REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 123 OF 2018

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED........APPELLANT

AND

JOHN CHORA OMOLO ....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N. Lutta, SPM dated 30th October 2018 at the Magistrates Court in Kisii in Civil Case No. 576 of 2010)

JUDGMENT

1. The respondent's case before the subordinate court was premised on an agreement dated 31st March 2003 in which the appellant contracted the respondent to grow and sell to it sugarcane on his land parcel being Plot 942 in field number 20D in Kakmasia Sublocation measuring 1.3 Hectares. The respondent was assigned account number 261664 and planted cane as agreed. The respondent alleged that in breach of the agreement, the appellant failed to harvest the plant crop when it was mature and ready for harvesting within 22 – 24 months of age and the cane started deteriorating. The respondent claimed damages for breach of the contract based on the plant and 2 ratoon crop based on an average yield of 135 tons per Hectare (Ha) for each crop at Kshs. 2,400 per tonne for a total of Kshs. 1, 316,250/-.

2. In its statement of defence, the appellant admitted the agreement between the parties but denied that it was in breach of the agreement to purchase sugarcane as alleged. It pleaded 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 further denied that the average yield was 135 tonnes per hectare and that any payment would be subjected to contractual and statutory deductions such as cane harvesting, transport, cess and milling charges. It also denied that the respondent denied the respondent was entitled to Kshs. 1,316,250/-.

3. At the hearing, the respondent (PW 1) and Justus Otieno George (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. 648,960/-. The appellant appeals against this judgment on the basis of the memorandum of appeal dated 28th November 2018.

4. At the hearing of the appeal, counsel for the appellant, summarized the grounds of appeal as follows. First, he contended that there was an error in the area of the plot based on the evidence of the survey report which showed it was 0.8Ha. Second, the appellant complained that the trial magistrate applied the same yield for the plant crop and both ratoons contrary to the evidence. Third, he submitted that the since the allegation was that the plant crop was not harvested, the respondent was not entitled to damages for the ratoon crops and if any damages were to be awarded, then the respondent would only be entitled to nominal damages.

5. Counsel for the respondent opposed the appeal. He submitted that the area of the farm was admitted and provided for in the contract and there was no evidence to show that the survey was conducted with the concurrence of the respondent. He pointed out that the yield report produced by the respondent was accepted and there was no evidence that that the ratoon yield was lower than that of the plant crop. He urged that the since the plant crop was wasted, the respondent was entitled to the full measure of damages for the ratoon crops.

6. The fact that the parties entered into an Outgrowers Cane Agreement in 1994 was not disputed. Under the agreement the respondent was to cultivate sugar cane for a period of 5 years or until the plant crop and 2 ratoon crops were harvested whichever period of would be less on her plot measuring 0.5Ha. It was also not disputed that the appellant harvested the plant crop but did not harvest the 1st ratoon crop.

7. The issues raised by the appellant are factual and this court, as the first appellate court, has a duty 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**).

8. PW 1 adopted his statement as his evidence. He testified that he tended to the plant crop until it matured after 24 months. He told the court that the crop stayed in the field for 36 months and dried up. Thereafter, he chopped it up and maintained the 1st ratoon which matured in 18 months but it was not harvested. He prayed for damages for breach of contract.

9. DW 2 also adopted his statement in which he stated that the appellant would assist the farmer with inputs which includes costs of inputs, services and statutory deductions. He stated the prevailing cane price was Kshs. 1,700/-. He further stated that the area of the plot was 0.3 Ha and the crop yields per Ha in Kakrao Sub-location were 66.56 per ton per Ha for the plant crop and 48.76 per ton per Ha for the ratoon crops. He testified that PW 1 harvested the plant and 1st ratoon crop and crushed them for jaggery while the 2nd ratoon was neglected and never developed.

10. The key issue for consideration is whether the appellant breached the agreement. On this issue the plaintiff's evidence is that the plant crop was never harvested within the time provided for in the agreement. Although PW 1 stated that the plant crop was harvested by the farmer and crushed for jaggery, he did not state that the appellant went to harvest the cane within the time for harvest and found that the farmer had harvested the cane or that it assisted the respondent develop the plant and ratoon crops and the respondent poached the cane to third parties. The fact is that the plant crop was not harvested within the time provided by the agreement, consequently the appellant was in breach and its breach compromised the development of the 1st and 2nd ratoons in the period the contract was valid. 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.

11. As regard the quantum of damages, the main issue raised by the appellant is the area of the respondent's field. The respondent pleaded that the area of the crop was 1.3Ha but the appellant's case was that the survey report showed that the area was 0.3Ha. The respondent's case was supported by Schedule A of the agreement which showed that the plot area was 1.3Ha. The respondent did not deny this aspect of the agreement in its defence and even if did, there was no evidence that there was a variation of the agreement to show area suggested by the appellant. When the counsel for the appellant was asked to cross-examine the respondent, did not ask any question or make any suggestion that his farm occupied a lesser area. The Survey Certificate was introduced by the appellant and it showed that the cane area was 0.3Ha. The trial magistrate did not deal with this aspect of the case as it was not a matter that arose in the pleadings. On my part and given that the area of the cane was stipulated in the agreement between the parties and the Surveyor's certificate was prepared by the appellant and its surveyor and did not involve the respondent, I find and hold that it cannot vary what was agreed upon. I therefor reject that contention.

12. The yield per hectare is a question of fact. The trial magistrate elected to be guided by the evidence of appellant showing that the plant crop yield for Kakmasia Sub-location was 66.56 tons per Ha. The same document shows that the yield for the ratoons in the same locality was 48.76 tons per Ha. It is not clear why the trial magistrate ignored the totality of the evidence in calculating the yield for the ratoon crops. I would consequently adopt the different yield for the plant and ratoon crops as supported by the evidence.

13. The appellant raised the issue that the trial magistrate failed to take into account the contractual and statutory deduction in awarding damages. DW 1 gave evidence of contractual and statutory deductions. The trial magistrate took the position that since the plant crop and ratoon crop were not harvested, then the appellant could not benefit from those deductions.

14. In resolving this issue, the court must go back to first principles. Damages for breach of contract are calculated on the basis of the principle of *restitution in integrum* which means that the claimant must be put as far as possible in the same position had the breach complained of not occurred. In this case, had the contract been performed in full then the appellant would have made statutory deductions, cost of inputs and services like transport which would be deducted before making payment. The net amount would constitute the actual loss made by the respondent. DW 1 gave evidence to support the harvest charge would be Kshs. 210 per ton, transport would be Kshs. 590 per ton and cess and sugar levy at 1% of the price per ton.

15. For the reason I have outlined, I would calculate the amount due to the respondent as follows:

Plant crop	66.56 tons X 1.3 ha X Kshs. 2.500/- = Kshs. 216,320/-	
1st Ratoon	48.76 tons X 1.3 ha X Kshs. 2,500/-= Kshs. 158,470/-	
2nd Ratoon	48.76 tons X 1.3 ha X Kshs. 2,500/- = Kshs. 158,470/-	
Less deductions	Kshs. 27,515.60 X 3	(Kshs. 82,545/-)
TOTAL		Kshs. 450,715/-

16. I now turn to the issue of interest. The appellant contended that interest ought to have been awarded from the date of judgment rather than from the date of filing suit. Counsel for the respondent supported the decision of the trial magistrate who relied on the case of the ***John***

Richard Okuku Oloo v South Nyanza Sugar Co., Ltd **KSM CA Civil Appeal No. 278 of 2010 [2013]** where the Court of Appeal awarded interest from the date of filing suit.

17. The court has discretion to award interest but such discretion is to be exercised judiciously bearing in mind established principles. I have considered the case of ***John Richard Okuku Oloo*** **(Supra)** and I find that the award of interest was not an issue in the matter. The court in that case, after allowing the appeal and awarding special damages applied the interest from the date of filing suit based on the general principle that interest on special damages is from the date of filing suit. I do not read that case to state that the court does not have any discretion. The suit before the subordinate court was filed in 2010 and remained in limbo until 15th September 2016 when it first came up for hearing. The appellant should not be penalised for the appellant's failure to prosecute the suit with diligence. I therefore award interest to the respondent at court rates from 15th September 2016 until payment in full.

18. For the reasons I have set out herein, I allow the appeal and now make the following orders:

> a. The judgment of the subordinate court be and is hereby set aside and substituted with a judgment for **Kshs. 450,715/-** together with interest from 15th September 2016 until payment in full.
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> b. The respondent shall have costs of the case before the trial court.
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> c. The appellant shall have costs of this appeal assessed at Kshs. 30,000/- exclusive of court fees.

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

D.S. MAJANJA

JUDGE

Mr Odero instructed by Okong'o, Wandago and Company Advocates for the appellant.

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