



**Ochieng v South Nyanza Sugar Co Ltd (Civil Appeal 21 of 2022)
[2023] KEHC 22771 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 21 OF 2022
RPV WENDOH, J
SEPTEMBER 29, 2023**

BETWEEN

ANJELINE AUMA OCHIENG APPELLANT

AND

SOUTH NYANZA SUGAR CO LTD RESPONDENT

(An Appeal from the Judgement and Decree of Hon. C.M. Kamau Resident Magistrate (RM) dated and delivered on 11/4/2018 in Rongo PMCC No. 146 of 2014)

JUDGMENT

1. This is an appeal by Anjeline Auma Ochieng (the appellant) against the judgement and decree of the Hon. C M Kamau dated and delivered on 11/4/2018. The appellant is represented by the firm of Oduk & Co. Advocates while the respondent is represented by the firm of Otieno, Yogo, Ojuro & Co. Advocates.
2. By a plaint dated 7/6/2014, the appellant sued the respondent for damages for breach of contract, costs of the suit, interest from 7/5/2007 until payment in full and any other relief.
3. The appellant pleaded that by an agreement dated 7/5/2007, the respondent contracted her to grow and sell to it sugarcane on her land parcel being plot number 221 field no. 12C in Kabuoch Sub - Location measuring 0.2 hectares; that the appellant duly signed the agreement and was assigned account number 483229 and planted the cane as agreed.
4. It was a term of the contract that it would commence on 7/5/2007 and remain in force for a period of 5 years, or until one plant crop and two ratoon crops of the sugarcane are harvested; that within the 5 years period, the plant and ratoon crops would be harvested at 12 - 18 months and 22 - 24 months respectively. The appellant contended that in breach of the agreement, the respondent failed, refused and/or neglected to harvest the plant and ratoon crops. The appellant particularized the loss of damages at a total of Kshs. 202,500/=.



5. The respondent filed a defence dated 17/7/2014 denying the allegations in the plaint and it put the respondent to strict proof thereof. The respondent stated that the plaint does not reveal any cause of action against the respondent and that the suit was statute barred and it ought to have been filed at the Sugar Tribunal.
6. In reply to the respondent's defence, on the issue of jurisdiction, the respondent stated that the trial court had jurisdiction but not the Sugar Tribunal in that, the appellant is not a grower or interested party within the meaning of the *Sugar Act*.
7. After the hearing, the trial court entered judgement in favour of the respondent and dismissed the appellant's suit with costs.
8. Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 11/4/2018 on the following three (3) grounds: -
 - i. That the learned trial magistrate erred in law and in fact in failing in disregarding the evidence of the appellant;
 - ii. That the trial court erred in law and in fact in landing credence to a warning letter, which letter was coined up purportedly to defeat the appellant's suit was inaccurate and was not compliant with the contract in issue;
 - iii. That the trial court erred in law in failing to find that the appellant had proved her case on a balance of probabilities.
9. The appellant prayed: -
 - i. That the judgement and decree dated 11/4/2018 be set aside;
 - ii. There be judgement for the appellant.
 - iii. The court do assess and award the appellant damages for breach of contract.
 - iv. Interest and cost of the suit and of the appeal be borne by the respondent.
10. Directions were taken and the appeal be canvassed by way of written submissions. Both parties complied.
11. The appellant submitted that the trial Magistrate based his findings on a warning letter but that the letter was disputed as it did not form part of the pleadings; that the trial court should have found that this limb of evidence was inadmissible having not been pleaded. It was further submitted that even if the document was admissible, it was irrelevant for want of proof; that the letter referred to plot no. 221A and not 221 a fact confirmed by the trial magistrate and the contract book; that the evidence Pexh5 was not relevant since she purchased her own seed cane.
12. Further, appellant submitted that the contract at clause 9 was specific on issuance of notices, for remedies and termination of the contract; that none of them was proved and therefore there was no sufficient evidence to prove breach of contract by the appellant as was discussed in the *Joseph Akech Nundu vs South Nyanza Sugar Company* HCCA No. 36 of 2016.
13. The appellant further contended that it was only on the date of the defence hearing that the respondent produced its statement and document list which is against the rules of procedure as it was held in the case of *Sipora Achieng Ayege vs South Nyanza Sugar Co. Ltd* HCCA No. 105 of 2019. The appellant urged this court to expunge the offending documents and find that the appellant's evidence remained



uncontroverted in the trial court. The appellant prayed that judgement be entered in her favour in the sum of Kshs. 202,500/= together with costs and interest.

14. In opposing the appeal, the respondent submitted that the contract was signed with the respondent in 2006 and it was to last for 5 years; that the suit was instituted in 2015 without leave of the trial court; that the suit ought to have been filed on or before 2012 and not 9 years after. The respondent relied on the findings in the cases of *Felix Otieno vs Kenya Power & Lighting Co. Limited* (2008) eKLR and [*Denis Kipsang Ripko vs KCB Ltd*](#) (2016) eKLR
15. On whether the respondent breached the contract, it was submitted that the appellant failed to prove her case as per the provisions of Section 107 of the [*Evidence Act*](#); that the appellant failed to prove that the plant crop and the ratoons were nurtured to maturity by producing photographic evidence of the mature crop; that during cross examination, the appellant confirmed that she diverted the cane to third parties which was in breach of the contract. The respondent relied on the case of *Pancras O. Onyango vs South Nyanza Sugar Co. Ltd* Civil Suit No. 49 of 2005 where the plaintiff was awarded 1st ratoon only. It was also contended that the appellant should have shown that the farm would yield the 135 tonnes per cycle for all the three cycles.
16. It was also submitted that the duty to harvest was on the appellant as per clause 3.1.2 of the contract. The respondent contended that by diverting the cane to third parties, the appellant mitigated her losses. The respondent further submitted that the nature of the claim raised by the appellant was general damages whereas this being a breach of contract claim, the damages ought to be in the form of special damages. The respondent prayed that the appeal be dismissed with costs and this court upholds the trial court's judgement.
17. I have considered the appeal, the submissions by the parties and the trial court's record and the following are the issues for determination: -
 - i. Whether the suit filed in the lower court was statute barred.
 - ii. Whether the trial court considered the correct legal principles in dismissing the appellant's suit.
18. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
19. A similar holding was held in the Court of Appeal for East Africa which took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion...”
20. Whether the suit was statute barred: It is not in dispute that parties entered into a contract which commenced on 7/5/2007. It was a term of the contract that it would in force for 5 years and/or when the plant would mature not later than 24 months, the 1st ratoon not later than 22 months after harvest of the plant crop and the 2nd ratoon not later than 22 months after the harvest of the 1st ratoon.



21. As per the terms of the contract, the expected maturity date and harvesting of the plant crop was after 24 months. Since the agreement was entered into on 7/5/2007, the expected harvest date of the plant crop after 24 months would be on or about 7/5/2009.

22. Section 4 (1) of the Limitation of Actions Act provides as follows in relation to actions on contracts, tort and certain other actions: -

“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. ...
- d. ...
- e. ...”

23. As provided by Statute, actions relating to contracts can only be brought to court before the lapse of six years from the time which the cause of action accrued.

24. According to Black’s Law Dictionary (10th Edition) the word “accrue” means “to come into existence as an enforceable claim or right.” Therefore, in interpreting the word accrued as per the Statute, the cause of action accrued at the time the actual breach occurred. This is when it can be said the time started running.

25. Courts have defined the period when the alleged breach is said to have occurred and/or accrued in sugarcane growing contracts. In the case of South Nyanza Sugar Company Limited vs Diskson Aoro Owuor (2017) eKLR the court held: -

“There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

26. Similarly, in B. Mathayo Obonyo vs South Nyanza Sugar Co. Ltd (2019) eKLR Majanja J held as follows:

“In my view, the question under section 4(1) of the LAA is when does the cause of action accrue? I adopt the position taken in South Nyanza Sugar Company Limited v Diskson Aoro Owuor (*supra*) in determining when the cause of action accrues... Thus under the outgrowers cane agreement, such as the one subject to the suit, the right to sue for breach of contract arose when one of the parties failed to meet its obligations under the contract. In the case at hand this could only arise when the respondent failed to harvest the plant crop. This is when the cause of action accrued and when, in terms of section 4(1)(a) of the LAA, the time begins to run.”



27. In the present case, the alleged breach occurred on 7/5/2009 when the respondent failed to harvest the plant crop. Time started running therefrom and the suit ought to have been filed before the lapse of 6 years that is, on or before 7/5/2015. The suit was filed in the lower court on 7/6/2014. The respondent cannot claim that the suit was filed in 2015 while the lower court proceedings show that the respondent entered appearance and filed its defence on 24/7/2014. I find that the suit was filed within time and the trial court had jurisdiction to hear and determine the same.
28. In dismissing the appellant's suit, the trial court considered the alleged warning letter dated 5/10/2009. The trial court noted that in the said letter, the respondent warned the appellant against turning the plant crops into jaggery. The appellant argued that the warning letter does not refer to her plot since her plot is no. 221 whilst in the warning letter refers to plot number 221A. The trial Magistrate held:-
- “The plaintiff sought to impugn the warning letter in submissions. It was contended that it made reference to plot 221A yet the claim related to plot 221. This is a spurious argument. Only the Schedule to the contract referred to plot 221. Other documents produced as exhibits by the plaintiff i.e job completion certificate (Pexb4) and delivery note for seed cane (Pexb5) referred to plot 221A. it was also argued that it was dated long after the plant crop was due for harvest. While it may be so, it is common knowledge that cane is not harvested strictly on the basis of its age. I therefore find no merit in the attempts to impugn the warning letter.”
29. I have considered the job completion certificate and delivery note documents. The job completion certificate no. 291xxx dated 13/8/2007 indicates that the plot no. is 221. The delivery note seed cane dated 19/8/2007 indicates that the plot no. is 221A.
30. I have also considered other documents. The debit advice to outgrowers dated 18/11/2008 and 28/10/2008 showing the delivery of the fertilizer and survey charges indicate the plot no. as 221. On the Farmer's record checklist and a letter addressed to the respondent dated 23/10/2008 indicates that the plot no. is 221.
31. At the front page of the agreement, there are words which confirm the wordings of the letter dated 23/10/2018 that the appellant planted her own seed cane. There is therefore no possibility that the respondent supplied the appellant with seeds to be planted on her plot no. 221. Richard Muok, DW1 testified that he had no documents to show that they supplied the seed cane.
32. The documents which the learned Magistrate referred to, do not indicate the plot number to be 221A as he held. In my view, the appellant may have had a different plot being plot no. 221A in which the seed cane was supplied for growing the plant crop. Plot no. 122 and 122A are different plots.
33. The warning letter is dated 5/10/2009. The plant crop ought to have been harvested on or before 7/5/2009. Therefore, there is no logical explanation as to why the warning letter was sent long after the harvesting period of the plant crop. It is this court's finding that it is the respondent who was in breach and failed to harvest the plant crop and the subsequent ratoon crops.
34. On the claims that the appellant did not plead special damages for the breach of contract. At paragraphs 7 of her plaint, the appellant pleaded the particulars of loss and damage. She pleaded that the plot was capable of producing 135 tonnes at the rate of Kshs. 2,500 per tonne. I find that this was a pleading for special damages.



35. On what the appellant is entitled to, the Court of Appeal in the case of Kisumu Civil Appeal No. 138 of 2017 *South Nyanza Sugar Company vs Awino Oreko* held: -

“The contract itself was for a period of five years or until one plant crop and two ratoons were harvested on the plot, whichever period would be less. The evidence accepted by both courts below, and which has not been challenged before us, is that Sony was guilty of breach by failing to harvest the plant crop. Once the plant crop was not harvested, it dried and the ratoon crops could not grow. This was a natural consequence of the breach. It is therefore reasonably foreseeable that failure to harvest the plant crop would imperil the subsequent ratoon crop and naturally, so too, the 2nd ratoon crop. In this way a loss of the plant crop was also a loss of the two ratoon crops.”

35. I have considered the cane yield in outgrowers document which forms part of the supplementary record of appeal. The plot is in South Kabuoch location. The estimated yields of the plant crop is 64.53tonnes while for the ratoons, it is 50.49 tonnes. The appellant pleaded Kshs. 2,500/= per tonne as the price per tonne. There was no guiding document produced by the parties on the prevailing market prices of the plant and ratoon crops.

36. The claim by the respondent was in the nature of special damages which must be specifically pleaded and proved. The Court of Appeal in *Douglas Odhiambo Apel & Another v Telkom Kenya Limited* Nrb CA Civil Appeal No. 115 of 2006 (2014) eKLR, the Court of Appeal expressed the view that;

“[W]e find that the learned judge was entirely correct in holding that at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his case. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court. The need for proof is not lessened by the fact that the claim is for special damages. Unless a consent is entered into for a specific sum, then it behooves the claiming part to produce evidence to prove special damages claims.”

37. In *South Nyanza Sugar Company Ltd vs Fredrick Ogolla* (2015) eKLR Majanja J held:-

“It was clear then that the only indicator of the price was the pleading which the court adopted for the plant crop. I find that the price of the sugarcane was an essential element of the respondent’s claim and the claim being in the nature of special damages ought to have been pleaded and proved with particularity... Although the respondent pleaded the price of sugarcane per ton, he did not prove the price hence there was no basis for making the award. Likewise, the respondent’s submissions on various prices in respect of the plant crop and 1st ratoon were not supported by any evidence. Unless there are admissions or agreed facts, submissions are not a substitute for proof of facts.”

38. The appellant is therefore not entitled to special damages for want of proof on the expected prices for the cane yields.

39. Consequently, I find that the appeal has no merit and it is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF SEPTEMBER 2023.

R. WENDOH

JUDGE



Judgment delivered in the presence of;
Ms. Theuri h/b for Mr. Oduk for the Appellant.
Mr. Odhiambo for the Respondent.
Emma & Phelix Court Assistants.

