REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 132 OF 2018

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

MARGARET A. OGALO.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. E. O. Obina, PM*

dated 31st August 2018 at the Magistrates Court in Kisii

***in Civil Case No. 465 of 2010*)**

JUDGMENT

1. The respondent's case before the subordinate court was premised on an agreement dated 29th October 2002 by which the appellant contracted the respondent to grow and sell to it sugarcane on her land parcel being Plot 902A in field number 168C in Kanyagwala Sublocation measuring 0.5Ha. The respondent claims that she was assigned account number 245721 and planted cane as agreed. She alleged that in breach of the agreement, the appellant neglected to harvest the plant crop but when it started to do so, it cut the sugarcane but failed to take delivery leading to waste and loss. The respondent therefore claimed damages for breach of the contract based on the plant and 2 ratoon crops based on an average yield of 135 tons per Ha for each crop at Kshs. 2,015 per ton for a total of Kshs. 408,037.50.

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 the cane.

3. At the hearing before the trial court, the respondent (PW 1) and George Ochieng (DW 1), a Senior Field Supervisor with the appellant, testified. The trial magistrate considered the evidence and submissions and found in favour of the respondent for the sum of Kshs. 236,012.60. The appellant appeals against this judgment on the basis of the memorandum of appeal dated 25th November 2018. In addition, counsel for both parties made brief oral submission in support of their respective positions.

4. In summary, the grounds raised by the appellant were that the trial magistrate erred in law and in fact in holding that there was a contract between the parties and ignoring the appellant's evidence that there was no contract. It also complained that the trial magistrate failed to hold that the claim was barred by the ***Limitation of Actions Act***. The appellant also contended that the trial magistrate erred in awarding damages by ignoring the expert witness on the expected tonnage per hectare and by awarding the damages for the 1st and 2nd ratoon when the same was never developed. At the hearing of the appeal, counsel for the appellant, reiterated those grounds and emphasized that there was no contract between the parties as the evidence appellant evidence was that each grower had a unique number and the number pleaded by the respondent did not belong to her but belonged to someone else. She also pointed out that the agreement produced by the respondent had several alterations and it was fraudulent.

5. The respondent opposed the appeal. Counsel for the respondent supported the conclusion of the trial magistrate and submitted that the trial magistrate evaluated the evidence and came to the correct conclusion that there was an agreement between the parties and that it was breached by the appellant.

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**). In dealing with this task it is necessary to set out the evidence as it emerged before the trial court.

7. PW 1 adopted her statement as her evidence. She testified that she entered into the agreement dated 29th October 2002. She stated that the appellant did not harvest her cane when it matured and when the respondent came to harvest it, it cut the whole field farm but did not take delivery of the cane causing it to dry up. She stated that she re-developed the came but the appellant neglected it. When cross-examined, she told the court that the plot was 0.5 Ha and that she was supplied with inputs on credit to be deducted from the plant crop.

8. The appellant's witness, DW 1, adopted his statement as his evidence. He stated that there was no contract between the appellant and respondent and that that the agreement produced by PW 1 had alterations on the name of the farmer. He also stated that the identity number on the agreement had been altered and the account number had also been altered and that the account number indicated by respondent referred to an agreement between the appellant and one Daniel Otigo and maintained that the appellant's claim was fraudulent. When cross-examined by counsel for the appellant and the document produced by PW 1 put to him, DW 1 pointed out the alterations. He stated account No. 245721 was a unique number which belonged to Daniel Otigo.

9. The first issue for consideration is whether there was an agreement between the appellant and respondent. The appellant contended that the agreement produced by the respondent was fraudulent and had been altered for a fraudulent purpose. On this issue, I agree with the findings of the trial magistrate that in order to annul or defeat the allegations by the respondent, the appellant ought to have pleaded and proved fraud. In coming to this conclusion, I wish to draw on two decisions of the Court of Appeal which set out the law on this issue with clarity. The first is ***Ndolo v Ndolo*** **[2008] 1 KLR (G&F) 742** where the Court stated as follows:

> *We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...*

The second is ***Vijay Morjaria v Nansingh Madhusingh Darbar & Another*** **NRB CA Civil Appeal No. 106 of 2000 [2000] eKLR** in which Tunoi JA., observed that:

> *It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.*

10. Notwithstanding what I have stated, the respondent still has an obligation to prove her case on the balance of probabilities. She produced an agreement bearing her name and which was signed by the appellant. The appellant did not object to its production and did not raise any question in cross-examination casting doubt on it. The appellant's advocates did not put to her it documents in cross-examination. On the other hand, DW 1 pointed to a what he considered alterations on the agreement produced by PW 1. He also stated that account 245721 was a unique number assigned to Daniel Otigo and produced documents to support its contention. I cannot say that what appear as alteration on the agreement produced by the respondent necessarily negates the agreement. The respondent said nothing of the location of the appellant's plot and existence and the fact that both agreements were signed in different years. Further, the respondent did not deny the demand letter that was sent to it by the respondent's advocate bearing the account number. Nothing would have been easier than for the appellant to respondent denying the claim and stating its position. I find and hold that the respondent proved that the agreement with the appellant on the balance of probabilities.

11. The second issue raised by the appellant is that the trial magistrate failed to hold that the suit was statute barred. On this issue, I find that the respondent did not raise the issue of limitation in its defence. It filed a notice of preliminary objection dated 30th July 2018 on the following terms, *"That the claim herein is statute barred under the provisions of Section 4 of the Limitation of Actions Act and the court lacks jurisdiction to entertain the present suit."* The trial magistrate directed that the preliminary objection canvassed in their defence. The issue was canvassed by the parties in their written submissions. The trial magistrate held that the defence of limitation was not available to the appellant as it had not been pleaded.

12. The manner of raising the defence of limitation was dealt with and answered by the Court of Appeal in ***Stephen Onyango Achola and Another v Edward Hongo Sule and Another*** **NRB CA Civil Appeal No. 209 of 2005 [2004] eKLR** as follows:

> *A plaintiff is not bound to plead in his plaint issues which would negate possible defences such as limitation, fraud, mistakes and so on long before such issues are raised. He can only deal with such defences if and when they are actually raised in the defence. That must be why order VI rule 4 (1) starts:*
>
> *"A party shall in any pleading subsequent to a plaint…."*
>
> *The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.*

13. The essence of the decision I have cited is that the appellant could not raise the issue of limitation as a preliminary objection unless it was

specifically pleaded as a defence in its statement of defence. That aspect of this appeal therefore fails.

14. Going back to the substance of the case, the respondent's case was that the appellant harvested but failed to take delivery of the plant crop causing it to be wasted in the field. Consequently, the appellant was in breach of the agreement and she was entitled to damages for the 1st and 2nd ratoons. The appellant complains that the 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 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)**).*

15. In this case, the agreement was for 5 years. The respondent failed to take the plant crop hence it must bear the consequences of breach. As to whether the trial court could take into account mitigation of damages, I hold that this not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the appellant (see ***African Highland Produce Limited v Kisorio*** **[1999] LLR 1461 (CAK)**). The appellant did not show how the respondent could have mitigated her damage.

16. 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 ***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.*

17. As regards the assessment of damages, the appellant complained that the trial magistrate erred in ignoring expert witness evidence on the expected tonnage. The expected tonnage is a question of fact. The respondent pleaded and produced a document showing the expected yield for the locality. That document was not controverted by the appellant. In fact, DW 1, in his statement, or evidence did not touch on that issue. The trial magistrate calculated the award based on the pleadings and evidence available. I do not find any error in this regard.

18. Having considered grounds of appeal set out in the memorandum of appeal, I have come to the conclusion that the appeal has no merit. It is dismissed with costs to the respondent which I assess at Kshs. 30,000/- exclusive of court fees.

DATED and DELIVERED at KISII this 15th day of APRIL 2019.

D.S. MAJANJA

JUDGE

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

Ms Koko instructed by Oduk and Company Advocates for the respondent.