



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 98 OF 2018

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

KALEB ONYANGO MIKWANGA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. O. Obina, PM dated 14th August 2018 at the Magistrates Court in Kisii in Civil Case No. 977 of 2004)

JUDGMENT

1. The respondent's case before the subordinate court was founded on an agreement dated 6th February 1998 by which the appellant contracted him to grow and sell to it sugarcane on his land; Plot 286 in field number 17 in Kakmasia Sublocation measuring 0.3Ha. The respondent was assigned account number 260754 and planted cane as agreed. He alleged that in breach of the agreement, the appellant failed to harvest the plant crop when it was mature and ready for harvesting causing her to suffer loss and damage. The respondent claimed damages for breach of the contract based on the loss of the plant and two ratoon crops based on an average yield of 135 tons per Ha for each crop at Kshs. 1,730 per ton.
2. In its statement of defence, the appellant denied that there was an agreement between the parties as alleged. It also denied the alleged breach of the agreement but stated in the alternative that in the event of failure to harvest the plant crop, the respondent was not entitled to damages for the ratoon crops. It also stated that its policy was not to cut or harvest poorly maintained cane and that the respondent had failed to employ the recommended husbandry to extent that the cane was overshadowed and dwarfed by weeds and totally destroyed hence the appellant was not obliged to harvest it.
3. The respondent (PW 1) and Richard Mwok (DW 1), a Senior Field Supervisor with the appellant, testified at the trial. The trial magistrate considered the evidence and submissions and awarded the respondent Kshs. 23,899.64 being the net loss suffered for the plant crop. He declined to award damages for the ratoon crops as these were never developed. He awarded Kshs. 50,000/- as exemplary damages for the breach of contract resulting from the opportunity to realize the 1st and 2nd ratoon.
4. In its memorandum of appeal dated 6th October 2018, the appellant challenged the judgment on several grounds. It contended that the trial magistrate erred in law and in fact in failing to find that the appellant could not harvest and purchase the appellant's cane which was not developed. That the trial magistrate failed to take into account that the respondent having failed to develop the cane, it could not develop subsequent ratoons and could not be awarded damages for the ratoons. That the trial magistrate erred in law in wrongly calculating costs and interest due awarded to the respondent and that the trial magistrate erred in evaluating the evidence and coming to the wrong conclusion. In her oral submissions, Ms Anyango, counsel for the appellant, reiterated the grounds of appeal and added that the trial magistrate erred in awarding exemplary damages contrary to established principles.
5. The respondent cross-appealed against the judgment and decree on the ground that the trial magistrate erred in making an award that was inordinately low in the circumstances and that the trial magistrate failed to consider making an award for the respondent's lost ratoon crops as they arose from damage and loss of the plant crop. Counsel for the respondent, Mr Oduk, urged the court to re-assess the damages due as a result of the breach.
6. Before I consider the issues in this appeal, I must recall the duty of the first appellate court. It is to re-evaluate and re-assess the evidence adduced before the trial court, keeping in mind that the trial court saw and heard the parties and giving allowance for that, and to reach an

independent conclusion as to whether to uphold the judgment (see *Selle v Associated Motor Boat Co. [1968] EA 123*).

7. At the hearing, the respondent (PW 1) adopted his statement in which he reiterated his claim that he cultivated the plant crop for which he was assisted by the appellant who ploughed the land, supplied the seed cane and fertilizer. He complained that the appellant never harvested the cane hence it dried up causing him to lose subsequent crops. DW 1 admitted that the parties entered into the agreement dated 6th February 1998 and that the appellant offered services on credit including ploughing, harrowing, survey and seed cane supply. In addition to the amount due to the respondent, he stated that appellant was entitled to deduct harvesting and transport charges, cess and sugar levy from the amount due. He told the court that the farmer failed to avail the cane for harvesting and to carry out his obligations under the agreement.

8. From the evidence, it is not in dispute that the parties entered into the agreement which was to remain in force for five years from the commencement date or until the plant and two ratoon cane crops were harvested whichever period would be less. The contention in this case is who breached the agreement. The respondent's case is that the appellant failed to harvest the cane when it was ready and mature while the appellant case from the pleading was that, "the cane was overshadowed and dwarfed by weed and totally destroyed and the Defendant flatly refused to harvest it." The evidence of DW 1 that the farmer failed to avail the crop or carry out his obligation was inconsistent with the pleading. Under Clause 4 of the agreement, if the grower was in breach of the agreement, the appellant ought to have issued a notice for him to remedy the breach but it did not. In the circumstances, I find and hold that it is the appellant who was in breach of the agreement by failing to harvest the cane.

9. Since the respondent proved breach of the agreement, he was entitled to damages for the plant, 1st and 2nd ratoon crops. The appellant submitted that there was no basis to award the respondent damages for the ratoon crops as these were never cultivated. In *Consolata Anyango Auma v South Nyanza Sugar Company Limited MGR HCCA No. 53 of 2015 [2015] eKLR*, I stated the basis of calculating damages for breach of contract as follows:

[15] The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitutio in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR*, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR*). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale (1854) 9. Exch. 341* that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR*). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR)* and *Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)*).

10. The agreement was for five years and since the appellant failed to harvest the plant crop hence it must bear the consequences of breach. I therefore find and hold that the respondent was entitled to damages for the three crop cycles and in reaching this decision, I adopt the statement of principle in *Martin Akama Lango v South Nyanza Sugar Company Limited KSM HCCA No. 20 of 2000 (UR)* 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.

11. The yield of cane per hectare is a question of fact. In this case both parties presented conflicting evidence. PW 1's claim was based on 135 tons per Ha. He relied on a report titled, "CANE PRODUCTIVITY SUB LOCATIONWISE" which show the yield per hectare for various sub-locations for the years 1995/96 and 1996/97. I am unable to accept it as PW 1's claim is based on an agreement that was signed in 1998 and the plant crop was due for harvest two years later. I prefer the testimony of DW 1 as he was well versed in matters concerning the appellant that the yield per hectare for the plant and ratoons for the area was 66.56 and 48.76 tons for respectively.

12. As the respondent's claim is for the amount he would have earned had the agreement been performed, I am entitled to deduct from the gross amount, the contractual deduction for services rendered by the appellant. The respondent would only receive the net amount as this would represent his actual loss. DW 1 testified that at the end of the harvest, the appellant was entitled to deduct harvesting and transport charges at Kshs. 210 per ton and Kshs. 399 per ton respectively. The amount for deductions works out as follows:

Plant crop	Kshs. 609 X 0.3Ha X 66.56 = Kshs. 12,160.50
1 st ratoon	Kshs. 609 X 0.3Ha X 48.76 = Kshs. 8,908.45
2 nd ratoon	Kshs. 609 X 0.3Ha X 48.76 = Kshs.8,908.45
TOTAL	Kshs. 29,976.90

13. Having reached the conclusions above, I find that the respondent was entitled to the plant and two ratoon crops less the cost of contractual services made up as follows:

Plant Crop	0.3Ha X 1730 X 66.56 ton per Ha = Kshs. 33,544.64
1 st Ratoon	0.3 Ha X 1730 X 48.76 ton per Ha = Kshs. 25,306.44
2 nd Ratoon	0.3Ha X 1730 X 48.76 ton per Ha = Kshs. 25,306.44
Less	(Kshs. 29,976.90)
TOTAL	Kshs. 54,180.22

14. The trial magistrate awarded exemplary damages for what he considered a loss for breach of contract. This was a misdirection on his part for two reasons. First, the respondent did not pray for exemplary damages. Second, the principles for the award of exemplary damages are well settled and the facts in this case did not fall within those principles. These principles were summarized as follows in *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR* as follows:

[32] The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard [1964] AC 1129* where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.

15. For the reasons I have set out, I dismiss the appeal and allow the cross appeal. I enter judgment for the respondent against the appellant for **Kshs. 54,180.62** together with interest thereon at court rates from the date of filing suit until payment in full. The respondent shall have the costs of the appeal and cross appeal which I assess at **Kshs. 25,000/-** exclusive of court fees.

DATED and DELIVERED at KISII this 18th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Ms Anyango instructed by Otieno, Yogo, Ojuro and Company Advocates for the appellant.

Mr Oduk instructed by Oduk and Company Advocates for the respondent.