**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT KISII**

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO. 38 OF 2019**

**JOASH OTIENO KONGERE.........................................APPELLANT**

**VERSUS**

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

***(Being an appeal from the judgment and decree of Hon.***

***S.K Onjoro (SRM) dated 9th day of September 2018 in CMCC No. 509 of 2004)***

**JUDGEMENT**

**1.** The appellant herein, Joash Otieno kongere, filed Chief Magistrate's Court Civil Suit No. 509 of 2004 against South Nyanza Sugar company Limited, the respondent herein, claiming that by an agreement dated 4th January 1996 the respondent contracted the appellant herein to grow and sell to it sugarcane on the appellant's parcel of land plot number 403 in field number 18 in Kanyamamba Sub-location measuring 0.8 Hectares.

**2.** The appellant pleaded that the contract was for a period of 5 years or until one plant crop and two ratoon crops of sugarcane were harvested from the subject parcel of land whichever event occurred first. It averred that it discharged its obligation, but the respondent failed to harvest the cane hence suffered loss.

**3.** Aggrieved by the alleged breach of the contract the appellant filed the suit on the 5th May 2004 claiming damages for breach of contract and for an order that the respondent do compensate the appellant for loss of sugarcane on the 0.8 hectares of land at the rate of 135 tonnes per acre (65 tonnes per hectare) at Kshs. 1,730/=, costs and interest at court rates**.**

**4.** The respondent filed a statement of defence dated 14th June 2004 wherein it denied the contract and breach alleged by the appellant and put the appellant into strict proof thereof. The respondent in the alternative pleaded that it was not its policy to cut or harvest poorly maintained cane and that the appellant failed to employ the recommended crop husbandry to the extent that the cane was totally destroyed and the defendant had no right to harvest the same. The respondent further raised the issue of limitation of time and that the court had no jurisdiction and prayed for the dismissal of the suit with costs.

**5.** The appellant was the sole witness. He adopted his witness statement filed in court on 19/3/2004. He asserted that he entered into a contract with the defendant on 4/1/96 for cane growing. It was to last 5 years and 3 harvests were to be made. He planted and the sugar cane matured at 22-24 months. The defendant neglected to harvest and the cane dried up. The ratoon matured at 16 -18 months. He suffered loss estimated at 135 tonnes per hectare. Price per tone was Sh 1730. He sought for compensation for 3 crops cycle.

**6.** On cross examination, he said he had nothing to show that he had informed the defendant that the crop had matured. He did not have pictures to show that he developed the ratoon.

**7.** Richard Muok testified for the respondent. He acknowledged that the appellant entered into a contract with the respondent on 4/1/96. The cane area was 0.5 hectares. Price was Sh 1720 per ton. The respondent was to offer ploughing, harrowing, furrowing, seed cane, surveying and fertilizer services to the appellant.

**8.** In the locality, crop yields were 68.87 ton/hac. Ratoon crop yields were 50.14 ton/hac.

**9.** Richard testified that in this case the appellant failed to avail the cane to the defendant as per Clause 3.1.2 of the agreement.

**10.** The trial court found that indeed the respondent was in breach of the terms of the agreement. It proceeded to dismiss the suit on the basis that damages for breach of contract cannot be awarded and that special damages must be specifically pleaded and strictly proven.

**11.** Having re-evaluated the evidence my conclusions are as follows;

**12. Section 107** of the **Evidence Act** provides in clear terms on the burden of proof in a case before court. It states;

> *"S 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

**13.** The appellant had the duty to prove that after the contract was entered into, he proceeded to plant cane, the same was properly taken care of, matured and was ready for harvest but the respondent failed to harvest the crop.

**14.** In his evidence as per the witness statement, the appellant states that the cane matured at 22 – 24 months which the respondent neglected to harvest. He offers no evidence by way of photographs or otherwise that the crop matured. He bore the burden of prove that the cane matured.

**15.** In **Karugi & Another –vs- Kabiya & 3 Others [1987] KLR 347**, the Court of Appeal held that the burden on a plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.

**16.** The appellant in this matter had to satisfy the court that he performed his part of the contract before any breach on the part of the respondent can be said to arise.

**17.** On the evidence before the court, the appellant has failed to provide evidence that the cane was planted and matured and therefore the alleged breach of failing to harvest by the respondent remains unproved.

**18.** To that extent, I find and hold that the trial court fell into error on its finding that there was a breach.

**19.** Even assuming there was breach, the question of what damages, if any, that were payable comes to the fore.

**20.** At paragraph 20 of the plaint the appellant stated;

> *"9. The plaintiff's plot was capable of producing an average 135 tonnes per hectare and the rate of payment then applicable per tone was Kshs. 1,730/=. And the plaintiff claims damages.*

**21.** Under the prayers in the plaint the appellant particularized his prayers as;

> **a. Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of sugarcane on 0.8 hectares of land at the rate of 135 tonnes per acre (65 tonnes per hectare and payment of Kshs. 1,730/- per tone.**
>
> **b. Costs of this suit.**
>
> **c. Interest thereon at court rates until payment in full.**
>
> **d. Any other relief this honourable court deems just and expedient to grant.**

**22.** The trial court in addressing damages stated that damages for breach of contract cannot be awarded and placed reliance on the cases of **Kenya Breweries Ltd –vs- Kiambu General Transport Agency Limited Civil Appeal No. 9 of 2000 [2000]2 EA 398** and **Provincial Insurance Company of East Africa Ltd –vs- Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995 – 1998] 2 EA 289.**

**23.** It proceeded to find that special damages must be specifically pleaded and proved.

**24.** It concluded that the appellant's claim was unclear and the court could not frame the prayer for the party.

**25.** In my considered view damages for breach of contract can be awarded. These are, however, specific damages which are known at the time of filing suit. They are not general damages to be quantified by court. As held in **Provincial Insurance Company of East Africa Ltd –vs- Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995 – 1998] 2 EA 289.**

> *"Whatever compensation the plaintiff could claim under the policy was ascertainable and quantifiable before the action was filed. These were clearly special damages which were not pleaded. It is well established that special damages need to be specifically pleaded before they can be awarded. No general damages may be awarded for a breach of contract."*

**26.** In the case of **Delilah Kerubo Otiso –vs- Ramesh Chander Ndingra [2018] eKLR,** the Court of Appeal quoted the finding in **Hardley**

**–vs- baxen Dale [1854] 9 Exch 341 1** where it was held that the measure of damages was such as may be fairly and reasonably considered arising naturally from the breach of what the parties may reasonably contemplate at the time of making the contract and the probable result of such breach. The purpose of damages is to put the plaintiff as far as possible in the position he would have been in had the breach complained of not occurred.

**27.** In our instant suit the appellant made an ambiguous prayer seeking compensation for loss of sugarcane on 0.8 hectares of land at the rate of 135 tonnes per acre (65 tonnes per hectare).

**28.** A cursory reading of the plaint leaves one with uncertainty as to what the appellant's claim really was.

**29.** A hectare is larger in size than an acre. It is inexplicable how as per *prayer (a)* above an acre, would yield more than a hectare (135 and 65 tonnes respectively). This renders that prayer ambiguous. Special damages must be specifically pleaded and proved.

**30.** The trial court at line 5 of page 76 line 5 of the record of appeal wrongly paraphrased prayer (a) by indicating *"……65 tonnes per hectare or 135 tonnes per hectare"*.

**31.** Having re-evaluated the pleadings and the evidence, it is clear as set out in paragraph 12 above that prayer (a) is ambiguous the mix up by the trial court at line 5 page 76 notwithstanding.

**32.** The law on pleadings is very clear that they must be clear and specific (See **Thomas Nthiwa Mwanzia –vs- Sammy Kisangi Mutie & Another [2016] eKLR**. The pleading in the appellant's case (the plaint) is unclear on what the prayers are. The trial court was spot on in holding that it could not draw the prayer(s) for the appellant.

**33.** The appellant went through the entire trial without making any effort to amend the pleadings to bring clarity to his case. The Law on amendments to pleadings is clear and very flexible. The appellant cannot be rewarded for his indolence.

**34.** The court in **Southern Credit Banking Corp Ltd –vs- Charles wachira Ngundo, Milimani HCCC No. 1780 of 2000** held;

> *"… I do not think I can draft a prayer for a party and sit to decide on that prayer. I can only decide on prayers before me. There is no prayer before me seeking injunction pending the determination of this suit. The prayer before me is injunction pending the inter partes hearing of the application. The application has been heard inter partes and I have nothing more before me to decide upon. As I cannot make decisions on a matter or prayer not before me and this application has by its very wording ceased to exist, I do dismiss it with costs to the respondent."*

**35.** The trial court properly addressed itself to this issue and cannot be faulted.

**36.** From the foregoing, I find and hold that the appellant did not prove his case over the alleged breach on a balance of probabilities. Even if that threshold had been achieved, he was not entitled to any damages as his claim was unclear and ambiguous.

**37.** I find no merit in the appeal and dismiss the same with costs to the respondent.

**Dated, Signed and Delivered at Kisii this 26th day of February, 2020.**

**A. K. NDUNG'U**

**JUDGE**