REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 12 OF 2019

BETWEEN

JUSINTA A. ODERO.....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. S. K. Onjoro, SRM dated 21st December 2018 at the Magistrates Court in Kisii in Civil Case No. 682 of 2010*)

JUDGMENT

1. In her amended plaint before the subordinate court, the appellant pleaded as follows:

> *[3] By a written agreement dated 8th September 2005, the defendant contracted the plaintiff to grow and to sell to it sugarcane on his land parcel being plot number 1228E filed number 217 in Kakmasia Sublocation measuring 0.1 hectares.*
>
> *[4] The plaintiff duly signed the agreement and was assigned account number 263215.*
>
> ……
>
> *[7] In breach of the agreement, the defendant failed to harvest the plant crop when the same was mature and ready for harvesting at 22-24 months of age and the cane started deteriorating.*
>
> *PARTICULARS OF LOSS AND DAMAGE*
>
> *The plantiff's plot was capable of producing an average of 135 tonnes per hectare for the plant crop and 135 tonnes per hectare for the ratoon crop and the rate of payment then applicable per tonne was Kshs. 2,500 and the plaintiff claims damages for three (3) crop cycles as particularized.*
>
> *a) Expected yield for plant crop 135 tonnes X 0.1ha X 2015 27,202.50*
>
> *b) Expected yield for 1st ratoon crop 135 tonnes X 0.1ha X2015 27,202.50*
>
> *c) Expexted yield for 2nd ratoon crop 135 tonnes X 0.1haX2015 27,202.50*
>
> *TOTAL 81,607.50*
>
> ……
>
> *REASONS WHEREFORE the plaintiff prays for judgment against the defendant for*
>
> *a) Damages for breach of contract.*

b) Costs of this suit.

c) Interest thereon at court rates from 8th day of September 2005 until payment in full.

d) Any other relied that this Honourable Court may deem just and expedient to grant.

2. I have taken the trouble to set out the relevant part of the claim because after hearing the matter, the trial magistrate dismissed the suit on the following grounds;

The plaintiff prayed to be compensated for the breach of contract by way of damages.

The general rule is that general damages cannot be claimed for breach of contract. The has been reiterated in numerous authorities including ***Kenya Breweries Limited v Kiambu General Transport Agency Civil Appeal No. 9 of 200 [2002]EA 398*** *and* ***Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995 – 1998] 2 EA 289.***

The prayer for general damages must therefore fail and I so hold. The plaintiff having not sought for any other prayer for compensation, I dismiss the plaintiff's suit with costs to the defendant.

3. The appellant complained that the trial magistrate erred in law and in fact in misconstruing his claim as one of general damages when her pleadings were precise, clear, sufficient and proper as to disclose the nature of her claim as one for special damages. I agree. The trial magistrate appeared to have elevated form over substance as the particulars of the claim were set out in the body of the plaint as I have set out above. The claim for damages for breach of contract was in the prayer and was in reference to what was pleaded in the body of the plaint. The trial magistrate erred in reaching the conclusion that the claim was for general damages. I also find that the appellant's claim was for breach of contract and the special damages were particularized as required by the law (see ***Jivanji v Sanyo Electrical Company Limited*** **[2003] 1 EA 98** and ***John Richard Okuku Oloo v South Nyanza Sugar Co., Ltd*** **KSM CA Civil Appeal No. 278 of 2010 [2013] eKLR**).

4. Even where a trial court dismisses a claim on some technical ground, the court should proceed to express its view on the substance of the claim particularly where a full trial has taken place. In ***Selle v Associated Motor Boat Co.*** **[1968] EA 123,** *Law, JA., observed as follows*:

It is always desirable, in a suit for damages, for the trial Judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. Much time and expenses can be avoided if this course is followed …

5. Since the trial magistrate did not deal with the substance of the appellant's claim, I have to consider it in line with the duties of the appellate court under **section 78(a)** of the ***Civil Procedure Act*** which empowers this court, *"to determine the case finally"* given that the appellant (PW 1) and the respondent's witness, Richard Muok (DW 1) testified. I must of course bear in mind that I neither heard or saw the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **(Supra)**).

6. I have already set out the appellant's claim at the opening paragraph of the judgment. The respondent denied the agreement in its defence and put the appellant to strict proof. In the alternative, it pleaded that it harvested the plant crop and paid the appellant all the money but failed to harvest the ratoon crops as the appellant failed to maintain the said cycles leading to low yields. It denied that the appellant was entitled to damages. It also pleaded that if any damages were due it was entitled to deduct the cost of services provided to the respondent. It also averred that the claim was time barres under the ***Limitation of Actions Act*** having been filed after the lapse of 11 years.

7. Both parties agreed that they entered into a contract for the development of sugarcane dated 8th September 2005. The point of departure was PW 1 contended that she planted the sugar cane but it was not harvested while DW 1 testified that plant crop was harvested by PW 1 who crushed it into jiggery hence it was not harvested and the ratoon crops were never developed. He produced notice dated 30th December 2006 informing PW 1 that it had come to the respondent's notice that she had decided to abandon the crop by poaching the cane for jaggery. The letter required her to inform it how she intended to clear her bills.

8. I find that DW 1's testimony is inconsistent with para. 5 of its defence where its states that, *"The Defendant avers …… that the plant crop was harvested and the plaintiff paid all the money but failed to harvest the two ratoons as the plaintiff failed to properly maintain the said cycles leading to low yields."* Since the evidence of the fact that the plaintiff diverted the cane to jaggery is inconsistent with the pleading and therefore inadmissible, the only evidence I am left with is that of the appellant who testified that the respondent did not harvest the plant crop.

9. Since the appellant proved breach of the agreement, she was entitled to damages for the plant, 1st and 2nd ratoon crops. 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 is principle is encapsulated in the Latin phrase restitution 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 in this case was for five years from the date of commencement. The respondent failed to take the plant crop hence it must bear the consequences of breach. I therefore find and hold that the appellant 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. Having reached the above conclusions, I now turn to the actual calculations. In calculating the yield per hectare, PW 1 relied on a report titled, *"CANE PRODUCTIVITY SUB LOCATIONWISE''* which shows the yield per hectare for various sub-locations for the years 1995/96 and 1996/97. It is not applicable to the agreement in this case which was entered into in 2005 and the first harvest was due in 2007. I would accept the evidence of DW 1 as he is well versed in matters concerning the respondent that the yield per hectare for the plant and ratoons was 66.56 and 48.76 tons for respectively.

12. Since the appellant's claim is for the amount she 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 appellant would only receive the net amount as this would represent her actual loss. DW 1 testified that at the end of the harvest, the respondent 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 0.1Ha X 66.56 = Kshs. 4,053.50	
1st ratoon	Kshs. 609 X 0.1Ha X 48.76 = Kshs. 2,969.50	
2nd ratoon	Kshs. 609 X 0.1Ha X 48.76 = Kshs. 2,969.50	
TOTAL		Kshs. 9,992.50

13. From the totality of the evidence, I find that the amount due to the appellant is as follows:

Plant Crop	0.1Ha X 2000 X 66.56 ton per Ha = Kshs. 13,312.00	
1st Ratoon	0.1 Ha X 2000 X 48.76 ton per Ha= Kshs.	9,752.00
2nd Ratoon	0.1Ha X 2000 X 48.76 ton per Ha = Kshs.	9,752.00
Less		
Transport and Harvest Charges		(Kshs. 9,992.50)
TOTAL		Kshs. 22,823.50

14. The final issue relates to the defence of limitation pleaded in its statement of defence. Under **section 4(1)(a)** of the ***Limitation of Actions Act***, an action founded on a contract may not be brought after the end of six years from the date when the cause of action accrues. In considering this issue, I am guided by the decision in ***South Nyanza Sugar Company Limited v Diskson Aoro Owuor*** **MGR HCCA No. 85 of 2015 [2017] eKLR** where the court held that;

> *[17] There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.*

15. The agreement between the parties was entered into on 8th September 2005 and the plant crop would mature at the end of 24 months and since the breach in this case occurred at the time of failure to harvest the plaint crop, that is when the breach of contract accrued. The breach of contract herein accrued in September 2007. This suit was filed in 2010 within 3 years of the breach hence it was not statute barred. The respondent has argued that the appellant could not claim damages for the 2nd ratoon due to the fact that the claim would fall outside the limitation period. I disagree because the appellant is entitled to the full measure of damages for the breach of contract which accrued within the limitation period.

16. For the reasons I have set out, I find in favour of the appellant. I allow the appeal, set aside the judgment of the subordinate court and substitute it with a judgment for the appellant against the respondent for **Kshs. 22,823.50** 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 which I assess at **Kshs. 20,000/-** exclusive of court fees and also costs in the subordinate court.

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

D.S. MAJANJA

JUDGE

Mr Bosire instructed by Moronge and Company Advocates for the appellant.

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