



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 9 OF 2016

HARJEET PANDHAL SINGH & SONS LTD.PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.RESPONDENT

JUDGMENT

The Plaintiff, **HARJEET PANDHAL SINGH & SONS LIMITED**, was a large scale sugar-cane farmer in the Muhoroni Sub-County of Kisumu County.

1. It sued the Defendant, **KENYA POWER AND LIGHTING COMPANY LIMITED**, after fires burnt down sugarcane which was growing on the following 4 parcels of land;

(a) **1611/1;**

(b) **1611/2;**

(c) **1611/3; and**

(d) **3095.**

2. All the aforesaid parcels of land are situated in Nyangore Sub-Ward, Chemelil Ward, Muhoroni Sub-County in Kisumu County.

3. On 9th February 2015, 14 March 2015 and 17th May 2015, fires burnt down the cane. The said three fires were said to have been a direct consequence of sparks which emanated from loose electric cables which had been installed by the Defendant.

4. In effect, the Plaintiff attributed the fires to the Defendant’s negligence.

5. As a result of the cane being burnt, the Plaintiff asserted that it suffered losses on the 3 different dates, and the Plaintiff computed the said losses as follows;

1. 09.02.2015..... Kshs 18,718,350.00

2. 14.03.2015.....Kshs 3,890,100.00

3. 17.05.2015.....Kshs 105,000. 00

TOTAL Kshs 22,713,450.00

6. In the circumstances, the Plaintiff sought judgment against the Defendant for the sum of Kshs 22,713,450.00, which was said to be the value of the sugarcane that was burnt.

7. The Plaintiff also prayed for costs of the suit, together with interest on both the sum claimed and also on the costs.

8. The Defendant filed a Defence in which it denied the claim in all material particulars.

9. The Defendant deemed itself as a victim of the fires in question, as some of its transmission lines were burnt down. But it denied having

caused the fires.

10. It was suggested that the sugar-cane farms were burnt by wild fires, whose causes were unknown.

11. When the case came up for hearing on 30th May 2018, the Defendant conceded liability, and the court entered judgment in that regard. Therefore liability is not an issue before me.

12. **PW1, AMANDEEP SINGH PANDHAL**, is a Director of the Plaintiff Company. In relation to the issue of the quantum of the claim, he relied on the Report dated 10th February 2015, which was prepared by **PW3**.

13. **PW1** conceded that he did not know how **PW3** arrived at the figures he cited.

14. However, **PW1** had accompanied **PW3** when the latter had visited the farms on 10th February 2015, with a view to assessing the damage caused by fire.

15. Similarly, on 16th March 2015 and on 19th May 2015, **PW1** accompanied **PW3** to the farms, for purposes of having the damage assessed by **PW3**.

16. Based on the 3 Reports of **PW3**, **PW1** asked the Court to grant judgment for Kshs 22,713,415/=.

17. **PW2, FRANCIS ODUOR ODERO**, testified that he worked for **CHEMELIL SUGAR COMPANY**, as the Outgrowers Manager.

18. He said that the Plaintiff was one of the large scale sugarcane farmers in the area, and that the Plaintiff's farm neighbours the Sugar Company's farm.

19. **PW2** produced a Report dated 8th March 2019, which was signed by Joel K. Kiplagat in his capacity as the Head of Department.

20. **PW2** testified that the Plaintiff enjoyed the highest yields in Chemelil Zone, at between 30 to 40 tons per acre.

21. The witness highlighted the fact that the Report incorporates a summary of the cane which the Plaintiff had supplied to Chemelil Sugar Company between January and March 2016. By his calculations, the summary confirmed that the average yield was between 30 and 40 tons per acre.

22. When **PW2** was shown a Report **KENYA AGRICULTURAL & LIVESTOCK RESEARCH ORGANISATION (KALRO)**, he noted that it indicated that the average yield in Chemelil was between 15 and 22 tons per acre. However, he believes that the said Report was not inconsistent with his Report.

23. He pointed out that the Report from **KALRO** was not based on yields from any particular farm. He further pointed out that **KALRO**'s report was in respect of the entire Chemelil cane growing zone, which covers 2 counties.

24. It was his evidence that yields from any field depend on the Management of the farm and the resources invested in it. He added that even 2 fields which were located side by side can have very different yields.

25. During cross-examination **PW2** conceded that he had not provided any document to prove that the Plaintiff had invested heavily in the farm.

26. Although **PW2** reiterated that the Plaintiff's farms yield between 30 and 40 tons per acre, and that that conclusion was derived from assessments done per field, he did not provide the court with the said assessments.

27. **PW2** told the court that the Sugar Company has statements which reflects the cane delivered by each of the farmers. Therefore, he confirmed that they have statements which show the quantity of cane delivered by the Plaintiff.

28. However, he did not produce the said statements because they were very bulky.

29. **PW3, SILAS WYCS MAKUNDA**, was an employee of the Department of Agriculture, working in Muhoroni Sub-County, Chemelil Ward.

30. He produced 3 reports which valued the damage to farms where cane was burnt.

31. In each of the 3 reports, he indicated that the average yield per acre was 35 tons.

32. **PW3** said;

“The farm was clean, and after looking at the cane sticks, I came up with the production at 35 tons per acre. The farmer used to supply cane to Chemelil Sugar Company. I did not rely on any other documentation to come up with the estimated value.”

33. After **PW3** testified, the Plaintiff closed its case. Thereafter, the Defendant called one witness, **GORDON ABAYO**.
34. **DW1** was an employee of **KALRO**, and was based at the Sugar Research Institute, Kibos.
35. He produced his Report dated 11th October 2018. The said report showed that between January 2015 and December 2015, the yields on sugarcane production ranged between 38 tons and 54.81 tons per Hectare.
36. By his calculations **DW1** testified that the Gross Profit Margins for the months of February, March and May 2015, from the parcels of land which burnt down, was a total of Kshs 9,951,468/=.
37. According to **DW1**, yields were dependant upon soil type, climate and management practices.
38. He testified that the Plaintiff's farm was one of the best managed in Nyando.
39. However, in his considered opinion, even when a farm was well managed, it cannot give good yields beyond the second ratoon. Indeed, **DW1** said that ratooning was one of the factors of good management.
40. During cross-examination, **DW1** conceded that Chemelil Sugar Company should have been in a position to know the actual yields from the Plaintiff's farm. But the contents of his report did not relate to any particular farm.
41. Whilst saying that a sugarcane farmer in an area with good soil and good climate, should get good yields if he applied good management, **DW1** made it clear that it would be difficult to achieve yields that were higher than the average.
42. He told the court that Chemelil was a marginal sugar-cane growing area because;
- (a) it receives about 1500mm of rain, which is insufficient;**
- (b) it has heavy clay soils, which flood easily when there was heavy rain.**
43. After **DW1** testified, the Defendant closed its case.
44. On the basis of the evidence on record, I am now called upon to determine the issues arising in the case. And the basic question is whether or not the Plaintiff has proved his claim for Kshs 22,713,450/=.
45. Whilst the Plaintiff asserted that the yield per acre was 30 to 40 tons, the Defendant's position was that in the Chemelil zone, the yield was between 15.2 tons and 21.92 tons.
46. It is noted that the evidence tendered by the Defendant was formulated from **AFFA** , being the Sugar Directorate Yearbook of the statistics for the year 2015.
47. According to the Plaintiff, their evidence was more believable because it was based on real incidents that took place, rather than on some reports based on research.
48. The Plaintiff submitted that;
- “The loss suffered by the plaintiff cannot therefore be measured against an average of what other lands in the area would generate.”***
49. I did not understand the Defendant to have adduced evidence of average of what other lands in the area would generate.
50. The Plaintiff did not extract any such concession from the Defendant. Therefore, I find no basis for the Plaintiff's assertion that their farms were excluded from the Sugar Directorate Yearbook of the Statistics for the year 2015.
51. It is noteworthy that the Plaintiff held the following viewpoint;
- “If, for example, the Plaintiff farm was not developed with cane, and there was no evidence of what the farm had generated in the past, and the Defendant had done something and omitted to do anything that had stopped it developing the farm, the position postulated by the Defendant would make sense. It would have been perfectly in order for the court to rely on projections supported by research findings of what the Plaintiff would have lost. Since the Plaintiff's case is based on actual loss of his cane, the generalized projections cannot work.”***
52. In a nutshell, the Plaintiff said that the loss of his cane was real: that is not in any doubt.
53. The Plaintiff alluded to

***“evidence of what the farm had generated in the past*”**

54. However, I find that the Plaintiff did not present evidence of what the farm had generated in the past.
55. **PW2** prepared a report, and the said report contained a summary of the cane which the Plaintiff had supplied to Chemelil Sugar Company.
56. However, **PW2** also conceded that he failed to produce documents to show that the Plaintiff had invested heavily on the farm.
57. Secondly, **PW2** conceded that he did not produce before the court, the statements of the cane which the Plaintiff had delivered to the Chemelil Sugar Company. His explanation was that the said documents were very bulky.
58. On his part, **PW3** testified that he did not use any documentation to come up with the “*estimated value*” of production, of 35 tons per acre.
59. Thus whereas the Plaintiff has submitted that the computation of the losses they sustained were based on real figures, their witness, who prepared the reports that the Plaintiff was relying on, called them “*estimated value*”. More significantly, the same witness told the court that he looked at the cane sticks and was able to come up with the production quantity of 35 tons per acre: He did not place reliance on any other documentation when he came up with the estimated value.
60. I understand that to mean that although there were documents at Chemelil Sugar Company, which would have been the best evidence of the quantity of cane harvested previously by the Plaintiff, **PW3** did not even rely on such documents when formulating his report.
61. If he had used actual figures, he would not have described the resultant calculated quantity as an estimated value.
62. The criticism which the Plaintiff levelled against the Defendant’s witness is equally applicable to the Plaintiff’s witnesses. Both parties provided the court with reports which were put together using other information and material, but the supporting documentation, information or material was not made available to the court. In the circumstances, the court was unable to verify whether or not the respective reports were backed with appropriate supporting documents or material.
63. The Plaintiff submitted that the Defendant’s case was that the productivity in the Plaintiff’s farm was not consistent with the average production in the area. However, it is equally true that **PW2** said that the report prepared by the Defendant’s witness was not inconsistent with the report for the Plaintiff.
64. If the Plaintiff’s actual production was out of line with the information in the report by **DW1**, it would have been described as being inconsistent with it.
65. According to the Plaintiff, this case is to be determined by deciding who, between the Plaintiff and the Defendant, was more believable.
66. With all due respect to the Plaintiff, I find that their reasoning, in that respect is not properly founded upon the law. In so finding I have not overlooked the fact that in civil claims the standard of proof is ordinarily on a balance of probability.
67. In this case the Plaintiff’s claim is for Special Damages. It is trite law that Special Damages must not only be specifically pleaded but must also be strictly proved.
68. In the case of **ELDAMA RAVINE DISTRIBUTORS LIMITED AND ANOTHER Vs CHEBON, CIVIL APPEAL NO. 22 OF 1991** Cockar JA (as he then was) said;
- “The character of the acts themselves which produce the damage, and the circumstances under which those acts were done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved.***
- As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”***
69. The Plaintiff herein specifically pleaded the special damages they were claiming. In order to succeed, the Plaintiff was required to produce evidence which would strictly prove the claim with as much certainty and particularity as was reasonable.
70. I find that it was reasonable to require the Plaintiff to provide evidence which proved the actual deliveries made by them, in several instances prior to the time in issue. The Plaintiff’s witnesses confirmed that those records were to be found at Chemelil Sugar Company.
71. Even though the documents might have been bulky, I find that that could not justify withholding them from the court.
72. A perusal of those records could have enabled the court to determine whether the special efforts of management which the Plaintiff had applied, had actually yielded cane of such quantities as was higher than the yields in the **KALRO** Report.

73. The evidence could also have enabled the court ascertain whether or not the yields from the Plaintiff's farms remained consistently high, regardless of whether the harvest was from a "plant" crop or from the 5th and the 6th ratoons.

74. Actual records from the Sugar Factory was thus critical evidence, for purposes of strict proof of the claim. As those records were not produced in court, although the Plaintiff knew that the said records were available, I hold that the Plaintiff failed to strictly prove their case.

75. In the circumstances, should the suit be dismissed?

76. The answer is in the negative. I say so, first, because liability was already conceded.

77. Secondly, in the case of **CHAPLIN Vs HICKS [1911] 2 KB 786**, which was quoted with approval by the Court of Appeal in **JOHN RICHARD OKUKU OLOO Vs SOUTH NYANZA SUGAR COMPANY LIMITED, CIVIL APPEAL NO. 278 OF 2010**, Vaughan Williams L.J. said that even where certainty had not been attained in proving special damages, the jury still had a function in the assessment of damages. The learned Judge said;

"I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages."

78. On their part, the learned Judges of Appeal said as follows in **Civil Appeal No. 278 of 2010**;

"Vaughan Williams L J goes on to state, and we fully agree, that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for the breach of contract."

79. I hold the considered view that even in the case where the claim is founded upon negligence, and the claim is for special damages, the wrongdoer cannot be absolved from the obligation to pay damages, just because the Plaintiff failed to prove his claim with certainty.

80. In the case of **SOUTH NYANZA SUGAR COMPANY LIMITED Vs JOSEPH O. ONYANGO, HCCA NO. 10 OF 2016**, the Court upheld the guide prepared by the **KENYA AGRICULTURAL AND LIVESTOCK RESEARCH AUTHORITY (KALRO)**. Mrima J. found that the said guide was;

"..... a product of extensive research.....",

which had been undertaken by an institution which had been given the mandate to promote research and to investigate all problems related to sugarcane productivity, quality, sustainability of land and all matters ancillary thereto.

81. I find that because **KALRO** had undertaken a broad-based task, their report is objective, and was not intended to simply answer to the Plaintiff's claim. I therefore find the said **KALRO** Report to provide a reasonable basis for calculating the appropriate compensation payable to the Plaintiff.

82. Accordingly, I now enter judgment in favour of the Plaintiff in the sum of Kshs 9,951,468/=. The said sum will attract Interest at 14% per annum from 5th April 2016, when the suit was filed in court.

83. The Defendant is ordered to pay to the Plaintiff, the costs of the suit.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL 2021

FRED A. OCHIENG

JUDGE