



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 102 OF 2019**

**BETWEEN**

**KENYA SUGAR RESEARCH FOUNDATION.....APPELLANT**

**AND**

**ONSANGO FARMERS CO-OP SOCIETY LIMITED....RESPONDENT**

**(Being an Appeal from the Judgment and Decree in Kisumu CMCC ELC No. 46 of 2017 by Hon. C.L. Yalwala (PM) on 09<sup>th</sup> April, 2019)**

**JUDGMENT**

**1. ONSANGO FARMERS CO-OP SOCIETY LIMITED (*Respondent*) sued GUARDIAN KENYA SUGAR RESEARCH FOUNDATION (*Appellant*) in the lower court claiming Kshs. 3,699,215.60 being the costs of sugarcane damaged by fire on 20.01.09 allegedly due to the negligence of the Appellant.**

2. The Appellant denied the claim and urged the court to dismiss it with costs.

3. In a judgment delivered on 09<sup>th</sup> April, 2019, the learned trial Magistrate found that the Respondent had proved its claim and condemned the Appellant to pay Kshs. 3,699,215.60 with costs.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 27.08.2019 filed the Memorandum of Appeal dated 21.08.19 which he raised 11 grounds which I have summarized into 3 grounds that: -

**1. The Respondent did not provide a link between the Appellant's actions and the alleged damage to its sugarcane**

**2. The Learned Magistrate erred in disregarding the Appellant's expert evidence**

**3. The Learned Magistrate erred in awarding Kshs. 3,699,215.60 without discounting for unseen circumstances such as acts of God, fall in cane sugar price and bad weather**

**ANALYSIS AND DETERMINATION**

5. I have carefully perused the record before me, and considered the grounds of appeal and submissions on behalf of both parties.

6. I am mindful of my duty as an appellate court which is grounded in Section 78 of the Civil Procedure Act to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to my own conclusion, but in doing so, I must give an allowance of the fact that I neither saw nor heard the witnesses as they testified. See **Selle v Associated Motor Boat Co [1968] EA 123.**

## **Evidence on record**

7. In support of its case, the Respondent called five witnesses. **PW1 Yona Maina Koko**, the Respondent's chairman upon being informed about fire on their farm on 20.01.09 rushed to the scene and finding the sugarcane on fire reported the matter to the police and was issued with a police abstract by **PW4 Sgt David Makali**. **PW2 Martin Maeti Abuto** who was visiting his friend near the Respondent's farm and **PW3 William Adenga** who was a guard in a nearby sugar plantation stated that on 20.01.09, they saw Appellant's employees burning trash after which the fire spread into the Respondents farm burning its cane. **PW5 Monica Aluoch Arombe** an agricultural officer visited the scene of the damaged sugarcane and based on the ministry of agriculture crop yield guidelines assessed lost earnings from the damaged sugarcane at Kshs. 3,699,215.60. She tendered a report dated 20.02.09.

8. Appellant called two witnesses. Onyango, an agricultural officer stated that the methodology used in PW5's report was only achievable by using the right seed, right fertilizer and planting at the right time under favourable conditions. Susan Amakulo, the Appellant's farm manager received information from one of Appellant's guards that cane was on fire on their farm and upon visiting the scene found fire both on their farm and the Respondent's farm.

9. I have considered the evidence on record and submission for both parties and deduced the following issues for determination.

**1. Liability for the destruction of Respondent's sugarcane**

**2. Quantum for the damaged sugarcane**

**3. Interest**

## **Liability**

10. It is trite law that whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

**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**

11. Further **Section 109** in narrowing down to proof of particular facts stipulates:

**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.**

12. The foregoing provisions of the law were restated by the Court of Appeal in the case of **Kirugi & Another – Vs – Kabiya & 3 Others [1987] KLR**

347. where it held thus:

**“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”**

13. In this case, the Respondent had the burden to not only prove that its crop was damaged but that the Appellant was liable. This position was restated by the Court of Appeal said in the case of **Kiema Mutuku v Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258** where it held that there is still no liability without fault and a party who alleges negligence must prove it upon a balance of probabilities or else fail in its claim.

14. The trial court found as a fact that there was corroborated evidence by PW2 and PW3 that the fire that damaged the Respondent's crop was started by Appellant's employees and then spread to Respondent's farm. The court also found that Susan Amakulo, the Appellant's farm manager had been informed by one of their guards that there was fire on their farm and upon visiting the scene found fire both on their farm and the Respondent's farm.

15. A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion. (See **Nkuba – Vs – Nyamiro [1983] KLR 403**).

16. From the totality of the evidence, the learned trial magistrate was persuaded and this court is similarly persuaded that the Respondent had proved that fire emanated from Appellant's farm and spread to the Respondent's farm. Consequently, I find that liability at 100% as against the Appellant was well founded.

## **Quantum**

17. It is not disputed that a sugarcane crop, and indeed all crops may not achieve the expected yield due to unseen circumstances such as acts

of God, fall in price and bad weather. With that, I do not find it difficult to agree with the Appellant that the sum of Kshs. 3,699,215.60 ought to have been discounted to take care of such unforeseen eventualities.

18. I have searched case law on the application of the discount rate applicable in cases such as this and did not find any. Doing the best I can however, I find that a discount of 10% is reasonable in the circumstances.

### **Interest**

19. Interest on general damages accrues from the date of judgement as opposed to special damages which accrue interest from the date of filing of the suit. This was the holding by the Eastern Court of Appeal in **Dipak Emporium vs. Bond's Clothing Civil Appeal No. 64 of 1972 [1973] EA 553** where the Court stated:

**“The court’s right to award interest is based on section 26(1) of the Civil Procedure Act (Cap 5) which states that where and in so far a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit...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. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgement.”**

20. I therefore find that the learned trial magistrate’s decision that interest does accrue from 04.04.2011 when suit was filed was well founded.

21. In the end and for the reasons given on the assessment above, the appeal partially succeeds. It is therefore hereby ordered:

1. The judgment sum shall be discounted by 10 %
2. Appellant shall pay the Respondent 90% costs of this appeal

**DATED AT KISUMU THIS 22<sup>nd</sup> DAY OF *October*, 2020**

**T. W. CHERERE**

### **JUDGE**

Court Assistants - **Amondi/Okodoi**

For the Appellants - **Mr. Chesoro for Milimo Muthoni & Co. Advocates**

For the Respondent - **Mr. Anyul for D.O.E.Anyul & Co. Advocates**