Winam v South Nyanza Sugar Company Limited (Civil Appeal 98 of 2017) [2021] KECA 165 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 165 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 98 OF 2017

S OLE KANTAI, M NGUGI & HA OMONDI, JJA

NOVEMBER 19, 2021

BETWEEN

MATHEWS O. WINAM ..... APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED ..... RESPONDENT

(An Appeal against the Judgment and Decree of the High Court of Kenya at Kisii (W.A. Okwany, J) dated 10th April, 2017 In HCCA No. 106 of 2012)

JUDGMENT

1. Mathews O. Winam (the appellant) has preferred this appeal against the Judgment and Decree of the High Court of Kenya at Kisii delivered by Okwany J, finding that the court had no jurisdiction to hear and determine the matter.

2. The appellant, (being the plaintiff in Kisii CMCC No. 540 of 2009) filed suit on 9th September, 2009 and subsequently amended on 10th January, 2012 seeking the following reliefs:

    a. Damages.

    b. Costs of the suit.

    c. interest from 4th February, 2002 until payment in full.

    d. any other relief that the Honourable Court may deem just to grant.

3. The appellant's claim was that by a written agreement dated 4th February, 2002 it was agreed that he would grow sugar cane on his land Plot Number 79 on field number 20A in Kakmasia Sub Location measuring 0.2 ha. which he would then sell to the respondent company. The contract was to be in force for a period of five years or until one plant crop and two ratoon crops of sugarcane were harvested whichever period was less.

4. The appellant further contended that the respondent harvested only one plant crop pursuant to their said contract and later neglected to harvest the subsequent ratoon crop thereby occasioning him loss and damage amounting to Kshs.108,810.

5. The respondent filed a statement of defence wherein he denied the appellant's claim in its entirety, and on a without prejudice basis, stated that it was the appellant who breached the agreement as he failed to maintain and/or employ the recommended crop husbandry technique resulting in cane that was destroyed and dwarfed by weeds; and the respondent could not be expected to harvest cane that was not there in the first place.

6. Further, that the appellant's claim was for special damages which had not been specifically pleaded and in any event, the trial court lacked jurisdiction to entertain the suit on the basis that the Sugar Act had created a special tribunal to handle such disputes.

7. In his testimony before the magistrate's court, the appellant repeated what we have summarized of the claim.

8. The respondent's witness, Richard Muok who is the respondent's field supervisor, told the trial court that the appellant abandoned the 1st ratoon and had nothing to harvest, thereby being in breach of the contract. He however admitted on cross examination that he had no document or report to prove that the appellant abandoned the 1st ratoon thereby causing the death of the 2nd ratoon. The witness further conceded that the respondent did not notify the appellant to make good the abandonment of the 1st ratoon crop. It was argued in evidence that the 0.2 ha portion of contracted sugar cane could not produce 135 tonnes from the plant crop.

9. The trial court considered the case by both parties and dismissed the appellant's claim on grounds that the court's jurisdiction had been ousted by creation of the special Sugar Arbitration Tribunal which was vested with jurisdiction to hear and determine disputes between parties.

10. Aggrieved by the decision of the trial court, the appellant, filed his Memorandum of Appeal before the High Court challenging the judgment of the lower court on grounds that having had a contractual relationship with the respondent, he had invoked common law available in civil courts so as to get a remedy by way of compensation; that the jurisdiction of the civil court was never repealed either expressly; and that Section 29 of the *Sugar Act* precluded him from being an 'interested party' under the Act. He urged that the appeal be allowed and the judgment set aside; the suit be remitted to the trial court with an order that the court do assess the damages payable; and that the costs of the appeal be awarded to the appellant.

11. In opposing the appeal at the High Court, the respondent maintained that once a tribunal vested with jurisdiction to hear and determine disputes between parties had been established, then the court lacked jurisdiction to handle the matter.

    In canvassing the appeal before the High Court, parties filed written submissions.

12. The High Court considered the proceedings and judgment in the trial court, the Memorandum of Appeal and the written submissions by both parties and narrowed the issues for determination as: whether the trial court had jurisdiction to hear and determine the suit, whether the appellant's suit was time barred and whether the special damages were pleaded.

13. On the issue of jurisdiction, the High Court was of the 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, removing such disputes from the mainstream courts of law. The court

also pointed out that Article 165 (3) (c) of the *Constitution* grants the High Court jurisdiction to hear an appeal from a decision of a tribunal.

14. The learned Judge stated that Section 31 of the Sugar Act established a specific tribunal with the sole purpose of arbitrating disputes arising under the Act. The Judge was of the opinion that the dispute between the parties relating to the sugar growing contract fell within the purview of the Sugar Act.

15. Being aggrieved by the High Court's finding, the appellant filed this second appeal on grounds that the High Court erred in holding that the Magistrate's Court's jurisdiction was ousted by the Sugar Act 2001 as there was no express ouster or repealing legislation to that effect, the judge is faulted for failing to find that the contract sought to be enforced was not subject to the Sugar Act 2001, and which Act did not apply retrospectively to the contract in question, the appellant was not an "Interested Party" as defined under the Sugar Act 2001, the Sugar Arbitration Tribunal did not have the power to award compensation, and that the powers expressed under section 32 of the Sugar (Arbitration Tribunal) Rules 2008 were ultra vires the Sugar Act 2001. The appellant therefore prays that the appeal be allowed, the judgment dated 10th April 2017 be set aside, and this court assess and awards damages as appropriate. It is also prayed that the costs of this appeal, the appeal in the High Court, and of the suit be awarded to the appellant.

16. The appeal before us was canvassed through written submissions. The appellant addressed us on the issue as to whether the trial court had jurisdiction to hear and determine the suit. The appellant's argument on this ground is that the Sugar Act did not specifically oust the jurisdiction of the court, either by way of repeal or express ouster. The appellant relied on the cases of *The Matter of The Interim Independent Electoral Commission [2011] eKLR*, *Peter Gichuki Kingara vs IEBC & 20 Others, Appeal No. 31 of 2013* and *Eluid Wafula Maelo vs Ministry of Agriculture & 3 Others [2016] eKLR*.

17. The appellant contends that the High Court erred in finding that the Magistrate Court's jurisdiction was ousted by the Sugar Act 2001 in the absence of an express ouster or repealing legislation and failing to find that the contract to be enforced was not subject to the Sugar Act, 2001.

18. He further contends that the claim did not arise under the Sugar Act as the contract was made on 11th February, 2002 whereas the Act came into force on 1st April, 2002, and as such the Act could not apply retrospectively.

19. In support of this argument, the Appellant relies on the case of *South Nyanza Sugar Co. Ltd vs Ezekiel Oduk [2019] eKLR* where Justice Mrima at paragraph 18 quoted Musinga (J) (as he then was) in *South Nyanza Sugar Co. Ltd vs Isaiah Owino Lawi Kisii HCCA No. 159 of 2006* thus:

> "I have carefully perused the record of appeal. It appears to me that the outcome of the application before the trial court depended on whether the Sugar Act, 2001 was applicable in interpreting the contract that was entered into on 11th April, 1996. The simple answer is No. ...The Act came into operation on 1st April, 2002 and its provisions cannot apply retrospectively...the provisions of the Sugar Arbitration Tribunal cannot be relied on in determining disputes in contracts that were entered into long before the Act was enacted."

20. The appellant also argues that the appellant had the right to elect to pursue a common law remedy, or remedy provided under the statute, and relies on this Court's decision in *Jeremiah Otieno Madara vs Sukari Industries Limited, Civil Appeal No. 257 of 2019*.

21. Further, that Section 29 of the Sugar Act precludes him, an out grower, from being referred to as an 'interested party' under the Act, that Sub-section 2 of the Act does not cover an out grower rather an out-grower institution by definition. The appellant also submits that the learned Judge failed to

address her mind to grounds of the appeal which touched on limitation, special damage vis a vis general damages, and sufficiency if pleaded and breach of the contract by the respondent.

22. On the issue of limitation, the appellant argues that the respondent in its defence never pleaded limitation of time, and that the trial court therefore had no jurisdiction to determine the issue of limitation. He relied on Order 2 Rule 4 of the *Civil Procedure Rules* which provides:

> " a party shall in any pleading subsequent to a Plaint plead specifically any matter ...any relevant statute of limitation...."
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> The appellant also relies on the case of Stephen Onyango Achola vs Edward Hongo Civil Appeal 209 of 2004 where this court held:
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> " the second respondent having failed to plead the issue of limitation in its defence was not entitled to rely on that issue and base its preliminary objection on it...it is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition."

23. It is the appellant's contention that limitation cannot apply in any event, as the contract is dated 4.02.02 and the suit was filed on 9.9.02. That the limitation period for contract is 6 years, and the appellant was clearly within the window as time would have lapsed on 4.02.2011.

24. As regards special damages for breach of contract the appellant contends that the same was specifically pleaded in the amended plaint dated 10th January, 2012 and proved by the productivity report of expected yields. He further points out that the respondent admitted in cross-examination that it did not make a report on the appellant's abandoned crops, and further that it was an obligation to issue a notification to the appellant to make good on the contracted cane crop, which was not done. This, in the appellant's view, shows that there was no breach of contract.

The Appellant therefore prays that the appeal be allowed.

25. The respondent's counter that this having been a matter that fell squarely within the ambit of Section 31 of the then Sugar Act (now repealed), it was required that the appellant's first port of call be the said tribunal before proceeding to court. That in the instant case, when the appellant filed this matter in 2007, there existed a tribunal in place specifically tasked with the duty of handling disputes between millers, growers and out-growers. The respondent cites the decision in *Albert Chaurembo Mumba & Others v Maureen Munvao &148 others (2019) eKLR* which held inter alia that:

> " Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute"

26. This being a second appeal this court's mandate has been enunciated in a long line of cases decided by this court, see *Maina vs Muriga [1983] KLR 78, Kenya Breweries Ltd vs Godfrey Odongo, Civil Appeal No. 127 of 2007*, and *Stanley N. Muriithi & Another vs Bernard Munene Ithiga [2016] eKLR*, for the holding inter alia that on a second appeal the court confines itself to matters of law only unless it is shown that the courts below considered matters they should have not considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse.

27. On the issue of jurisdiction, it is the appellant's contention that the trial court had the jurisdiction to hear and determine his suit, and the same was not under the purview of the Sugar Act and the Sugar

Arbitration Tribunal. In support of this argument, the appellant draws from this Court's decision in Jeremiah Otieno Madara vs Sukari Industries Limited, Civil Appeal No. 257 of 2019 which held:

> "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 Law is created by a statute which gives a special and particular remedy for enforcing it".

28. Both the trial court and the High Court correctly noted that the Sugar Act 2001 which created and established the Sugar Arbitration Tribunal was in force at the time that the suit was filed, and the Tribunal would be the first port of call in determining disputes arising in the sugar industry, thereby removing such disputes from the main stream courts.

29. This appeal hinges on the issue of jurisdiction, and the existence of an established body to deal with the disputes in the first instance. In the celebrated case of *Motor Vessel Lillian S vs Caltex Oil (K) Limited (1998) KLR* Nyarangi, J held:

> "Where the court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given... jurisdiction is everything. Without it a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

30. We are also alive to the decision in the case of *Speaker of the National Assembly vs James Njenga Karume (1992) eKLR* where this Court was of the view that:

> " in our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed."

31. The parties entered into a contract in the year 2002, and according to the appellant's pleadings, the first crop was to be harvested after 22-24 months after planting, and the subsequent harvest ought to have been made within 16-18 months of the harvest. The parties were unanimous in their evidence that this harvest was done in the year 2004. However, the first ratoon was not harvested and ended up drying in the farm, subsequently, this, suit was filed in the year 2009. This then means that within the subsequent period when the breach allegedly occurred, the Sugar Tribunal was in existence and should have been the first port of call.

32. We hold that the High Court, on first appeal, rightly found that the trial court had no jurisdiction in the matter before it as the complaint should have been taken to the tribunal established and contemplated under section 31 (1) (2) of the Sugar Act. Indeed, where there is a specific mechanism established for resolution of disputes, a party has no right to side-step that dispute resolution mechanism at all. The courts will only have jurisdiction after that mechanism has been exhausted. As jurisdiction is everything (Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (supra) the trial court should have downed tools and refused to entertain the appellants claim. In this case, the moment the Sugar Tribunal was established, the disputants should have presented their contest there first. The ruling in

the Njenga Karume case (supra) is relevant to the instant case, and we find that the High Court did not err in upholding the trial court's judgment that it did not have jurisdiction.

33. Having found that the court properly held that it had no jurisdiction to determine the dispute (and therefore dispositive of the appeal), then it would be superfluous for us to engage in analysing and determining whether the appellant's suit was statute barred, or whether the special damages were specifically pleaded and proved.

Consequently, we hold that the appeal lacks merit, and is dismissed with costs to the respondent

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

S. ole KANTAI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR