REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 165 OF 2011

GERRY N. ABONGO ..... APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree of the Resident Magistrate P.L. Shinyada (RM) dated 27th July 2011in Civil Suit No. 687 of 2006)

JUDGMENT

1. This appeal arises from the judgment and decree of the trial court in Civil Suit No. 687 of 2006 where the court dismissed the suit on the grounds that the claim was not properly pleaded or proved as required for special damages.

2. The appellant had sued the respondent for breach of a contract dated 18th February, 2002 where it was agreed that appellant would grow and sell sugarcane to the respondent from his parcel of land measuring 0.6 hectares. The appellant claimed that the respondent had failed to harvest the plant crop and the two ratoon crops of sugarcane as agreed and sought compensation for the loss of all crop cycles.

3. At the hearing of this appeal, Mr. Oduk, counsel for the appellant argued that the trial magistrate had correctly found the defendant liable but erroneously dismissed the suit due to the manner in which the pleadings were formulated. Counsel disagreed with the trial court on this issue and urged this court to adopt the reasoning of the court in ***Silvan Ketch vs South Nyanza Sugar Co. Ltd HCCA No. 210 of 2001*** and ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd CA No. 278 of 2010***.

4. The trial magistrate had assessed the damages she would have awarded as Kshs. 420,300/=, had the claim been successful. He asked the court to allow the appeal and award the appellant damages as assessed.

5. Ms. Anyango, counsel for the respondent, aligned herself with the trial court's decision that the appellant's claim had been wrongly pleaded. She submitted that the appellant was bound by his pleadings and in this case he had failed to plead his claim as special damages. She urged this court to dismiss the appeal with costs.

6. As this is a first appeal, I will proceed to analyse and re-assess the evidence afresh and reach my own conclusion, bearing in mind that I did not have the benefit of seeing the witnesses testify**.** *(See **Selle v Associated Motor Boat Company Ltd. [1968] EA 123**)*

7. The appellant told the trial court that he had been contracted by the respondent to develop cane on his land. He stated that the agreement was dated 18th February, 2002 and was to last for 5 years during which time, the cane would be developed and harvested thrice. The first cycle would be harvested between 22 to 24 months and the 1st and 2nd ratoon crop between 16 to 18 months. When the cane matured, he approached the respondent in February 2004 to harvest it but they did not. He went back to the respondent in June and in November 2004 and they still did not harvest his cane. The cane got burnt at 33 months. He prepared the cane once more but by the time the respondent came to harvest it, it had dried up. He also maintained the 3rd ratoon crop but it still was not harvested. He stated that he expected 135 tonnes per hectare and at the time, the cane was selling at Kshs. 1,730/= per tonne.

8. Richard Muok (DW1), testified that the respondent entered into a contract with appellant on 2nd April 2003. He testified that the appellant planted the cane on 21st July 2003 and produced a job completion certificate for it. He also produced documents to prove that the respondent had supplied fertilizer and that the field had been ploughed and furrowed. He produced a debit advices for surveying, planting and furrowing the cane totalling to Kshs. 8,535.60/=, for the supply of seed cane Kshs. 15,464.50/= and for fertilizer at Kshs. 5,276/=. He testified that in total the appellant owed the farmer a sum of Kshs. 29,276.10/=.

9. DW1 admitted that the respondent had received a request to harvest burnt cane from the appellant but stated that the company was not bound to harvest burnt cane. However on cross examination he admitted that the burnt cane's quality had been found sufficient yet the cane had not been harvested. He also admitted that respondent had not harvested the 1st and 2nd ratoon crops. He told the court that the respondent

had never realized 135 tonnes and stated that if well maintained the plant crop could realize 100 tonnes and the ratoon crops 60 tonnes but stated that he did not have a cane census report which would have shown the expected yields. He further stated that the price per tonne at the time was Kshs. 1,730/= per tonne.

10. Having heard both parties, the trial court found that there was a valid contract between the parties and that the respondent had acted in breach in failing for failing to harvest the cane. DW1 admitted that there was a valid contract between the parties. He also admitted that the burnt cane was analyzed and found to be of good quality and further that the respondent had not harvested the 1st and 2nd ratoon crops. The respondent had contracted the appellant to grow and sell to it sugarcane for a period of 5 years, by the time the plant crop got burnt, the respondent was in breach of contract. The appellant developed the ratoon crops and the respondent also failed to harvest them. I uphold the trial court's finding that the respondent was in breach of contract and occasioned the appellant loss of his expected earnings for all three crop cycles.

11. Having so found, the question that this court needs to determine is whether the appellant was entitled to an award of damages as claimed.

12. The principles to be considered by a court in awarding a claim for special damages are well settled. Special damages must be pleaded with as much particularity as circumstances permit. It is only when the particulars of the special damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars. This was the position of the Court of Appeal in ***Coast Bus Service Ltd -v- Sisco E Murunga Ndanyi and 2 others: Nairobi C.A. No.192 of 1992 (U.R.)*** which was cited with approval in the case of ***Central Bank of Kenya v Martin King'ori Civil Appeal 334 of 2002 [2009] eKLR).***

13. The Appellate court in ***John Richard Okuku Oloo(supra)*** further held that the certainty and particularity with which the damage ought to be stated and proved depended on the character of the acts producing the damage. The court held:

> "We have in the judgment set out in full this averment by the appellant at paragraph 12 of the plaint where it was pleaded that the average cane yield per acre was 135 tonnes which the appellant claimed at the rate of Kshs. 1,553 per tonne being the average yield unharvested by the respondent.
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> We have shown that the pleadings 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 standards nor offered sufficient proof."

14. Applying the above principles to the present case, I find that the appellant's claim was properly pleaded as a claim for special damages. In paragraphs 3, 8 and 9 of his plaint, he particularized the acreage of his field as 0.6 Hectares, his expected yield as 135 tonnes of cane per hectare and pleaded the price of a tonne of cane as Kshs. 1,730/=. The appellant was then required to strictly prove his claim.

15. The trial court found that the appellant had improperly pleaded the date of contract. The record shows that the appellant pleaded that his contract was dated 18th February, 2002 but during trial, he produced a contract dated 2nd April, 2003. He however insisted in his testimony that his claim was based on a contract dated 18th February, 2002.

16. It is trite that parties are bound by their pleadings and evidence that is led which does not support the averments in the pleadings should be disregarded. However, if the other party had fair notice of the case it had to meet, the departure from pleadings does not cause a failure of justice and is deemed a mere irregularity not fatal to the case. *(See**Simon Muchemi Atako & another v Gordon Osore Civil Appeal No. 180 of 2005 [2013] eKLR)***

17. In this case, the evidence given by the appellant did not tally with what was pleaded on the date of the agreement, nevertheless, the respondent had sufficient notice of the case it had to meet and prepared its defence accordingly. The defendant admitted in evidence that the plant crop was planted in 2003.

18. The appellant testified that his land measured 0.6 hectares. This was supported by the documents produced by both him and DW1. Both witnesses agreed that the cane at the time was selling for Kshs. 1,730/=. DW1 however disputed the appellant's estimated yield of 135 tonnes per hectare but did not produce the cane census report which would have shown the expected yields and the appellant's estimate is taken to be the appropriate tonnage of yield expected. DW1 computation of the monies owed to the respondent for its utilities remained uncontroverted.

19. Taking all the above into account, I awarded the appellant a sum of **Kshs. 391,113.90** made up as follows :

> Kshs. 1,730/= per tonne x 0.6 ha x 135 tonnes x 3 crop cycles = Kshs. 420,390 /= less Kshs. 29,276.10/=

20. I set aside the judgement of the subordinate court and enter judgment for the appellant for Kshs.391, 113.90. As this appeal was filed on 16th August 2011, I award interest at court rates from the date of filing suit that is 30th August 2006 to the date the memorandum of appeal was filed that is on 16th August 2011. Interest shall then accrue from the date of this judgment until payment in full. The appellant shall have costs for this appeal which I assess at Kshs. 15,000/=.

Dated, **signed** and **delivered** at Kisii this **24th**day of **January 2019**.

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyagwencha h/b Mr. Oduk For the Appellant

Mr. Kimaiyo h/b Mr. Otieno For the Respondent

Rael Court clerk