REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 247 OF 2006

MARGARET AKEYO ODONDI.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD....RESPONDENT

(An appeal from the Judgment and Decree of the Senior Resident Magistrate A.A. Ingutia in CMCC No. 503 of 2004 dated 16th August 2006)

JUDGEMENT

1. This appeal arises from suit filed in the lower court on 5th May2004 through plaint dated 27th April 2004 against the respondent seeking the following prayers:-

a. An inquiry as to damages for breach of contract and compensation of the plaintiff for loss of sugarcane on 0.5 hectares for the three lost crop yields

b. Cost of the suit

c. Interest at court's rates until payment is made in full.

2. The trial court after a full hearing dismissed the appellant's suit precipitating the filing of this instant appeal on grounds that;

1. The learned trial magistrate erred in law and in fact in failing to make a finding on the merits of the case after hearing the suit on the merits.

2. The learned trial magistrate erred in law in dismissing the suit by invoking the arbitration clause in the parties (sic) agreement when it was not proper to do so, and when reference to arbitration was not an issue at the trial.

3. The learned trial Magistrate erred in law in accepting and adopting reasons advanced in a notice of preliminary objection date 18th May 2006, after the trial was concluded and without affording the appellant a chance to rebut the same and was thereby guilty of misconduct.

4. The learned trial Magistrate erred in law in finding that the appellant had failed to prove planting of sugar cane by way of "documentary evidence", when there was other acceptable and adequate proof of the said fact.

5. The learned trial Magistrate erred in law in failing to make a finding on damages payable; had the plaintiff succeeded in the suit.

3. The duties of the first appellate court are now settled and were stated in the case of **Sielle vs Associated Motor Boat Company Ltd [1968] EA 123** by Sir Clement De Lestang:

"This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

4. The brief background of this case is that the parties entered into an agreement where the appellant was to grow and sell to the respondent sugarcane grown on the appellant's land being plot number 412B in field number 85 measuring 0.5 Ha situated in Kakmasia sub-location, North Sakwa location. The agreement was to run for 5 years or until 1 plant and 2 ratoon crops of sugar cane are harvested.

5. The appellant alleged that the respondent breached terms of the agreement by failing to harvest the mature plant crop and as a result the cane dried up. The appellant alleged that because of the breach he lost his bargain and expected profits from the expected 3 crop yields.

6. The respondent entered appearance and filed its defence denying breach of contract on its part. It claimed that it failed to harvest the mature cane for reasons beyond its control as there were clashes between the neighboring communities. The respondent claimed that the appellant's plot could only have yielded 62 tonnes per hectare. It was pleaded in the alternative that the plaintiff's suit was time barred as the same was filed out of time without leave of court.

ANALYSIS AND DETERMINATION

7. I will first turn to whether the trial court was correct in referring the dispute to arbitration. The subordinate court in holding that the appropriate forum for resolving the dispute was through arbitration stated as follows;

> "The agreement put in evidence provides that the parties should proceed to arbitration in the event of a dispute. In the tender and spirit of the Arbitration Act Chapter 49 Laws of Kenya, the parties hereto cannot circumvent clause 13 of the agreement and proceed to court before first proceedings of arbitration."

8. The respondent supported the trial court's finding that the dispute was filed pre-mature as the dispute ought to have gone for arbitration. The respondent submitted that the subordinate court was right to rely on the arbitration clause under clause 13 of the agreement and further argued that it is not the business of courts to rewrite contract between parties but merely enforce them. They cited the case of **South Nyanza Co Ltd v Dominic Erick Angila (2011) eKLR** and **Joseph Okoth Ongengo v South Nyanza Sugar Co. Ltd (2018) eKLR** in support of its position.

9. The appellant submitted that the respondent having filed a defence and participated in the trial, waived any right to arbitration. The appellant argued that the respondent had an option to obtain stay and have the matter referred to arbitration. It relied on the case of **Malawi Railway Ltd vs Peter Nyasulu Misc Civil Appeal No. 13 of 1992**(Malawi Supreme Court) and the case of **Kisumuwalla Oil Industries vs PAN Asiatic Commodities 1995-1988 EA 153 at page 159(j)**.

10. It can be ascertained from the record that the respondent entered appearance and filed its defence. The respondent in its statement of defence admitted the jurisdiction of the court. The respondent thus subjected itself to jurisdiction of the trial court and lost the right to rely on clause 13 of the contract. The Court of Appeal in **Adrec Limited v Nation Media Group Limited [2017] eKLR**, **CIVIL APPEAL NO. 75 OF 2017, held as follows;**

> "**…**It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position.
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> 15. **In FAIRLANE SUPERMARKET LIMTED VERSUS BARCLAYS BANK LTD** NBI HCCC NO.102 OF 2011, this court held that –
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> "the option to refer to the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE COMPANY VS. WACHIRA (1995-1998) IEA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence ...
>
> any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration."

11. The second issue for consideration is whether the plaintiff's suit was time barred. The respondent contends that there was no clarity on when the breach of contract occurred. It was argued that if the breach occurred in January of 1998 then the six year statutory period lapsed in January of 2004 yet the appellant filed suit in May of 2004. The respondent cited the following decisions in support of its case: **South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor (2017) Eklr**; **South Nyanza Company Limited v Peter Okanda Oketch (2012) Eklr;** and **Patrick Owino Kula v South Nyanza Company Limited**. The appellant on the other hand contends that she filed her suit before the lapse of the 6 year period and relied on the case of **Zadock N. Danda vs South Nyanza Sugar Co. Ltd HCCC No. 11 OF 2017**.

12. Having considered the facts presented before the trial court I find that the appellant's suit was not barred by statute. Margret Akeyo Odondi (Pw1) testified that the cane was to be harvested in June of 1998 and thus the respondent's breached its contractual obligations in June of 1998. The plaint having been filed on 5th May 2004 was filed within the 6 years statutory period.

13. I will now proceed to determine merits of the case, but first I must set out the facts that emerged at the hearing before the subordinate court.

14. Margret Akeyo Odondi (Pw1) testified that she had an agreement with the respondent who was to harvest 3 crop cycles. She planted and weeded the crop but the respondent failed to harvest. She testified that she was expecting yield of 133 tones and payment at the rate of Kshs

1,730 per tonne. Booker Omuga (Pw2) testified that he hold a Bachelor of Science and works at the Ministry of Agriculture. He testified that when the respondent failed to harvest the cane he went to the appellant's plot and observed that the plant crop was not harvested and the ratoons were not developed. He established that the plant crop would have yielded 100 tonnes per hectare, the 1st ratoon 90 tones while the 2nd ratoon was expected to yield 80 tonnes per hectare. He testified that the appellant was expecting Kshs 233,500/- from the 3 crop cycles.

15. The respondent did not call any witness in support of its case.

16. I now turn to the issue of special damages. It is trite law that special damages must be specifically pleaded and proved. The respondent submitted that the appellant's claim is one for dismissal as she did not sue for a specific amount. In support of its case it relied on the case of **Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited (2016) eKLR** and **South Nyanza Sugar Co. Ltd v Domnic Erick Angila (supra)**.

17. The appellant in her reply to the respondent's submissions urged the court to disregard the respondent's authorities as they are no longer good in law in light of the Court of Appeal's decision in **Richard Okuku Oloo v South Nyanza Sugar Co. Ltd 2013 eKLR, HCCA No. 278 of 2010**.

18. The decision cited by the respondent, **South Nyanza Sugar Co. Ltd v Domnic Erick Angila (supra)** is merely persuasive the same having been made by this court.

19. In the Richard OkukuOloo v South Nyanza Sugar Co. Ltd case (supra) the Court of Appeal held 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 mine)

20. In this instant case the claim for special damages is clearly set out in the plaint at paragraph 7 and 8;

> "7. By reason of the said neglected (sic) and breach, the plaintiff lost his bargain and expected profits from the expected three (3) crop yields.
>
> 8. The plaintiff's plot was capable of producing an average of 135 tonnes per hectare at the rate of payment then applicable per tonne was Kshs. 1,730/- and the plaintiff claims damages."

21. I therefore find that the appellant had clearly pleaded special damages in her plaint.

22. The next issue for consideration is whether the appellant is entitled to the award of special damages. Pw1 testified that she planted the plant crop but the respondent failed to harvest it when it was mature. Pw2 who holds a bachelor of science and works for the Ministry of Agriculture after visiting the appellant's farm testified that the area would have yielded 100 tonnes per hectare for the plant crop, while the 1st and 2nd ratoon would have yielded 90 and 80 tonnes respectively.

23. The respondent did not call any witness to tender evidence in its favor and the defence filed before the trial court therefore remains mere allegations. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

24. According to the survey carried out the appellant's land was 0.5 Ha. Both Pw1 and Pw2 both testified that the cane was being sold at Kshs 1,730 per tonne. I therefore find that the appellant is entitled to special damages made up as follows;

Plant Crop	1,730 x 0.5 x 100 = 86,500

1st Ratoon	1,730 x 0.5 x 90 =	77,850
2nd Ratoon	1,730 x 0.5 x 80 =	69,200
TOTAL		**233,500**

25. The only issue that now remains for determination is interest. The appellant filed her suit on 5th May 2004 and on 3rd February 2005 the matter was set down for hearing on 14th July 2005 and judgment delivered on 19th September 2006. The appeal was subsequently filed on 11th of October 2006. Although the appeal herein was filed more than 10 years ago, the same was first mention before this court on30th October 2019. Although the appellant argued that the file was misplaced, there was no request made to have the file reconstructed 13 years after the filing of the appeal. The delay to have the appeal heard was in my view occasioned by the appellant.

26. The appellant in her submissions contends that she is entitled to interest from the date of filing suit and has cited the case of **Mathews O. Ogot vs South Nyanza Sugar Co. Ltd HCCA No. 64 of 2019**.

27. However I am inclined to agree with the respondent's submissions that the appellant was to blame for failing to prosecute her appeal. the respondent cited the case of **Kengeta Beer Distributers Limited v Kubai Kiringo & 2 Others (2018) Eklr** where the court held as follows;

> "21. Following what I have stated, I allow the appeal only to the extent that I award the appellant an additional Kshs. 135,057/- in special damages for cost of spare parts and mechanical repairs and wiring. I note that this appeal is a 2008 appeal and from the record, it is the appellant who bears the blame for not prosecuting it. In fact, the court, notified the appellant several times that it would be dismissed. It would therefore be unconscionable to award interest on that part of the claim from the time the suit was filed noting that this appeal has taken 10 years to prosecute. Section 26 of the Civil Procedure Act gives this court discretion to award interest. I therefore award interest on the said sum from the date of filing suit up to the date of payment of the other decretal amount. The interest however, shall accrue from the date of this judgment."

28. The Court of Appeal while sitting at Nairobi in the case of **Peter M. Kariuki v Attorney General NRB CA Civil Appeal No. 79 of 2012 [2014]Eklr** held as follows;

> "Award of interest is in the discretion of the Court, which discretion must be exercised judiciously. See KENINDIA ASSURANCE CO LTD V ALPHA KNITS LTD & ANOTHER, (2003) 2 EA 512 and OMEGA ENTERPRISES KENYA LTD V ELDORET SIRIKWA HOTEL LTD & OTHERS, CA NO. 235 OF 2001 (Unreported). It is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim for interest denied. See METAL BOX CO LTD V CURRYS LTD, (1988) 1 ALL ER 341 and the decision of this Court in MUMIAS SUGAR CO LTD V NALINKUMAR M SHAH, CA NO. 21 OF 2011, (MSA), (unreported). Due to the appellant's own delay in filing his petition, we shall only award interest from the date of decree of the High Court till payment in full."

29. In this regard, I hereby award interest from the date of filing suit up to the date in which judgment of the trial court was entered, then from 30th October 2019 up until payment shall be made in full.

30. From the foregoing, the appellant is awarded Kshs 233,500 with interest as stated above.

31. I award the costs of the appeal to the appellant.

Dated, Signed and **Delivered** at **KISII** this **23rd** day of **September 2020**.

A. K NDUNG'U

JUDGE