IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, OKWENGU & SICHALE, JJ.A.)

CIVIL APPEAL NO. 256 OF 2019

BETWEEN

JOHN ORIRI NYANDORO...APPELLANT

AND

TRANSMARA SUGAR COMPANY LIMITED.............RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Migori (Mrima, J.) dated 19th September, 2019

in

HCCC No. 167 of 2018)

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JUDGMENT OF THE COURT

[**1**] This is a second appeal arising from a ruling that was delivered by the Senior Resident Magistrate's Court at Rongo in an application that was lodged by **Transmara Sugar Company Limited** (the respondent herein). **John Oriri Nyandoro** who is now the appellant, originated the litigation through a suit filed in the magistrate's court against the respondent alleging breach of a sugarcane growing and supply contract dated 22nd June 2011 (herein the agreement), that had been entered into between the two parties.

[**2**] The respondent moved the magistrate's court under section 6(1) & 10 of the Arbitration Act, Article 159(2)(c) & (d) of the Constitution of Kenya, Order 51 rules 1 and 13(2) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeking to have the proceedings in the appellant's suit stayed pending the hearing and determination of the respondent's claim through arbitration as provided in the sugarcane growing and supply contract, and that the dispute be referred to arbitration.

[**3**] Upon hearing the application, the magistrate delivered a ruling in which he allowed the application, stayed the suit, and directed that the dispute be referred to arbitration in accordance with Clause 9 of the Contract. The following excerpt of the ruling gives insight on the reasoning of the magistrate:

> **"…the requirement that a member of the arbitration committee be drawn from the Kenya Sugar Board should, to (sic) be construed to mean that this member is to be drawn from the Agriculture and Food Authority. Further, under part 2 of the Sixth Schedule of the Constitution of Kenya 2010, all law in force immediately before its coming into force, shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with the new Constitution. The offices and officers who took over the offices and/or functions of the former District Officers, District Agricultural Officers, or Division Agricultural Officers are therefore to be turned to, where the agreement contemplated the former officers. I find that the arbitration provisions in the contract remain legal, valid, operative and binding upon the parties even with the changes in the law. Regarding the recourse of any party dissatisfied by the decision of the arbitration committee, such party will be at liberty to approach the court since the Sugar Arbitration Tribunal was abolished. However, the provision of Clause 9 (sic) the Contract, section 6 of the Arbitration Act, Section 41 of the Crops Act 2013, and Article 159 (2)(c) of the Constitution and the Sixth Schedule of the Constitution of Kenya 2010, when considered together do not envisage a party rushing to the court with a dispute before having pursued and exhausted the option of arbitration."**

[**4**] Being dissatisfied with that ruling, the appellant filed an appeal in the High Court, in which he raised five grounds. The appellant took issue with the learned magistrate: in holding that the arbitration clause in the agreement between the parties was still operative even after the repeal of the applicable laws; in failing to find that the non-existence of the Sugar Arbitration Tribunal made the arbitration clause

inoperative as there was no appeal mechanism; in failing to find that transitional clauses only affect matters and/or cases which were in existence when the repealed law was in force and not new matters filed after the repeal of the law; in holding that new institutions and parties can be created for purposes of the arbitration clause when in law they do not exist; and in failing to find that the right of appeal is a fundamental right, which cannot be derogated from or overlooked.

[**5**] Upon hearing the appeal through written submissions and oral highlights, the learned Judge upheld the ruling of the learned magistrate holding amongst other things, that the arbitral process was not compromised or rendered inoperative by the change in law as the parties are still under the protection of the law, and that as evident from section 41 of the Crops Act, the desire of parliament is that disputes in the larger crop sector between farmers and other crop dealers, should be dealt with by way of arbitration.

[**6**] The appellant did not give up but moved to this Court on a second appeal. In his memorandum of appeal, he has raised 9 grounds in which he faults the learned Judge of the High Court for, *inter alia*: holding that the arbitral clause in the agreement entered into between the appellant and the respondent remained in existence and was operational, notwithstanding the repeal of the parent Act; in finding that the Agricultural, Fisheries and Food Authorities Act 2013 (AF&FA Act), and the Crops Act 2013, governed the relationship between the appellant and the respondent; in occasioning a miscarriage of justice by misconceiving or misapprehending the import and implication of the doctrine of “retro-active” application of Statute; in breaching the doctrine of privity of contract and the rights of the parties; in usurping and arrogating unto himself the mandate/rights of the parties to a lawful contract and rewriting the contract between the parties; in denying and/or depriving the parties their constitutional rights of appeal in regard to the decision of the Arbitration Committee; in failing to appreciate the import of the provisions of Section 41 of the Crops Act 2013; in failing to properly evaluate, appraise and/or analyse the entire evidence and submissions that were on record; and in failing to capture all the issues that were raised before him.

[**7**] Hearing of the appeal proceeded by way of written submissions that were duly highlighted by the parties’ advocates. Mr. Mwita learned counsel appeared for the appellant, whilst Mr. Ongegu learned counsel appeared for the respondent.

[**8**] For the appellant, it was submitted that the arbitration agreement that was contained in Clause 9(1) of the agreement signed by the parties, was incapable of performance in accordance with section 6(a) of the Arbitration Act; that from clause 9(4) of the contract, the parties had made a choice of the law to be applicable to their contract; that these were the Arbitration Act 1995 as revised in 2012, together with the Sugar Act 2001 (now repealed); and that the Arbitration Act gives the parties power to choose the arbitrators and elect the procedure to be followed in the conduct of the arbitration proceedings.

[**9**] Citing **Joab Henry Onyango Omino vs Lalji Megji Patel & Co. Limited** [1995-1998] 1EA 264, the appellant asserted that party autonomy was central to the process of arbitration, and once parties in an agreement have chosen arbitration, that choice should be accepted by the court; that in this case the parties had at Clause 9(1) – (4) of the agreement chosen the arbitral committee and the court could not amend, substitute or add to that choice, except with the consent of the parties.

[**10**] The appellant argued that the learned Judge having found as a fact that the arbitral committee was no longer in existence, was wrong in not holding that the arbitration clause in the agreement was incapable of performance or inoperative by virtue of Section 6(a) of the Arbitration Act. The appellant faulted the finding by the learned Judge that the arbitral committee was saved by the transitional provisions in the AF&FA Act as read with the Crops Act, arguing that, the proposition has no legal basis as the appellant’s suit was filed after the changes in the Constitution, and before the AF&FA Act and the Crops Act came into effect; and that with the change of the law, the arbitral committee chosen by the parties lost its legal character and was inoperative.

[**11**] The appellant submitted that the Sugar Act 2001 having been repealed by the Crops Act 2013, the Sugar Arbitration Tribunal created under the Sugar Act became defunct, and Clause 9(a) of the agreement which provided for an appeal mechanism to the Sugar Arbitration Tribunal became inoperative, leaving the appellant without any right of appeal; that the Arbitration Act does not provide an automatic right of appeal over decisions of arbitrators, but has only a limited right for setting aside the arbitral award in specific instances under the provisions of section 35 or 39 of the Arbitration Act; that the parties did not envisage these provisions in their agreement; that the court had the obligation to give effect to the appeal mechanism that the parties had established in their arbitration agreement; and that if such mechanism was no longer available, the court should have found the agreement incapable of performance.

[**12**] In its written submissions, the respondent identified the issues of law for determination as follows:

(i) What was the law when the parties herein signed the agreement?

(ii) What was the law at the time of filing the lower court case?

(iii) What is the applicable law?

(iv) Whether the ground set out in the memorandum raise any reasonable challenge to the decision delivered by the learned Judge on 19th September 2019.

[**13**] In regard to the first issue, the respondent submitted that the parties entered into the agreement on 22nd June, 2011 which was during the transition period after the promulgation of the Constitution of Kenya 2010; that as a result of the promulgation of that Constitution, there were several statutes to be repealed and others to be enacted to provide for the new governance structure; and that the Fourth Schedule to the Constitution provided transitional provisions.

[**14**] The respondent argued that although Clause 9.1, 9.2, 9.3 and 9.4 of the agreement which provided an arbitration clause was governed by the Sugar Act that was then in existence, the Sugar Act had by the time of filing of the appellant’s suit, been repealed and replaced by the Crops Act No. 16 of 2013, due to the new dispensation triggered by the Constitution, and therefore the transitional provisions came into play; that the arbitral clause in the agreement did not become obsolete as alleged by the appellant as section 41 of the Crops Act No. 16 of 2013

provided for resolution of dispute between farmers and crop dealers, and that it empowered the Cabinet Secretary to make Rules to provide procedure for arbitration of such disputes.

[**15**] Section 42 of the Crops Act provided a repeal and saving clause, while Section 43 of the Crops Act provided a transitional provision in regard to proceedings. These sections stated as follows:

> **"42. Anything done under the provisions of the repealed law shall –**
>
> **Unless the authority otherwise directs be deemed to have been done under this Act."**
>
> **43. Any proceedings pending immediately before the appointed day to which a former institution is a party, shall be continued as if the authority was a party thereto in lieu of the former institution."**

[**16**] The respondent submitted that the authority established under the Crops Act, by operation of law, took over the functions of the repealed Act, and any act or omission done under the repealed Act is now governed by the new Act. This includes the Arbitral Clause provided under the agreement, which was now being governed under the provisions of the Crops Act No. 16 of 2013, and the AF&FA Act No. 14 of 2013; and this was consistent with Parliament's desire to have disputes under the larger crop sector dealt with by way of arbitration as evident from the Crops Act sections 3, 13, 15, 41, 42 and 43, as well as sections 14, 28 35 and 36 of the Arbitration Act.

[**17**] The respondent reiterated that following the repeal of the Sugar Act, the saving provisions of the Crops Act, the AF&FA Act are applicable; and that the learned Judge did not misconceive or misapprehend the import of the doctrine of retro-active application of the Statute, but properly interpreted the law. Nor did the learned Judge usurp or arrogate to himself the mandate and rights of the parties.

[**18**] We have considered this appeal, the submissions of the parties, the authorities cited and the relevant law. The facts are essentially not in dispute. The appellant and the respondent entered into the agreement which was governed by the Sugar Act 2001, which Act was subsequently repealed by the Crops Act. The main issue in this appeal is the applicability of Clause 9 of the agreement which provided for arbitration. That clause states as follows:

> ***9.1 All questions or differences which at any time hereafter arise between the parties hereto touching or concerning this Agreement or the construction hereof or as to the rights, duties and obligations of either party hereto or as to any subject matter in any way arising out of or connected with the committee of five people comprising:-***
>
> > ***a) The District Officer in whose area the land on which the cane supply contract relates is situated.***
> >
> > ***b) One person representing the Kenya Sugar Board.***
> >
> > ***c) One nominee of the TRANSMARA SUGAR CO. LTD.***
> >
> > ***d) One nominee of the Transmara Out growers Company Limited.***
> >
> > ***e) The Divisional Agriculture Officer of the area where the cane in question is situated or in his absence an Agricultural Officer holding the rank of Divisional Agricultural Officer or above appointed by the District Agricultural Officer for that purpose.***
>
> ***9.2 The District Officer shall preside over the meeting of this Arbitration committee.***
>
> ***9.3 The Arbitration Committee shall have powers to receive evidence from any source including summoning witnesses to testify before it and will have all the powers conferred on arbitrators by the Arbitration Act or any statutory Legislation thereof for the time being in force in Kenya.***
>
> ***9.4 Any party not satisfied with the decision of the Arbitration Committee may refer the dispute to the Sugar Arbitration Tribunal established under the Sugar Act, 2001 whose decision shall be final and binding on all the parties involved.***

[**19**] The parties are in agreement that this clause provided for disputes to be referred to an arbitral committee made up of the people named in clause 9.1 & 9.2, and an appeal mechanism with the Sugar Arbitration Tribunal under the Sugar Act. While the issue of the promulgation of the Constitution, the repeal of the Sugar Act and the enactment of the AF&FA Act and the Crops Act are historical facts that cannot be denied, the parties have contending views in regard to the effect on the arbitral clause in the agreement, arising from the repeal of the Sugar Act, the enactment of the new laws and the change in governance caused by the promulgation of the Constitution.

[**20**] In short, the issue is whether the arbitration clause provided under Clause 9.1 to 9.4 of the Agreement entered into by the parties has been rendered inoperable by the repeal of the Sugar Act, and the change in governance structure caused by the Constitution of Kenya 2010, or whether that clause has been saved by the transition clauses provided under the new Acts and the Constitution.

[**21**] The following extract of the judgment of the High Court, shows how the learned Judge addressed this issue:

> ***"11. It is true that among the changes brought about by the Constitution include the governance of our country. These changes are contained in the Constitution and the various laws in force by dint of Article 2 of the Constitution for which I must take***

judicial notice of under Section 60 of the Evidence Act, Cap. 80 of the Laws of Kenya. For instance, the former provincial administration gave way to a new outfit. Under the new structure the former Provincial Commissioner became the Regional Commissioner, the then District Commissioner became the County Commissioner and the District Officer became the Assistant County Commissioner. Therefore, the presiding officer of the Arbitration Committee who was the District Officer became the Assistant County Commissioner in whose area the land on which the Contract relates is situated.

12. As to the representative of the defunct Kenya Sugar Board (hereinafter referred to as '**<u>the Board'</u>**) the provisions of the AFFA Act come into play. Section 3 of the AFFA Act established the Agriculture, Fisheries and Food Authority (hereinafter referred to as '**<u>the Authority'</u>**) as a body corporate with perpetual succession and a common seal. Section 3(3) of the AFFA Act provides as follows: -

> *The Authority shall be the successor to the institutions established by the Acts repealed under Section 41 existing immediately before the commencement of this Act, the Crops Act, the Livestock Act and Fisheries Act respectively.*

13. Transitional Provision 1 of the First Schedule of the AFFA Act defines a '**<u>former institution</u>**' to mean** 'any institution established by a repealed Act, or a revoked legal notice, existing immediately before the appointed day'* ***and those institutions include the Board. Therefore, the functions of the defunct Board were taken over by the Authority. That being the case, the representative of the Board in the Arbitration Committee was hence replaced by a representative of the Authority.

14. On the nominee of the Trans Mara Outgrowers Company Limited, the Appellant submits that the entity was a creation of the Sugar Act and is no more and as such no one can attempt to be such a nominee. In answer to the dilemma, the interpretation of who an 'out-grower' is under

Section 2 of the Sugar Act is paramount. The provision defines an 'out-grower' to mean: -

> *An out-grower institution registered under the Companies Act (Cap. 486), the Co-operative Societies Act (Cap. 490), Trade Unions Act (Cap. 233) or any other organization registered under any other law the annual general meeting may approve.*

15. From the definition of an 'out-grower' it is clear that the Sugar Act was not the creator of the out-grower associations. The Sugar Act only recognized those institutions which had specific mandates in the implementation of the Sugar Act. I therefore find and hold that the Trans Mara Outgrowers Company Limited which was not a creation of the Sugar Act was not terminated by the repeal of the Sugar Act and has the capacity to nominate one of its members to the Arbitration Committee.

16. There is also the issue of the Divisional Agricultural Officer. Agreed, as a result of the devolved governance structure under the Constitution, agriculture as a function was majorly devolved to the County Governments. I say so because there are some other aspects touching on agriculture which remained as a function of the national government. Those functions include the Agriculture Policy, Veterinary Policy, National Economic Policy and Planning, General principles of land planning and the co-ordination of planning by the counties, Protection of the environment and natural resources among others. Resulting from the foregone, it is therefore not foreign to have representatives from both forms of Government on matters touching on agriculture in the Counties since each has clear and defined mandate.

17. In our case, the ideal officer to the Arbitration Committee must be the one dealing with crop husbandry and in view of the distribution of the functions between the governments under the Constitution that officer shall be from the respective County Government and shall be the Agricultural Officer in charge of the administrative division or the equivalent thereof where the land on which the Contract relates is situated.

18. In view of the foregone analysis, I now find and hold that the Arbitration Committee in this case is validly in place with requisite capacity to discharge its mandate."

[**22**] We are in agreement with the appropriate analysis and sound reasoning of the learned Judge. The Sixth Schedule to the Constitution that provides the transitional and consequential provisions states at clause 7 as follows:

7. Existing laws

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

(2) If, with respect to any particular matter—

> **(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and**
>
> **(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict."**

[**23**] It is apparent that due to the change in law and the governance structures, the responsibilities assigned to a District Officer were reassigned to an Assistant County Commissioner as stated by the learned Judge. The transitional provisions preserved the powers of the District Officers, only having the effect of changing the designation of the officer. As regards the Kenya Sugar Board, under Section 3.3 of

the AF&FA Act, the Authority established under Section 41 of that Act took over the powers of the Kenya Sugar Board. Likewise, as the new governance structure does not provide for a divisional agricultural officer, the divisional agricultural officer referred to under Clause 9.1(e) of the agreement, can only be construed to be the agricultural officer in charge of the administrative division in the county government who deals with crop husbandry.

[**24**] Much as the appellant contends that the arbitration clause in the agreement is no longer operational, the appellant has not addressed the transitional provisions. In interpreting and applying the law, the court has the responsibility under Article 259 of the Constitution to give effect to the purpose, values and principles of the Constitution. The transitional and consequential provisions in the Constitution and in particular clause 7 of the Sixth Schedule, obligates the court to interpret the law that was in force immediately before the effective date of the Constitution in a way that will bring it into conformity with the Constitution. That is what the learned Judge did in his analysis, by adopting, where necessary the provisions of the new Act, and by so doing giving effect to the wishes of the parties with regard to having their dispute resolved in accordance with the arbitral clause. To this extent the Constitution allowed the retroactive application of the new law, and the learned Judge cannot be faulted.

[**25**] With regard to clause 9.4 that provided for an appeal against the decision of the arbitral committee to the Sugar Arbitration Tribunal, that tribunal has become defunct with the repeal of the Sugar Act. This means that should one of the parties be dissatisfied with the arbitral proceedings, they will not be able to access the Tribunal for the purpose of the appeal. It is clear that the intention of the parties was to preserve the right of appeal against the decision of the arbitral committee.

[**26**] The intention of the parties can be achieved by applying

Section 39 of the Arbitration Act that states as follows:

> **"(1) Where in the case of a domestic arbitration the parties have agreed that;**
>
> > **a) An application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or**
> >
> > **b) An appeal by any party may be made to a court on any question of law arising out of the award. Such application or appeal as the case may be, may be made to the High Court.**
>
> **(2) On an application or appeal being made to it under subsection 1, the High Court shall:**
>
> > **a) determine the question of law arising;**
> >
> > **b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or where another tribunal has been appointed to that tribunal for consideration."**

[**27**] Although the parties did not specifically express a right to appeal against the tribunal award to the court, in accordance with the transitional provisions, the court must construe the agreement in clause 9 in a way that will protect the intention of the parties to preserve a right of appeal against the decision of the arbitral committee. In view of the change in law, this right to appeal can now only be canvassed through the court under section 39 of the Arbitration Act, that allows for an appeal by any party on a question of law arising in the course of the arbitration or out of the award.

[**28**] We come to the conclusion that the arbitration clause in the agreement is not incapable of performance nor is it inoperative as it is preserved by the transition clause. Accordingly, we uphold the judgment of the learned Judge and dismiss the appeal with costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

<u>DEPUTY REGISTRAR</u>