REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 35 OF 2019

MARTHA A. WAO.....APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree of Hon. S.K Onjoro (SRM) dated 15th day of March 2019 in Kisii CMCC No. 669 of 2010)

JUDGEMENT

1. The appellant filed her claim before the lower court seeking damages for breach of contract, cost of the suit and interest. The appellant claimed that by a written agreement dated 14th July 2004 the respondent contracted the appellant to grow and sell to it sugarcane on her plot number 434 in field number 116 measuring 0.4 hectares in Kakmasia Sub location. The appellant was assigned account number 262467. It was an express term of the contract that the contract would remain in force for a period of 5 years or until one plant crop and two ratoon crops of sugarcane are harvested.

2. The appellant averred that the respondent in breach of the agreement, failed to harvest the plant crop when the same was mature and ready for harvesting and the cane started deteriorating. The appellant pleaded that the plot was capable of producing 135 tonnes per hectare for the plant crop and the 2 ratoon crops. The rate of payment applicable at the time was Kshs 2,015 per tonne she claimed Kshs 326,430/- for the 3 cycles.

3. On 23rd August 2011 the Respondent's entered appearance and thereafter filed their list of documents and list of witnesses. Having carefully perused the record, I did not see the respondent's statement of defence.

4. At the hearing before the trial court Martha A. Wao (Pw1) adopted her witness statement as her evidence in chief. She gave evidence that when the plant crop matured the respondent failed to harvest the cane, the 2 ratoons were subsequently never harvested and thus claimed loss for 3 cycles. The respondent relied on the evidence of Richard Muok (Dw1). He testified that cane was planted on 27 th September 2004. Dw1 told court that the plant crop was crushed into jaggery and on 18th October 2006 they issued a memo to the appellant, but the same remained unanswered. It was his testimony that the contract was terminated by the farmer.

5. The trial court in dismissing the appellant's suit held as follows;

> *"As to whether the plaintiff can be awarded damages for breach of contract (sic). It is trite law that general damages cannot be claimed for breach of contract. See KENYA BREWERIES LTD VERSUS KIAMBU GENERAL TRANSPORT AGENCY LIMITED CIVIL APPEAL NO. 9 OF 2000[2000] 2 EA 398 AND PROVINCIAL INSURANCE CIMPANY OF EAST AFRICA LTD VERSUS MORDEKAI MWANGA NANDWA CIVIL APPEAL NO 179 OF 1995 [1995-1998] 2 EA 289.*
>
> *The prayer for general damages must therefore fail and that being the main sought the plaintiff's suit must also fail (sic)."*

6. It is the said judgment that triggered the appeal herein. The grounds raised by the memorandum of appeal are as follows;

> *a) The learned trial magistrate erred in holding that the pleadings in the plaintiff's suit was not in the nature of special damage claim yet the cause of action sufficiently disclosed the nature of the plaintiff's claim in contract.*
>
> *b) The learned trial magistrate failed to appreciate that from the nature of and circumstance of the case, the pleadings were sufficient and properly served the purpose and requirement in law of putting the defendant on notice as to what it was expected to*

meet at trial.

c) The learned trial magistrate erred in law in holding that damages were not awardable in the suit, yet she had enough material and proof to enable her make the award and indeed make an assessment as was required in law.

d) The learned trial magistrate erred in law in failing to find that the plaintiff's claim was liquidated claim and/or was for services rendered upon a contract duly proved.

e) The learned trial magistrate erred in law in relying and putting emphasis on style and form rather than substance in the pleadings and hereby arrived at a wrong decision.

f) In all circumstances of the case the defendant did not suffer any prejudice and the learned trial magistrate ought to have awarded the plaintiff the assessed amount, cost and interest.

DETERMINATION

7. Being the first appellate court, I am required to re-evaluate the evidence independently and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify *(See* ***Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348****).*

8. Having considered the evidence on the record and the appellant's submissions, I turn to the issue whether the plaint sought for general damages as held by the trial court or was a special damage claim. The Court of Appeal in **Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018]eKL** held that a claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity. The Court in **Godfrey Julius Ndumba Mbogori & another v Nairobi City County case (supra)**cited the holding in the case of ***Ouma v Nairobi City Council (1976) KLR 304*** where Chesoni, J (as he then was) held as follows;

"Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533;-

The character of the acts themselves which produce the damage, and the circumstances under which these acts are 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."

9. Paragraph 7 of the plaint reveals that the appellant had sought special damages as particularized therein. In the said paragraph, the appellant averred as follows;

"7. In breach of the agreement, the defendant failed to harvest the plant crop when the same was mature and ready for harvesting 22-24 months of age and the cane started deteriorating.

PARTICULARS OF LOSS AND DAMAGE

The plaintiff's plot was capable of producing an average of 135 tonnes per hectare for the plant crop and 135 tonnes per hectare for the ratoon crop and the rate of payment then applicable per tonne was Kshs 2,015 and the plaintiff claims damages for three (3) crop cycles as particularized:

a) Expected yield for plant crop 135 tonnes x 0.4 ha x 2,015
108,810

b) Expected crop yield for 1st ratoon crop 135 tonnes x 0.4 ha x 2,015
108,810

c) Expected crop yield for 2nd ratoon crop ***135 tonnes x 0.4 ha x 2,015***
108,810

TOTAL 326,430*"*

10. The Court of Appeal in ***John Richard Okuku Oloo v South Nyanza Sugar Co Ltd [2013] eKLR*** while making a determination on whether the appellant in their plaint before the trial magistrate failed to particularize the claim on special damages held as follows;

"In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of land which was 0.2 hectare (paragraph 3 of Plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=.The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.

.....

We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof."

11. The court in ***Siree vs Lake Turkana El Molo Lodges (2002) 2EA 521***held that "*when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages*." Similarly in this case I find that the trial magistrate erred in holding that the appellant's suit mainly sought an order for general damages and failed to consider the special damage claim at paragraph 7 of the plaint.

12. It was the appellant's testimony that the plant crop was to be harvested after 24 months and the ratoon crops after 16-18 months. In her witness statement she stated that the cane dried up and went to waste. Dw1 testified to the contrary that the cane was planted on 27th September 2004 but the same was harvested by the appellant and crushed to jaggery.

13. It was not in dispute that the parties entered into a *'Growers Cane Farming and Supply Contract'* which as per clause 2 was deemed to have commenced on 14th July 2004. As at 27th September 2004 the appellant confirmed that planting had been satisfactorily completed. The plant crop was therefore mature by 27th September 2006 after lapse of 24 months. The respondent claimed to have issued a memo to the appellant claiming that she crushed the cane to make jaggery. **Section 109** of the **Evidence Act** provides that *'the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*.'

14. There was no evidence tendered by the respondent to support its assertion that the sugar cane was crushed and turned into jaggery. What is clear is that the plant crop matured on 27th September 2006 and the same was not harvested as per the parties' agreement and in the circumstance, I find that the respondent breached the contract.

15. In determining whether the appellant is entitled to all the 3 cycles, I am guided by the decision in **Martin Akama Lango v South Nyanza Sugar Company Limited KSM HCCA No. 20 of 2000 (UR)**where the court found that:

"*[The Contract] remains in force for a period of five years or until one plant and two ratoon crops are harvested on the plot.*

To my mind what that means especially the last part is that one plant and two ratoon crops must be harvested in fulfillment of the obligation of the parties agreement ……. When the Respondent failed to do the harvesting and waited for until the crop was burnt by arsonists, it was in breach of the terms of the agreement and had the trial magistrate correctly interpreted the provisions of the said agreement, she should have held that the respondent was in breach of the contract and liable to pay damages."

16. While the appellant is entitled for 3 cycles made up of the plant crop, 1st ratoon and 2nd ratoon this must be subject to the costs incurred by the respondent. DW 1 testified that the following were recoverable from the cane proceeds;

D.A.P Fertilizer (1 bag)	Kshs 1,394
Urea (1 bag)	Kshs 1,244
Cost of Survey	Kshs 111.20
Cost of seed cane	Kshs 11,467.20
Total	**Kshs 14,216.40**

The computation for the 3 cycles would thus be made up as follows;

Plant crop	*135 tonnes x 0.4 ha x 2,015 = 108,810*
1st ratoon crop	*135 tonnes x 0.4 ha x 2,015 = 108,810*
2nd ratoon crop	*135 tonnes x 0.4 ha x 2,015 = 108,810*
	326,430
	Less 14,216.40
TOTAL	***312,213.60***

17. The final issue for the court's consideration is on interest. The plaintiff sought interest from 14th July 2004 when the agreement before the parties commenced. In ***Dipak Emporium vs. Bond's Clothing Civil Appeal No. 64 of 1972 [1973] EA 553*** it was held that:

> ***"Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit."***

18. The appellant having instituted his claim on 5th May 2011, the interest shall begin running from the date of filing suit until payment is made in full.

19. For the reasons I have set out herein, I find the instant appeal merited and hereby allow it. I will proceed to make the following final orders:

1. **The judgment of the trial court is hereby set aside and substituted with a judgment for Kshs. 312,213.60/- together with interest from the date of filing the plaint.**

2. **The appellant is awarded the costs of this appeal.**

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

A. K. NDUNG'U

JUDGE