REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 118 OF 2018

ELIZABETH O. ODHIAMBO.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree of S.N Makila – SRM

dated 9th November 2018 in CMCC No. 549 of 2009)

JUDGEMENT

1. The appellant herein entered into an agreement with the respondent on 20th April 2004 to grow and sell sugarcane on her parcel of land within Kadera sub location. The contract was to remain in force for a period of 5 years or until one plant and two ratoon crops of sugarcane were harvested whichever period was less. The appellant averred that it was a term of the contract in clause 6.2 thereof, that the respondent would not be bound to purchase any cane that was burnt but having agreed to accept such burnt cane the respondent would not be liable to pay for the cane until the time when the cane would be due for harvest and would be entitled to deduct a penalty of ten shillings per tonne from the payment of the cane.

2. In her amended plaint, the appellant claimed that the respondent failed to harvest the plant crop at 24 months as agreed which over matured and was burnt by an arsonist on 27th May 2006 when it was over 26 months old. The appellant averred that the matter was reported to the respondent who ordered a stack of the burnt cane for sampling and laboratory testing. It was her case that the respondent accepted to harvest the cane but failed to do so causing her loss of the plant crop and subsequent two crops, for which she sought compensation before the lower court.

3. In its statement of defence, the respondent denied the existence of the contract and the claim that it had abandoned the appellant's crop. In the alternative, the respondent pleaded that it was its policy not to cut or harvest poorly maintained cane and that in this instance, the appellant had not maintained the cane and had neglected it to the extent that it was overshadowed by weeds and totally destroyed, despite receiving services and inputs.

4. Having heard both parties the trial court found that the appellant had not proved her case on a balance of probabilities. To quote the relevant part of the impugned decision, the trial court held;

> *"It is not disputed that the defendant failed to harvest ratoon 2 due to the crop getting burnt. Clause 6.2 of the contract provides that the defendant was not obligated to harvest burnt cane. The plaintiff was unable to dispute the allegation that ratoon 2 got burnt and as such the defendant had nothing to harvest.*
>
> *In absence of any proof of breach by the defendant, I find that the plaintiff has not proved its case on a balance of probabilities against the defendant. The plaintiff is thus not entitled to any compensation and the suit is hereby dismissed with costs to the defendant."*

5. In arguing the appeal, learned counsel for the appellant in his written submissions raised two issues. First, he contends that the trial court erred by failing to disregard evidence led on an unpleaded issue. Counsel submits that the fact of the fire was not controverted in the statement of defence and the allegation that the defendant was not bound to harvest burnt cane had only been brought up at the defence hearing.

6. He contends that the recourse to clause 6.2 of the agreement amounted to a defence of frustration or force majure which must be pleaded in line with order 2 rule 4 of the Civil Procedure Rules. Since it was not pleaded, counsel argues that the appellant's case was not controverted. On this he relies on the cases of ***Susan Onyango Ngaji vs South Nyanza Sugar Co. Ltd HCCA No. 11 of 2018, James Maranya Mwita vs South Nyanza Sugar Co. Ltd HCCA No. 92 of 2015*** and ***David Sironga Ole Tukai vs Francis Arap Muge and Others CA No. 76 of 2014***.

7. Counsel also cites the case of ***Rosalinda D. Ouko vs South Nyanza Sugar Co. Ltd HCCA No. 176 of 2000*** in support of the argument that the burning of the cane did not afford the respondent refuge as it was a supervening event occurring long after the breach had occurred. Counsel submits that the trial court did not take into account the authorities cited before her thereby taking a position clearly confrontational to known legal principles.

8. The respondent's learned counsel, in brief rejoinder, submits that the appellant did not prove that the plant crop and ratoons were developed, well maintained and were indeed ready for harvest as claimed.

9. He submits that the appellant had conceded to DW1's testimony that her plant crop and 1st ratoon were harvested and the appellant duly paid for the crop. He argues that if the 2nd ratoon crop got burnt, the respondent was not obliged to purchase it according to clause 6.2 of the agreement. That force majure came into play and both parties were relieved from their obligations. Counsel submitted that in any event, the appellant had not produced any evidence showing that the cane had indeed matured and was 26 months old when it got burnt. He also submits that the appellant did not prove that her parcel of land could yield 135 tons per cycle.

10. The two issues commending themselves for determination from the parties' submissions and the material placed before this court are;

a. Whether the trial court erred in deciding the matter on an unpleaded defence; and

b. Whether the appellant proved that the defendant was in breach of the contract by failing to harvest the burnt cane and thus entitled to damages.

11. Being a first appeal, the court is required to analyse and re-assess the evidence on record and reach its own conclusions taking into account the fact that it neither saw nor heard the witnesses testify (See ***Peters v Sunday Post Ltd [1958] EA 424***).

12. Before the trial court, the appellant adopted her statement and list of documents as her evidence. She also testified that the plant crop and ratoon 1 were harvested but ratoon 2 was burnt at 36 months. She stated that they had cut the cane down under instructions of the respondent but they did not transport the cane. In cross examination, the appellant testified that the acreage of the land was 0.2 hectares and stated that the cane was 38 months when it got burnt.

13. The respondent called its senior field supervisor, Richard Muok, (DW1) to testify on its behalf. He adopted his statement and list of documents as his evidence and on cross examination, testified that the burnt ratoon 2 crop was not availed to the defendant. He stated that they discovered the burnt cane during their normal operations.

14. On the first issue, the appellant contends that the defendant could not rely on the defence of force majure without expressly setting out the issue in its statement of defence. The appellant relies on **order 2 rule 4** of the **Civil Procedure Rules** which provides;

> **4. (1)** *"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality."*

15. It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal in the case of ***David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR*** thus;

> *"In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."*

16. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

17. The foregoing position was also reiterated in the case of ***Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others Civil Appeal No. 219 of 2013 [2014] eKLR.***

18. In the present case, the respondent pleaded that despite supplying inputs and services to the appellant, she undertook no husbandry of the crop which got over shadowed by weeds and was totally destroyed. It was the respondent's policy not to harvest such cane. Conversely, the respondent's witness, DW 1 not only testified to the existence of the contract between the parties but also admitted that the respondent had cultivated her crop and that the first two cycles were harvested. He testified that the respondent was relieved from its obligations under the

agreement under clause 4 thereof which provided that *"The parties hereto shall be relieved of their obligations under this agreement due to the occurrence of an event of force majeure,"* when the 2nd ratoon crop got burnt up.

19. This elaborate evidence by DW 1 was not pleaded in the statement of defence and should therefore be disregarded as held by the courts in the foregoing authorities.

20. I concur with the persuasive decision of the court in ***Susan Onyango Ngaji v South Nyanza Sugar Company Limited Civil Appeal No. 112 of 2018 [2019] eKLR*** where Majanja J. held;

> *12 ... Although it purported to rely on the force majeure, I find and hold that the evidence of DW 1 was inconsistent with its pleaded defence. As I have set out above, the defendant's defence was that the plaintiff employed poor husbandry and the crop was so neglected that the defendant could not contractually harvest the cane. It also alleged that the contract was procured for a fraudulent purpose yet the claim of fraud was not pleaded. It is thus clear that the evidence of DW 1 was not only inconsistent with the statement of defence but the defence of force majeure was not pleaded.*

21. That being said, it is important to mention that the principle that parties are bound by their pleadings cut both ways. My analysis of the record shows that the appellant flouted this principle as well as her evidence was in complete contrast with the evidence adduced. The appellant pleaded that the respondent failed to harvest the plant crop at 24 months and that on 27th May 2006, the cane got burnt by an arsonist when it was over mature. She claimed that the respondent's actions had occasioned her loss and she therefore sought compensation for all three crop cycles.

22. Even after amending her plaint, the appellant failed to rectify her pleadings to tally with her evidence that the respondent had in fact harvested the plant crop and the 1st ratoon crop but failed to harvest the 2nd ratoon crop when it got burnt up. Moreover the appellant's testimony that respondent accepted the burnt cane was not supported by evidence.

23. From the foregoing, it is thus clear that the plaintiff failed to prove her case on a balance of probability the shortcomings of the defence case notwithstanding. She was therefore not entitled to the relief sought.

24. Consequently, the appeal is dismissed with costs to the respondent.

Dated, signed and **delivered** at **Kisii** this **11th** day of **December, 2019.**

A. K. NDUNG'U

JUDGE