IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 257 OF 2019

BETWEEN

JEREMIAH OTIENO MADARA.....APPELLANT

AND

SUKARI INDUSTRIES LIMITED.....RESPONDENT

(Being an appeal from the Judgment of High Court of Kenya at Homa-Bay (Justice J.R Karanjah) delivered on 2nd October, 2019

in

Civil Appeal No. 60 of 2017)

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JUDGMENT OF THE COURT

This is a second appeal from the judgment of the High Court (**Karanjah, J**.) delivered on **2nd October, 2019**.

The appellant, **Jeremiah Otieno Madara** commenced proceedings before the Senior Resident Magistrate's Court, Ndhiwa, claiming compensation from the respondent, **Sukari Industries Limited** for a breach of contract entered between the appellant and the respondent for failure to harvest and purchase sugarcane cultivated by the appellant on land parcel/plot No. 1608.

The respondent filed its defence, denying the particulars of the breach and raised an objection challenging the jurisdiction of the subordinate court to deal with the claim pursuant to **Section 5 and 38** of the **Crops Act No. 16 of 2013.**

By a ruling dated **14th September 2019,** the subordinate court dismissed the respondent's preliminary objection. It rendered itself thus:

> ***"In the instant case there is a dispute purely arising out of a contract entered into between the parties herein. Does such dispute fall under Section 38 of Act, No. 16 of 2013?***
>
> ***The answer is no. This dispute is premised on the law of contract. It should not be construed to mean that since sugarcane is a crop listed under the first schedule of the Crops Act, then it is the High Court to hear any claim of such nature filed in court***
>
> ***A breach of contract does not fall under the provisions of this Act to warrant the court to down its tools."***

Aggrieved, the respondent filed an appeal to the High Court vide a memorandum of appeal dated **28th September, 2017.** Upon considering the submissions made by the parties, the Learned Judge **(Karanjah J)** in upholding the preliminary objection held as follows**:**

> ***"...it is clear that the subject contract related to the sugarcane crop which is classified as a scheduled crop in the first schedule of the Crops Act 2013 which replaced the Sugar Act 2001, among other statutes. With that replacement, the contract fell within the ambit of the Crops Act, 2013 in so far as it involved dealing in the sugarcane crop by its production by one party (respondent).***
>
> ***If a breach or attempted breach of the contract occurred in the process, the aggrieved party was expected to petition the High Court for necessary orders under Section 38 of the Crops Act and more so, where a Cabinet Secretary has failed or neglected to***

make rules under Section 41 of the Act to provide for the creation of a tribunal to deal with such disputes.

In any event, under Section 42 of the Act, anything done under the provisions of the repealed Acts including the Sugar Act 2001, was deemed to have been done under the Act (i.e Crops Act 2013).

For all the foregoing reasons, this court would find that the dispute between the applicant and the respondent arose from an extra ordinary contract revolving around a crop whose production, sale and purchase is currently within the scope of the Crops Act 2013, which under Section 38 confers jurisdiction to the High Court to deal with it."

This is the decision that has provoked this appeal. The appellant is now before us having raised seven (7) grounds of appeal which he opted to summarise into the following two grounds in the submissions dated **29th September, 2020**:

" (i) That the Learned Judge erred in entertaining an appeal arising from a decision on a notice of preliminary objection in the absence of leave to appeal before the superior court,

(ii) That the Learned Judge erred in finding that the Provisions of Section 38 of the Crops Act, 2013 concerned the dispute between the parties, which dispute essentially concerned breach of contract as opposed to a violation of the Crops Act 2013".

At the hearing, both parties relied on their written submissions and briefly highlighted the same. Learned counsel **Mr Kerario** who represented the appellant contended that the respondent failed to obtain leave while appealing from the subordinate court to the High Court as required under **Section 75(1)** of the **Civil Procedure Act** and **Order 43 (1)** of the **Civil Procedure Rules**. Citing the case of ***Rayleigh W. Wanyama v Lorna Mukhwana Wanyama & 3 others [2020] eKLR*** where it was stated:

" …it is common ground that this appeal did not lie as of right. As such, it was trite that the appellant obtained leave of court before he could lodge it. Leave is a prerequisite to the assumption of jurisdiction by this court".

Counsel stated that leave was a prerequisite to the assumption of jurisdiction by the High Court and not even **Article 159** of the Constitution could cure such a fatal omission. Counsel however conceded that they did not raise the issue before the High Court.

On the second ground, the appellant faulted the judge for finding that the dispute between the parties was purely contractual and not a violation of the Crops Act. Relying on the persuasive decision of **Sukari Industries Limited vs Ezra Ododi Adero, HCCA No. 110 of 2019** where the court held that **Section 38** of the Crops Act was not aimed at ousting the Jurisdiction of the Magistrates Courts over all disputes and that the provision was not intended to deal with matters in the realm of private law, but restricted to those in the domain of public law, as this was a dispute over a breach of contract. Counsel urged us to allow the appeal.

Relying on the respondent's written submissions dated on **10th November, 2020** in opposition to the appeal, learned counsel for the respondent, **Mr. Olando** contended that the appeal was a nullity as no leave was sought nor obtained (Section 75 of the Civil Procedure Act). He also cited the provisions of **Rule 39** and **Rule 40** of the **Court of Appeal Rules, 2010** which he contended require that the appellant seeks leave of this Court. Citing the case of **Kenya Hotels Limited** vs. **Oriental Commercial Bank Ltd [2018] eKLR,** counsel submitted that the appellant ought not to introduce new grounds of appeal that were not pleaded before the High Court.

On the second issue, counsel submitted that The Crops Act dealt with all "*scheduled crops*" and whether the dispute fell under public law or private law was a non-issue. He contended that non-compliance with **Section 38** of the **Crops Act** is an infringement of the Act and that if the intention of the Act was to intentionally exclude private contracts as "*scheduled crops*" it would specifically provide so. We were urged to dismiss the appeal.

We have considered the record of appeal, the rival submissions by the parties and the law. Indisputably, it is a well-established principle that conferment of jurisdiction is a legislative function and any defect in jurisdiction whether pecuniary, territorial or in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any order or decree the absence of which the court has no option but to down its tools.

In our view, this appeal turns on a two pronged question of jurisdiction.

First, whether the High Court and subsequently this Court has jurisdiction to entertain the suit by virtue of the requirement under **Section 75** of the **Civil Procedure Act**. Second, whether in the circumstances of this case the High Court has exclusive jurisdiction to entertain the suit filed by appellant. **Section 75(1)** of the **Civil Procedure Act** and **Order 43** of the **Civil Procedure Rules** stipulate the orders from which appeals lie as a matter of right. The appellant alleges that the respondent failed to seek the required leave to appeal from the Magistrate's Court and subsequently the High Court lacked jurisdiction to determine the appeal. In turn, the respondent contended that it sought leave, which was granted while applying for stay of execution, and faulted the appellant for failing to seek leave from the High Court to appeal to this court under the same provisions and under Rules 39 and 40 of the Court of Appeal Rules.

Admittedly, the appellant did not raise this issue before the High Court.

Furthermore, this Court does not have a record of the subordinate court proceedings to ascertain the appellant's allegations nor has any proof been tendered to disprove the respondent's position that it complied with the provisions under **Section 75** and **Order 43**. As for the respondent's claim that the appellant failed to seek leave to file its appeal before this court, the same cannot hold. The Appeal herein

which arises from the final judgment and decree of the High Court does not fall within the purview of Section 75 and Order 43 which deal with appeals emanating from orders of the Court nor does it by any stretch fall under the provisions of Rules 39 and 40 of the Court of Appeal Rules pertaining to certification of appeals by the superior court. This ground of appeal must therefore fail.

The second issue raised is whether the Learned Judge erred in finding the dispute concerned a violation of the Crops Act as opposed to breach of contract.

Before we consider this point, it is necessary to bear in mind that when the dispute herein arose prompting the appellant to file his claim on **1st April 2016**, the **Sugar Act** under which the parties made their agreement, had been repealed by the **Crops Act whose** objective was to *inter alia* '***accelerate the growth and development of agriculture in general, enhance productivity and incomes of farmers and the rural population, improve investment climate and efficiency of agribusiness and develop agricultural crops as export crops that will augment the foreign exchange earnings of the country, through promotion of the production, processing, marketing, and distribution of crops in suitable areas of the country'.***

The **Sugar Act, (repealed)** specifically provided guidelines for agreements between parties in the sugar industry (including cane supply contracts and cane farming contracts as the one between the parties), the rights and liabilities of growers and millers concerning sugar agreements and an extensive machinery for the settlement of disputes arising in relation to such agreements including the forum (being the Sugar Arbitration Tribunal) and the procedure and form to be utilized in the event of a complaint. Even though the Crops Act does not provide for the said obligations **Section 23(3)(c)** of the **Interpretation and General Provisions Act** provides that the repeal of a law shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed, unless a contrary intention appears. Furthermore, **Section 42 (2)(a)** of the **Crops Act** provides that: "***anything done under the provisions of the repealed law shall, unless the Authority otherwise directs, be deemed to have been done under this Act***." This implies that the rights and obligations pertaining to sugar agreements acquired by the parties before the repeal of the Act still subsist.

Nonetheless, it is instructive to note that these rights and obligations have not been transferred to /created under the current Act and that the forum for adjudicating the violation of the substantive provisions has since been substituted from the Sugar Tribunal to the High Court under Section 38 of the Crops Act.

Section 38 provides:

> **(38) Any person who has reason to believe that the provisions of this Act have been, are being, or are about to be violated, may petition the High Court for—**
>
> > **(a) a declaration that the provisions of this Act are being, have been, are about to be contravened;**
> >
> > **(b) an injunction restraining any specified person from carrying out the contravention;**
> >
> > **(c) a writ of mandamus against an officer or a person who has failed to perform a duty imposed by or under this Act; or**
> >
> > **(d) any other lawful remedy.**

What is therefore argued by the appellant is that the suit which emanates from a breach of contract can be agitated before a court of competent jurisdiction since it is not a violation of the Crops Act, nor is it a suit premised on rights/liabilities accrued under the repealed Sugar Act. On the other hand, the respondent maintains that the Crops Act expressly bars such a suit under Section

38, as all transactions relating to scheduled crops must be dealt with under the Act, including disputes arising from private contractual agreements.

Furthermore, it has been alleged that any silence in the current Act is immaterial by virtue of Section 42 of the **Crops Act** which provides that anything done under the provisions of the repealed law shall, unless the Authority otherwise directs, be deemed to have been done under the current Act.

The question we must pose therefore, is whether the appellant's claim arose from the Crops Act or a common law right/liability and whether the Crops Act in stating the forum for disputes in the event of a violation of the Act, makes it obligatory to utilize that forum alone resulting in the ouster of the jurisdiction of all other Courts to entertain a suit filed in relation to a scheduled crop.

It is a principle well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy has to be sought only under the provisions of that Act and the common law court has no application. (see **Barrachlough v. Brown, [1897] A.C. 615** and **Sushil Kumar Mehta v. Gobind Ram Bohra, (1990) 1 SCC 19**).This rule was stated with abundant clarity by Willes, J. in ***Wolver-hampton New Water-works Co. v. Hawkesford [(1859) 6 CBNS 336]*** as follows:

> ***"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at Common Law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at Common Law: there, unless the statute contains words which expressly or by necessary implication exclude the Common Law remedy, (sic) and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely but provides no particular form of remedy. There, the party can only proceed by the action at Common Law. But there is a third class, viz., where a liability not existing at Common Law is created by a statute which at the same time gives a special and particular remedy for enforcing it."***

In the present case, we must look to the statute that created the obligations and duties of growers and millers pertaining to sugar agreements to see if there is a specified remedy contained therein. It is clear that appellant's suit was for breach of the sugar farming and supply contract wherein the appellant sought compensation for 3 unharvested cycles. Even though the right/liability existed at Common Law, the Sugar Act(repealed) affirmed the said right and remedy through its provisions and provided a special forum (being the Sugar Tribunal) to adjudicate any dispute arising from cane faming and supply contracts. Applying the principles enunciated in **Wolver-hampton New Water- works Co. v. Hawkesford** (above) to the repealed Act, the appellant had the right to elect to pursue either a common law remedy or the remedy provided under statute. The appellant's suit fell within the first of the three classes enumerated by Willes J, in which liability claimed existed at Common Law and was affirmed by a statute which gave a special and peculiar form of remedy different from the remedy which existed at Common Law and furthermore, the statute did not contain words which expressly or by necessary implication excluded the Common Law remedy**.**

In ***Premier Automobiles Ltd vs Kamlekar Shantaram Wadke 1975 AIR 2238, 1976 SCR (1) 427,,***where the Supreme Court of India facing a similar case in determining whether an Agreement under dispute between an employer and employee could be decided by a Civil Court stated as follows

> ***"But where the industrial dispute is for the purpose of enforcing any right, obligation or liability under the general law or the common law and not a right, obligation or liability created under the Act, then alternative forums are there giving an election to the suitor to choose his remedy of either moving the machinery under the Act or to approach the Civil Court. It is plain that he can't have both. He has to choose the one or the other. But we shall presently show that the Civil Court will have no jurisdiction to try and adjudicate upon an industrial dispute if it concerned enforcement of certain right or liability created only under the Act. In that event Civil Court will have no jurisdiction even to grant a decree of injunction to prevent the threatened injury on account of the alleged- breach of contract is the contract if one which is recognized by and enforceable under the Act alone." (Emphasis ours)***

A perusal of the Crops Act clearly shows that it does not create any rights, liabilities or specific requirements directly to growers and millers concerning sugar agreements. More importantly, this court has not been directed to the substantive provisions under the Act that have been breached which would initiate proceedings under Section 38. In our view, the appellant's cause of action must be found in the substantive provisions of the statute in question. The forum under Section 38 is obligatory only where it provides an exclusive method of determining questions which relate to breaches of the provisions in the Act and only then can they deprive other courts jurisdiction which they ordinarily possess.

It is trite that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. Under **Section 5 of the Civil Procedure Act**, Courts have jurisdiction to try all suits of a civil nature except suits of which its cognizance is either expressly or impliedly barred. It seems clear to us that, courts with competent jurisdiction are not specifically barred from entertaining claims relating to scheduled crops except where it is shown that substantive provisions of an Act have been breached and where a liability not existing at Common Lawis created by a statute which gives a special and particular remedy for enforcing it.

In the end we find that the appellant's claim was a simple claim by a farmer premised on an obligation and or remedy which exists under common law for compensation which he claims to be due to him under a cane faming and supply contract. It is, evident that it was not a special remedy under the Act which was sought but a common law right under breach of contract. Consequently, the appellant could elect which forum to sue. The Crops Act expressly ousts the jurisdiction of other courts only in circumstances where it is shown that a substantive right or liability created by the Act has been violated, is being violated, or is about to be violated. We similarly do not agree with the assertion that by virtue of being a "scheduled crop" the forum elected under Section 38 automatically applies.

Lastly, on the appellant's assertion that **Section 38** of the **Crops Act** was not intended to deal with matters in the realm of private law, but restricted to those in the domain of public law, we maintain that the same is dependent on whether or not a substantive provision of the Act has been breached. Nonetheless, we note that unlike its predecessor, the focus of the Crops Act is on the rights, obligations of the authority and regulation of the agricultural sector rather than the specific rights and liabilities of protected parties.

For the stated reasons we are of opinion that the preliminary objection must fail. We therefore allow the appeal and set aside the decision of the High Court.

It is so ordered.

Dated and Delivered at Nairobi This 19th Day of March, 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

DEPUTY REGISTRAR