REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 130 OF 2018

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD..... APPELLANT

AND

JOHN ODONDI OMOLO.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. S. N. Makila, SRM dated 16th November 2018 at the Magistrates Court at Kisii in Civil Case No. 577 of 2010*)

JUDGMENT

1. The appellant appeals against the judgment and decree of the subordinate based on its memorandum of appeal dated 30th November 2018 as follows;

> *a. The learned trial magistrate erred in both law and fact when she awarded the Respondent interest on the principal sum of Kshs. 57,574.40/= without assigning any reasons for awarding such interest, thereby exercising his discretion wrongly, given the positions parties had taken;*
>
> *b. The learned trial magistrate erred in both law and fact when she awarded the Respondent interest on the sum of Kshs. 57,574.40/= from the date of the filing of the suit, but without assigning her reasons for so ordering and, in so doing she exercised her discretion wrongly.*

2. On his part, the respondent cross-appealed against the judgment and decree based on the memorandum of cross-appeal dated 4th May 2019 in which he stated as follows:

> *1. The learned trial magistrate erred in making an award that was inordinately low in the circumstances.*
>
> *2. The learned trial magistrate erred in law in failing to consider making an award for the Respondent's lost ratoon crops as arose from the damage and loss of the plant crop.*

3. Before I deal with the issues raised in the appeal, let me set out the parties' respective positions before the trial court. The respondent's claim was that he was contracted by the appellant to grow sugarcane on his land parcel; Plot 556A in field number 62B in Kakmasia Sub location measuring 0.6Ha by an agreement dated 20th February 2001. He was assigned number 260984. The agreement would remain on force for a period of 5 years or until one plant crops and 2 ratoon crops of sugarcane were harvested, whichever period would be less. The respondent claimed that the appellant failed to harvest the plant crop when it was mature and ready for harvesting hence he suffered loss and damage for the three crop cycles amounting to Kshs. 607,500/- which he claimed.

4. In its statement of defence, the appellant denied the allegations by the respondent and in particular that it breached the agreement. It accused the respondent of failing to develop the cane on his land. The appellant put the respondent to strict proof regarding his allegations. It also denied that it failed to harvest the plant crop when it was ready.

5. At the hearing, the respondent (PW 1) testified that the appellant failed to harvest the plant crop as agreed causing it to dry up. He therefore claimed damages for the three crop cycles. In cross-examination, he told the court that he developed the land himself and that when the crop was ready, he alerted the appellant who failed to come and harvest the crop.

6. Richard Muok (DW 1), a senior field supervisor, testified on behalf of the appellant. His case was that the respondent crushed his sugar cane into jaggery between 20th and 30th October 2002 and that this was communicated to him by the area provincial administration on 30th October 2002 as such he was in breach of the agreement. In cross-examination he told the court that the respondent was served with a notice but it was not produced in evidence.

7. After considering the evidence, the trial magistrate held that the appellant had not proved that the respondent had violated the terms of the agreement by crushing the sugarcane into jaggery. The court concluded that the appellant was entitled to damages equivalent to the plant crop as the respondent did not prove that he had developed the ratoon crops. The court awarded Kshs. 57,574.40/- for the plant crop with costs and interest from the date of filing suit until payment in full.

8. Since the appellant did not appeal against the findings of breach, the only issue raised in the cross-appeal is whether the respondent was entitled to damages equivalent to the three crop cycles. The respondent's case is that because of the breach, it ought to have been awarded damages equivalent to the three crop cycles. Counsel for the respondent based his submissions on the decisions in ***Michael S. Odongo v South Nyanza Sugar Company Limited*** **KSI HCCA No. 53 of 2018 [2016] eKLR** and ***South Nyanza Sugar Company Limited v Kaleb Onyango Mikwanga*** **KSI HCCA No. 98 of 2018 [2019] eKLR** where I set out the basis for calculating damages for breach of contracts by quoting ***Consolata Anyango Auma v South Nyanza Sugar Company Limited*** **MGR HCCA No. 53 of 2015 [2015] eKLR** where I stated 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)****).*

9. Since the agreement between the appellant and respondent was for five years and the appellant failed to harvest the plant crop, it must bear the consequences of breach. I therefore find and hold that the respondent was entitled to damages for the three crop cycles as was held 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.*

10. I now turn to determining the yield per hectare for the crop cycles. This is a question of fact which the first appellate court is entitled determine by evaluating the evidence and reaching its own conclusion having regard to the fact that it neither saw or hear the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

11. The respondent pleaded that his plot was capable of producing on 135 tons per Ha and in evidence he produced a report titled, *"CANE PRODUCTIVITY SUB LOCATIONWISE''* which shows the yield per Ha for various sub-locations for the years 1995/96 and 1996/97. The respondent did not give evidence on who prepared the report or its basis. On the other hand, the appellant's witness, DW 1, produced its own data which shows that the yield for Kakmasia for the plant crop is 66.56 tons per Ha and 48.76 tons per Ha for the ratoons which I accept. I also accept that the price per ton of cane was Kshs. 1,730/-.

12. Having reached the conclusions above, I find that the respondent was entitled to the plant and two ratoon crops as follows:

Plant Crop 0.6Ha X 1730 X 66.56 ton per Ha = Kshs. 69,089.28

1st Ratoon 0.6 Ha X 1730 X 48.76 ton per Ha = Kshs. 50,612.88

2nd Ratoon 0.6Ha X 1730 X 48.76 ton per Ha = Kshs. 50,612.88

TOTAL Kshs. 170,315.04

13. I now turn to the issue of interest that has been raised by the appellant. Counsel for the appellant submitted that the award of interest was unjust and disproportionate as the matter had taken 9 years to conclude yet the appellant could not be blamed for the delay. In response, counsel for the respondent submitted that the trial court had been guided by the general principle that the interest on special damages is to be calculated from the date of filing suit and that there was no basis to depart from this principle.

14. The determination of interest is a matter of discretion for the trial court and this court is guided by principle stated in ***Mbogo and Another v Shah*** **[1968] EA 15** where the court observed that an appellate court will not interfere with the exercise of the trial court's

discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been a miscarriage of justice.

15. Apart from the general rule on interest stated in **section 26** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)***, the Court of Appeal in ***Peter M. Kariuki v Attorney General*** **NRB CA Civil Appeal No. 79 of 2012 [2014] eKLR observed** as follows:

> *Award of interest is in the discretion of the Court, which discretion must be exercised judiciously. See KENINDIA ASSURANCE CO LTD V ALPHA KNITS LTD & ANOTHER, (2003) 2 EA 512 and OMEGA ENTERPRISES KENYA LTD V ELDORET SIRIKWA HOTEL LTD & OTHERS, CA NO. 235 OF 2001 (Unreported). It is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim for interest denied. See METAL BOX CO LTD V CURRYS LTD, (1988) 1 ALL ER 341 and the decision of this Court in MUMIAS SUGAR CO LTD V NALINKUMAR M SHAH, CA NO. 21 OF 2011, (MSA), (unreported). Due to the appellant's own delay in filing his petition, we shall only award interest from the date of decree of the High Court till payment in full.*

16. In its submissions before the trial court, the appellant contended that the appellant could not be blamed for the respondent's failure to prosecute the claim for a period of 8 years. It is apparent from the judgment that the trial magistrate did not consider the appellant's submissions on this issue or give reasons for rejecting them thus I am obliged to review it.

17. From the record, the respondent filed his plaint on 17th December 2010 and judgment was delivered on 16th November 2018. After filing the plaint, judgment in default of appearance and defence was entered on 19th May 2011 and the matter set down for formal proof on 20th July 2015 after a period of 4 years. The judgment was delivered on 21st March 2016. Thereafter, the appellant filed an application to set aside judgment on 18th June 2016 and the same was prosecuted successfully. After the judgment was set aside on 21st February 2017, the matter was fixed for hearing several times but could not be heard on various dates it was fixed for hearing as either the appellant or respondent were not ready to proceed.

18. Having looked at the record, I find there is good reason to depart from the general principle because the respondent did not take any step to prosecute the suit even when it obtained judgment in default of appearance and defence. The matter was only set down for hearing on 10th June 2015 which I shall deem to be the date when interest will run.

19. For the reasons I have set out, I allow the appeal and set aside the judgment and decree of the subordinate court and substitute it with a judgment for the respondent against the appellant for the sum of **Kshs. 170,315/-** together with interest at court rates from 10th June 2015 until payment in full. The respondent shall have costs in the subordinate court.

20. The parties have both succeeded, I make no order as to costs for this appeal.

SIGNED AT NAIROBI BY

D.S. MAJANJA

JUDGE

DATED and **DELIVERED** at **KISII** this **25th day of JULY 2019.**

R. E. OUGO

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.