



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 72 OF 2015

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT/CROSS-RESPONDENT

versus

HON. SHADRACK MANGA.....RESPONDENT/CROSS-APPELLANT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident

Magistrate in Migori Chief Magistrate's Civil Suit No. 242 of 2015 delivered on 29/05/2018)

JUDGMENT

1. There is an appeal and a cross-appeal in this matter. The appeal was preferred by *South Nyanza Sugar Co. Ltd* whereas the cross-appeal was instituted by *Hon. Shadrack Manga*. In this appeal I will refer to *South Nyanza Sugar Co. Ltd* as the 'Appellant' and *Hon. Shadrack Manga* to as the 'Respondent'.

2. The background of the appeal is that the Respondent filed **Cause No. 1530 of 2012** before the defunct Sugar Arbitration Tribunal (which cause was later transferred to and was assigned as **Migori Chief Magistrate's Court Civil Suit No. 242 of 2015** (hereinafter referred to as 'the suit') against the Appellant herein. The Respondent claimed that by a Growers Cane Farming and Supply Contract entered into on 18/02/2005 (hereinafter referred to as 'the Contract') the Appellant contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 312 Field No. 14 in Moheto Sub-Location measuring 18.8 Hectares within Migori County.

3. The Respondent pleaded that the Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first. That, the cane was company-developed in that the Appellant provided the Respondent with some inputs and services. That, the Respondent discharged his part of the contract until the plant crop was ready for harvesting but the Appellant without any justification only harvested part of it and it refused and/or failed to harvest the rest of it hence compromised the development of the ratoon crops and that he suffered loss.

4. Aggrieved by the alleged breach of the contract the Respondent filed the suit claiming compensation for the loss of the unharvested ratoon crop cycles of the sugar cane together with costs and interest at court rates.

5. The Appellant entered appearance and filed an Answer to the Claim dated 14/03/2013 wherein it denied both the contract and the breach and put the Respondent into strict proof thereof. The Appellant prayed for the dismissal of the suit with costs. The parties filed their statements as well.

6. The suit was finally settled down for hearing where both parties were represented by Counsels. The Respondent testified through an agent one *Chrispinus Weiria Gibagiri* (hereinafter referred to as 'Chrispinus') as the sole witness. Chrispinus produced a Power of Attorney dated 02/08/2015 in support of his agency among other exhibits. The Appellant called its Senior Field Supervisor as its sole witness who adopted his statement and produced documents as exhibits.

7. The trial court rendered its judgment on 29/05/2018 and allowed the suit by remedying the Respondent the value of the plant crop and the first ratoon crop at Kshs. 4,591, 170/= with costs and interests. The interest was to run from the date of judgment.

8. Both parties were aggrieved by the judgment. The Appellant lodged an appeal whereas the Respondent filed a cross-appeal. Whereas the appeal was on the entire judgement, the cross-appeal was on the time when the interest ought to start running from.

9. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The Appellant challenged the findings of the trial court vigorously and more so claiming that the court erred in awarding the value of the cane which was

not pleaded and proved and also failed to take mitigation of loss into account, that the award was not based on any evidence and that the court erroneously relied on a defective power of attorney. The Appellant referred to various decisions in support of its submissions.

10. The Respondent supported the judgment and prayed for the dismissal of the appeal. He however contended that the interest ought to have run from the date of filing of the claim before the tribunal. The Respondent also relied on various decisions in support of the cross-appeal.

11. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

12. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of the appeal and the cross-appeal, submissions and the decisions referred to by the parties.

13. I will begin with the issue of the power of attorney.

14. The Appellant challenged the power of attorney right from the trial court on four fronts. *First*, that the power of attorney was not registered. *Second*, that it was not signed by the purported donee (Chrispinus); *third*, that it was not signed by the Advocate before whom it was purported to have been signed and *fourth*, that it was not approved by the court. The Appellant submitted that the power of attorney went to the root of the matter and that the illegality cannot be cured under **Article 159** of the **Constitution**.

15. The trial court however did not render itself on the issue. I will however consider the issue since it has again been raised on appeal.

16. The starting point is that there is no statute in Kenya governing powers of attorney. There is however the **Registration of Documents Act, Cap. 285** of the Laws of Kenya (hereinafter referred to as '**RDA**') which provides for *inter alia* mandatory registration of certain documents.

17. **Section 4** of the **RDA** provides as follows: -

All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:

Provided that the registration of the documents following shall not be compulsory-

i) any composition deed;

ii) any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;

iii) any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;

iv) any endorsement upon or transfer of any debenture issued by any such company;

v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;

vi) any lease or licence of land for any term not exceeding one year; or

vii) any document registrable under the provisions of the Government Lands Act (Cap.,280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap.300):

Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this Act.

18. Further, **Section 5** of the **RDA** provides that: -

Any other document may be registered, at the option of the person holding the same:

Provided that a registrar may refuse to register any such document, for reasons to be stated by him in writing.

19. To be able to determine whether the power of attorney in this matter fell within the category of the documents which must be registered,

a look at the power of attorney itself is inevitable. The same was tailored as follows: -

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES'S COURT AT MIGORI

CIVIL SUIT NO. 242 OF 2015

HON. SHADRACK MANGA.....PLAINTIFF

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....DEFENDANT

GENERAL POWER OF ATTORNEY

ORDER 9 RULE 2 CIVIL PROCEDURE RULES 2010

I, **SHADRACK ROGER MANGA** holder of ID No. 1868617 and of P. O. Box 20190 Nairobi, HEREBY APOINT CHRISPUS WEIRIA GIBAGIRI ID/NO 8807554 to be my Agent/Attorney and generally in relation to my interest in the above mentioned suit, to do anything and everything that I myself could do, and for me and in my name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers given within the Republic of Kenya do hereby swear affidavit and state as follows;

Signed by the Donor

In the presence of

20. The power of attorney related to the suit. It was a revocable general power of attorney. The documents referred to in **Section 4** of the **RDA** relates to interests in immovable properties.

21. **Section 2** of the **RDA** defined '*immovable property*' to include *land, buildings, hereditary allowances, rights of way, lights, ferries, fisheries and any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber (except coconut trees), growing crops or grass.*'

22. The suit therefore did not deal with an immovable property. It simply related to a breach of contract. I hence find and hold that the power of attorney in this suit did not require registration.

23. On the second limb, the law is silent on whether a power of attorney must be signed by the donee. I have researched on the subject without much success. Most of the decisions I came across dealt with registration of documents in land law.

24. On my part, and only limited to this case, I take the position that there was no legal requirement that the power of attorney was to be signed by the donee. Whereas it may be desirable for the donee to sign the power of attorney failure thereof does not render the power of attorney invalid. However, as a condition precedent to its validity a power of attorney must certainly be signed by the donor.

25. There was also the contention that the power of attorney was not executed before an Advocate as purported. I have carefully looked at the copy of the power of attorney in the Record of appeal and the copy thereof in the suit. The original power of attorney was not produced in evidence. The copy thereof was however produced by the consensus of the parties.

26. Production of a document as an exhibit is different from proof of the contents of that document. A document may even be produced by the consent of the parties, but that is still far from proof of its contents. Even after the production of a document and its admission as an exhibit, if the contents therein or part thereof are disputed then such disputed contents are subject to proof. If the disputed contents are not proved, then such contents remain as such; unproved, despite the mutual production of the document.

27. The Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** clearly stated the correct legal position on production of exhibits and proof of the contents of those exhibits. The Court stated as follows: -

18. Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record..... (emphasis added).

28. The Appellant denied every part of the claim. The Respondent was under a duty to prove his case as required in law. That duty included proof of the contents of the power of attorney. The power of attorney was to the effect that the Respondent revocably granted all his right in the suit to Chrispinus. The Respondent did not appear before Court to confirm as such. The only communication to that effect from the Respondent was through the power of attorney.

29. The wording of the power of attorney was clear that what the Respondent stated was to be attested before a witness. The contemplated witness was an Advocate. I say so because of the stamp affixed at the place where the witness was to sign. It was a stamp for *Messrs. Okong'o Wandago & Company Advocates* Commissioner for Oaths and Notary Public.

30. A look at the stamp reveals that there was no signature by the intended witness. That was the argument by the Appellant. Without much ado the power of attorney was not witnessed either before an Advocate or at all. It remains unwitnessed.

31. What is then the effect of an unwitnessed power of attorney? In **Nairobi HCCC No. 1141 of 2000 Samuel Mburu & Another vs. Eco Bank Limited & 4 Others (2019) eKLR** the Court found that an unsealed and unattested Agreement of Sale of land was null and void and incapable of conferring the intended interest. In **Ismail Suleiman & 9 Others vs. Returning Officer Isiolo County Independent Electoral and Boundaries Commission & 4 Others (2013) eKLR** the Court held that an affidavit which was not attested before a Commissioner for Oaths was not an affidavit at all and could not be relied as part of the evidence.

32. In **Abraham Mwangi vs. S.O. Omboo Nairobi HCCC No. 1511 of 2002** (unreported) the High Court while rejecting annextures to an affidavit which were not sealed and attested by a Commissioner for oaths although the affidavit itself was duly attested held that: -

The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case the application fails and is dismissed.

33. Still dealing with unattested annextures to an affidavit, the Court in **Solomon Omwenga Omache & Another vs. Zachary O. Ayieko & 2 Others (2016) eKLR** held as follows: -

Before the court is a replying affidavit with annextures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annextures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to the counsels or their assistant's lack of attention and due diligence.

34. There is another issue on the execution of the power of attorney which I noted. Although the issue was not raised by the parties I just realized that the signature of the Respondent on the power of attorney and the one on the statement dated 02/08/2015 (the same date as the power of attorney) at page 10 of the record of appeal are completely different. There is another statement by the Respondent evenly dated and signed in the lower court file but not in the record of appeal with yet another signature. I have also come across a Replying Affidavit of the Respondent sworn on 11/07/2018 and filed in court on 12/07/2018 yet again with another signature of the Respondent. I will rest the matter at that since, as earlier said, the issue was not raised at trial and on appeal.

35. Returning to the power of attorney I am alive to the fact that the documents (affidavits and the Agreement for sale of land) referred to in the various foregone persuasive decisions were required under specific statutes to be attested before a witness and the annextures duly stamped and attested. That is not the position in this case. As stated above, there is no statute requiring that powers of attorney must be attested before a witness. I however note that witnessing of powers of attorney is greatly recognized as the norm but since there is no specific provision of a statute requiring such I will not find that failure to attest the power of attorney rendered it of no evidential value. Had the power of attorney not been signed by the Respondent or if there was a specific provision of any law requiring the attestation of powers of attorney I would not have hesitated to find otherwise. In such a case even recourse to **Article 159(2)(d)** of the **Constitution** would not have cured that glaring defect.

36. The fourth issue raised by the Appellant in respect of the power of attorney was that no leave of the court was neither sought nor granted prior to the reception of the evidence of Chrispinus. The argument was based on **Order 9 Rule 2(a)** of the **Civil Procedure Rules, 2010** (hereinafter referred to as '**the Rules**'). It was further contended that Chrispinus ought to have been approved to appear as an donee in the suit by the court failure to which all his actions are invalid.

37. **Order 9 Rule 2(a)** of the **Rules** provides that: -

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are -

(a) Subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

38. The foregone Rule as well as the Appellant's argument have been dealt with by Courts. In **Jack J. Khanjira & Another vs. Safaricom Limited (2012) eKLR Mwangi, J** refused to approve a holder of a power of attorney/donee whose scope was to appear and act for a party. The Court held that such powers transcended the intended scope of a donee in law into the realm of an Advocate. The Court stated as follows: -

21. Clearly the essential characteristics of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the court.

22. The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in court, they must periodically obtain the approval of the court to do such acts. It is for the court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognized; it is the extent or scope of their agency that is recognized. That is to say, a recognized agent can perform only that which he is recognized or authorized to do in law.

In this regard, I would go as far as to say that, for orderly representation in court, every appearance, act or application by a recognized agent should be subjected to the approval of the court as and when sought to be done.

23. In determining the scope of the mandate of a recognized agent acting under a power of attorney, careful scrutiny of the instrument itself is essential. In the present case, the donor granted Mr. Kalama powers to

a) represent him in court, for all intents and purposes in connection with the suit. This is a power only properly available to an advocate.

b) give evidence - this is obviously impossible, as no person can substitute his evidence for another

c) appear-plead or otherwise conduct the case - these unless used in a technical sense are beyond the scope of the authority of a recognized agent.

Mr. Kalama is not, and cannot be entitled in law to exercise the above powers.

24. In *Theuri*, the following action of the attorney were found to be contrary to the law: drawing a notice of appointment; inviting counsel to fix a hearing date; issuing a chamber summons; appearing before a judge, filing a civil case. *Theuri* was charged and convicted for these acts.

39. On my part I take the view that approval of a donee by a court ought to be encouraged in appropriate circumstances. Where the power of attorney donates what amounts to a transgression of the law Courts must insist on compliance of **Order 9 Rule 2(a)** of the **Rules** with a view of stopping such transgression. If from the reading of a power of attorney nothing seems to be contrary to the law the requirement of approval by the court may not be necessary.

40. In this case the Respondent was represented by Counsel. Chrispinus appeared in place of the Respondent. He only testified on the implementation of the contract. During the contract period Chrispinus was Respondent's the Farm Manager. If the Respondent did not have a Counsel, it would have then meant that Chrispinus would have appeared for and on behalf of the Respondent. Chrispinus would have called and examined witnesses and generally prosecuted the suit on behalf of the Respondent. That would have been a transgression of the law. However, since his participation in the case was only limited to testifying on what he personally took part in during the contract period I find and hold that the failure to seek an approval of the court did not render the evidence and proceedings invalid.

41. Having dealt with all the issues raised by the Appellant on the power of attorney I hereby find that the power of attorney was properly received in evidence. This must however be a wakeup call to Counsels to be more careful in preparation and presentation of documents in Court.

42. The Appellant also argued that the pleadings contravened the settled legal position that special damages ought to be specifically pleaded and proved. The Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** dealt with the issue. The Learned Judges considered a Plaintiff based on a breach of a sugar contract (as in this case) and stated as follows: -

In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and 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.

The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.

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.

Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit. (emphasis added).

43. I therefore find that the suit was not bad in law.

44. On whether the suit was proved, the currency of the contract was admitted. In paragraph 3 of the Appellant's Answer to the Claim the Appellant pleaded in the alternative that if there was any breach of the contract then it was the Respondent's fault in not developing the cane to yield a satisfactory yield.

45. The Appellant maintained that line of defence in its evidence through its Senior Field Supervisor (DW1). DW1 contended that the Respondent planted the cane but did not maintain it to maturity. On cross-examination DW1 stated that he had not produced anything to show that the cane was not maintained as required.

46. On his part Chrispinus testified that, as the Farm Manager, he exercised good crop husbandry until the plant crop was ready for harvesting. He also stated that part of the plant crop was harvested by the Appellant. Chrispinus produced a letter dated 25/07/2006 from the Respondent to the Appellant complaining of the partial harvesting and calling upon the Appellant to complete the harvesting. The letter was admitted in evidence by consent of the parties. The contents thereof were not challenged in any way.

47. I have carefully perused the contract. Clause 6.2 stated as follows:

The Miller shall be entitled to upon expiry of a fourteen day notice and at its own discretion and without relieving the Grower of the obligations under this agreement, in the event that the Grower does not prepare, plant and maintain the plot and the cane in accordance with his obligations under this agreement and / or instructions and advise issued by the Miller to (but not limited to) carry out such operations on the plot which the Miller shall in its sole discretion deem necessary to ensure satisfactory yield and quality.

48. My understanding of the above provision is that in the event of any breach of the contract implementation on the part of the Respondent the Appellant was to issue an appropriate notice citing the breach and calling for remedial action. If the Respondent failed to comply with the notice within 14 days of its service, then the Appellant would exercise its right to step into the shoes of the Respondent and remedy the breach. The Respondent would definitely shoulder the costs thereof.

49. From the record the Respondent proved on a balance of probability that he maintained the cane to maturity. In that case the evidential burden of proof therefore shifted to the Appellant to demonstrate how the Respondent was in breach of the contract. The Appellant failed to discharge the burden. I hence agree with the trial court that the Appellant was in breach of the contract.

50. On the remedies resultant from the said breach, the Appellant vehemently submitted that the trial court erred in not taking into account the doctrine of mitigation of loss.

51. The issue of mitigation of loss is one which is hotly contested almost in every appeal in sugar cases. The issue is pending determination at the Court of Appeal. There are divergent views by the High Court on the issue.

52. I must certainly affirm the position that disputes based on breach of contracts are subject to the principles of ***remoteness, causation and mitigation***. I further agree with the Court of Appeal in several decisions that a party alleging breach of contract must take steps to mitigate loss (See ***African Highland Produce Limited vs. John Kisorio (2001) eKLR***).

53. The question which now arises is how should a Defendant handle the issue of mitigation of loss in a suit where the Plaintiff did not plead how it/he/she mitigated the loss? That question is factual. To me, the burden rests upon the Defendant to demonstrate how the Plaintiff ought to have mitigated the loss. Such approach must first find its basis in the pleadings. By doing so the Plaintiff would be put in sufficient notice and accorded an opportunity to challenge the evidence on mitigation of loss if need be. That is the essence of a fair trial in **Article 50(1)** of the **Constitution**.

54. A defendant should not raise the issue of mitigation of loss on appeal at the first instance. By doing so, the issue becomes a non-issue. The issue must be pleaded and proved. (See the Supreme Court ruling in ***Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR*** and the Court of Appeal in ***The Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR***).

55. I have consciously taken the foregone position on the understanding that contracts are between parties and each contract must be independently scrutinized as there may be some instances where the principle of mitigation of loss may reasonably not be applicable in a dispute more so depending on the terms of such a contract.

56. The foregone has been echoed by some Courts. **Majanja, J.** in ***Kisii High Court Civil Appeal No. 60 of 2017 South Nyanza Sugar Co. Ltd vs. Donald Ochieng Mideny (2018) eKLR*** when he recently (on 21/12/2018) rendered himself on the issue after considering several past decisions including some by yours truly and held that: -

15. Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (See African Highland Produce Limited vs. Kisorio (1999) LLR 1461 (CAK). Since the appellant did not contest the respondent's claim, it did not show how the respondent could mitigate the loss.

16. The appellant's arguments in support of the appeal were attractive but at the end of the day the respondent's case before the trial court was not contested and for this reason, I dismiss the appeal.....

57. In this case the issue of mitigation of loss was not pleaded by the Appellant in the Answer to the Claim. Instead, the Appellant denied the existence of the contract. The Appellant only pleaded in the alternative that upon proof of the contract then the Respondent failed to exercise diligence in growing the cane. The Appellant unfortunately did not lead any evidence on the aspect of how the Respondent would have

mitigated the loss. Infact there was no mention of the issue of mitigation of loss or at all. The issue was only raised for the first time on appeal. How then was the Respondent expected to respond to a non-issue?

58. I therefore find and hold that the issue of mitigation of loss having not been raised in the suit cannot be subject of an appeal.

59. Having so found, I have previously held in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. I still hold that position.

60. In this case the Respondent prayed for the proceeds of the first and second ratoon crops. Certainly, he had no issue with the proceeds of the plant crop. The Respondent was hence entitled to the proceeds of the first and second ratoon crop yields since the pleadings claimed as such. This position is in tandem with the finding of my sister **Okwany, J.** in **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2018) eKLR**.

61. The trial court however awarded the Respondent net proceeds for the plant crop at Kshs. 2,295,585/=. The court respectfully erred since the Respondent did not pray for such. The award cannot stand and is hereby set-aside.

62. The Respondent's appeal was only on the issue of interest. Before I deal with that aspect I will consider whether the Respondent was rightly remedied for the first ratoon crop at Kshs. 2,295,585/=.

63. The court settled for the yields at 1,042.5 tons for the first ratoon crop. The issue of the yields is factual. That being so, evidence must be led to that effect. Both parties tendered evidence on the expected yields. The Appellant relied on its Cane Yields Report and a Cane Yields Report by the defunct Kenya Sugar Research Foundation (Kesref) prepared in November 2008. On its part the Respondent relied on Cane Yields Report by the defunct Kenya Sugar Research Foundation (Kesref) prepared in May 2005.

64. The court rightly relied on the Kesref report(s) on the yields instead of the Appellant Cane Yields Report. The reason being that the reports by Kesref are research-based and were prepared by an independent entity. The question which follows is which of the two Kesref reports did the court rely on? According to the contract and evidence the plant crop was harvested around July 2006. Pursuant to *Clause 1(f)* of the contract the first ratoon crop was expected to be ready for harvesting sometimes in May 2008.

65. The Kesref report prepared in May 2005 was hence applicable for the first ratoon crop. The first ratoon crop would have yielded a mean of 85.1 tons per hectare.

66. There is no dispute on the size of the Respondent's land. It was 18.8 Hectares. The resultant yields for the first ratoon crop would have been 1,600 tons.

67. Both parties relied on the same Respondent's Cane Price Schedule. In May 2008 the price of the cane per ton was Kshs. 2,500/=. The proceeds from the first ratoon yields would have been Kshs. 4,000,000/=. The trial court however awarded Kshs. 2,295,585/=. The award was not appealed against. I will therefore not disturb the award made by the trial court on the first ratoon crop. I must also state that the trial court rightly took into account the transport and harvesting charges.

68. On the issue of interest, the Court in **John Richard Okuku Oloo** (supra) settled the same. It held that interest must run from the date of filing the suit. The trial court however made an order that interest should start running from the date of judgment without assigning any reasons. Such reasons would have demonstrated how the Court of Appeal decision was distinguishable in this case. Respectfully, the trial court erred in making that order. It is hereby set-aside accordingly.

69. I must add that the Court of Appeal was alive to the fact that the lower court case had been filed in 1998 when it rendered its judgment in 2013 after a period of 15 years. The simple reason thereto is that it is well settled in law and has been so held over time that interest starts running from filing of suit in special damages claims like in this case. The Respondent was denied the use of his money for all that period and the interest remain the sole consolation. Further, if the trial court was to otherwise find that interest ought to begin running from any other date then that was a factual issue which ought to have been pleaded and proved and the Respondent given an opportunity to respond. As this Court is bound by precedents, the argument by the Appellant on when the interest ought to start running from is for rejection.

70. Having dealt with all issues raised in this appeal the following final orders do hereby issue: -

(a) The Appeal by Sony Sugar Company Limited partly succeeds whereas the Cross-Appeal by Hon. Shadrack Manga wholly succeeds.

(b) The award of Kshs. 4,591,170/= is hereby set-aside and substituted with an award of Kshs. 2,295,585/=.

(c) The interest on the ward of Kshs. 2,295,585/= shall be from the date of filing of the Claim before the Tribunal.

(d) The Appellant herein, Sony Sugar Company Limited, shall shoulder the costs of the Cross-Appeal whereas the Respondent herein, Hon. Shadrack Manga, will shoulder one-half of the costs of the Appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May, 2020. A. C. MRIMA

JUDGE

Judgment delivered electronically: -

1. okongowadangomigori@gmail.com for Okongo Wandango & Company Advocate for the Appellant.
2. kerariom@gmail.com for Kerario Marwa & Company Advocates for the Respondent
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE