is reiterated in the respondents testimony on cross examination when he stated that 'field officers visited my plot from the defendant company. The overhead costs had completion certificate. I have not produced any in court today. I do not have the job completion certificate at all'.

12. It is my considered view that if the respondent's farm had been properly tendered and maintained then I believe he should have had a job completion certificate. It was upto the respondent to rebut the written statement of defence and adduce evidence showing that the farm was indeed properly maintained. I agree with counsel for the appellant in his when he stated that order VI Rule 9(1) of the old Civil Procedure Rules ties the respondent to his pleadings The rule provides as follows:-

An allegation of fact in pleadings shall be deemed to be admitted by the opposite party unless it is traversed by a party in his pleadings.

13. In **Moses Onyango Diango vs. South Nyanza Sugar Company Limited, KISII HCCA. 206 of 2007** the respondent too did not file a reply to defence and as such was deemed to have admitted the contents in the defence. Also see **Unga Maize Millers Ltd –vs- James Munene Kamau-Eldoret HCCA. NO. 16 OF 2011.**

14. With regard to the amounts awarded Kshs.72,660 the learned magistrate took a report from RMCC.80 of 2004 which had estimated optimum yields on outgrower farms. I find it

hard to concur with the above award because for a start, no evidence had been adduced in the trial court to establish that the respondent's farm had been properly maintained making the respondent worthy of the award. The Appellants themselves pleaded in their written statement of defence that the respondent did not take care of the farm properly thus breaching clause 4(c) of the outgrowers agreement. It was up to the respondent to counter the said allegation either by replying the defence or by adducing evidence that would indicate clearly the steps and measures he employed to make sure that the cane was in good condition and that it could have yielded such tonnage. This was clearly not the case as per the evidence adduced, he did not strictly prove that he deserved the award.

15. On the issue as to whether the case fell under the clear mandate of the Sugar Act No.10 of 2007. I wish to quote my brother Justice Asike Makhandia in **Phoebe Achieng Aluoch v.**

South Nyanza Sugar Co. Civil Appeal No. 245 of 2006 where he stated:-

'Indeed the contract provided for arbitration between the parties in the event of a dispute arising. However it is upto the parties to invoke it. The respondent did not raise the issue of arbitration clause, let alone agree to it before the suit was filed. It did not also apply to stay the suit pending arbitration as required. However it filed an appearance and opted to defend the suit. In the premises the respondent lost the right or waived its right to rely on the arbitration clause'.

16. Therefore, had the appellants once they had been served with the plaint raised a preliminary objection on clause 12 of the outgrower's agreement then this case would have been referred for arbitration. But since they chose to enter appearance and defend the suit then they cannot be heard to

17. bring the issue of arbitration now. This ground of appeal must fail.

18. With regard to whether or not the respondent filed the suit out of time without seeking leave, I have perused the file

and it is an undisputed fact that the respondent entered into an outgrowers Agreement on 23rd September,

1995. The plaint was dated 9th August, 2004. It was also the respondent testimony that the appellants breached the agreement in 1997. The respondent filed the plaint in court 7 years later.

19. I agree with counsel for the appellant that the suit was filed contrary to Section 4 of the Limitations of Actions Act Cap 22 Laws of Kenya which provides that:-

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.

a) Actions founded on contract

b) ……

c) ……

20. This suit is based on an action founded on contract and was filed 7 years after the purported breach of contract occurred. In such a case, the respondent was required to seek leave from court before he could file the plaint in court. There is such evidence that such leave was sought and/or obtained. The failure to seek and obtain leave may have been due to the respodnent's advocate to give his client proper advice, but that notwithstanding, the appellant cannot escape from the consequences of such failure.

21. In the premises, and for the reasons above stated, I allow the appeal. The judgment of the lower court dated 11th August, 2006 is set aside and in lieu thereof, I make an order dismissing the respondent's suit but with no order as to costs.

22. Each party in this appeal shall bear their own costs.

Dated and delivered at Kisii this 12th day of September, 2012.

RUTH NEKOYE SITATI,
JUDGE.

<u>In the presence of:-</u>

Mr. G.S. Okoth for Okongo (present) for Appellant

Mr. Kerario Marwa (absent) for Respondent

Mr. Bibu - Court Clerk.

RUTH NEKOYE SITATI,
JUDGE.