REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 245 OF 2011

ROSBELA AWINO OTHOO…….....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(An appeal from the judgment and decree of Hon. P.L. SHINYADA (Senior Resident Magistrate) dated and delivered on the 26th day of October 2011 in the ORIGINAL KISII CMCC NO. 935 OF 2004.)

JUDGMENT

1. The appellant herein, ROSBELA AWINO OTHOO, was the plaintiff in the suit filed before the trial court at Kisii being Kisii CMCC No. 935 of 2004 wherein she sued the respondent, South Nyanza Sugar Co. Ltd, and sought the following orders:

> **a) Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of the two (2) crops on 0.1 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/- per tonne for the expected two (2) crops.**
>
> **b) Costs of this suit.**
>
> **c) Interest thereon at court rates from 25th day of April 1996 until payment in full.**
>
> **d) Any other relief that this Honourable court may deem just and expedient to grant.**

2. The appellant's claims was that by a written and signed agreement dated 25th April 1996, the respondent contracted her to grow sugarcane on her land parcel No. 139C in field no. 7 in Kangeso sub location measuring 1.0 hectares. According to the appellant, it was agreed that the agreement would commence on 25th April 1996 and remain in force for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested whichever period was to be less. The appellant's case was that the respondent harvested the plant crop only and failed to harvest the two (2) ratoon crops when the same matured thereby leading to waste and loss.

3. It was the appellant's further claim that her plot was capable of producing an average of 135 tonnes per acre and that the applicable rate of payment was Kshs. 1,730 per tonne.

4. In its statement of defence dated 27th September 2004, the respondent denied the appellant's claim in its entirety and reiterated, on a without prejudice basis, that it had a policy not to harvest poorly maintained sugarcane that was not grown in line with recommended crop husbandry techniques.

5. The trial court heard the case in which the parties presented the evidence of one witness each and at the close of the trial, the appellant's case was dismissed for lack of sufficient proof thereby triggering this appeal in which the appellant has listed the following grounds of appeal in the memorandum of appeal.

> **1. The Learned Trial Magistrate erred in holding that the pleadings in the plaintiff's suit was not in the nature of a special damage claim yet the cause of action sufficiently disclosed the nature of the plaintiff's claim in contract.**
>
> **2. The Learned Trial Magistrate failed to appreciate that from the nature and circumstances of the case, the pleadings were sufficient and properly served the purpose and requirement in law of putting the defendant on notice as to what it was expected to meet at the trial.**
>
> **3. The Learned Trial Magistrate erred in law in holding that damages were not awardable in the suit, yet she had enough material and proof to enable her make the award and indeed did make an assessment as was required in law.**
>
> **4. The Learned Trial Magistrate erred in law in failing to find that the plaintiff's claim was a liquidated claim and/or was for services rendered upon a contract duly proved.**
>
> **5. The Learned Trial Magistrate erred in law in relying and putting emphasis on style and form rather than substance in the pleadings and thereby arrived at a wrong decision.**
>
> **6. In all circumstances of the case, the defendant did not suffer any prejudice and the Learned Trial Magistrate ought to have awarded the plaintiff the assessed amount, costs and interest.**

6. The appeal was subsequently canvassed by way of written submissions which I have considered together with the proceedings and judgment of the trial court. This is a first appeal and I am therefore under a duty to re-analyse and re-evaluate the evidence tendered before the subordinate court while bearing in mind the fact that I neither heard nor saw the witnesses testify. (See **Selle vs Associated Motor Boat Co. Ltd. (1968) EA 123**).

7. In the instant case, the main issue for determination is whether the appellant's claim was a special damage claim and whether it was properly pleaded and proved as required by the law.

8. The appellant's testimony was that she had a five year sugar cane growing contract with the respondent in which she was to get proceeds from 3 harvests but that after the initial harvest, the respondent did not harvest the 1st and 2nd ratoons thereby leading to the loss claimed. She stated that she expected to earn Kshs. 1730/= per ton and sought compensation for the 2 ratoon crops. She produced a copy of the contract book and land survey report as P-exhibit 1 and 4 respectively.

9. On cross examination she stated that she expected compensation of Kshs. 80,000/= but that she was not able to calculate the tonnage per acre and asked the court to do the calculation for her. She claimed Kshs. 1,730 x 130 tonnes per hectare. She denied the respondent's claim that her cane crop was not properly maintained.

10. DW1, Richard Muoki was the respondent's field supervisor. He confirmed that the appellant entered into a sugar cane growing contract with the respondent and that the first harvest realized only 7.4 tonnes of sugarcane which was a very poor harvest for which the farmer was not paid any money as the expected yield per hectare was 100 tonnes. His case was that the total yield realized from the appellant's cane was way less than the expenditure that the respondent incurred in growing the sugar cane and that because of the low yield, the appellant still owed the respondent some money.

11. It was not disputed that the appellant and the respondent entered into a written and signed cane growing agreement on 25th April 1996 as shown in Pexhibit 1. A reading of the appellant's plaint shows that her claim was for damages for breach of contract and for compensation for the loss of 2 crops on 0.1

hectares of land at the rate of 135 tonnes per hectare being Kshs. 1,730 per tonne for the expected two (2) crops.

12. The trial court found that no general damages can be awarded for breach of contract and that the claim qualified to be one for special damages. The question which this case needs to answer is if the trial court made the correct finding.

13. It is trite law that special damages must not only be specifically pleaded but must also be specifically proved with a degree of certainty and particularity. The appellant pleaded that her plot was capable of producing an average of 135 tonnes per acre and that she expected to earn Kshs. 1.730 per tonne. I therefore find that the appellant's claim was properly pleaded.

14. On the issue of specific proof of special damages the appellant cited the Court of Appeal's decision in **John Richard OkukuOloovs South Nyanza Sugar Co. Ltd [2013] eKLR** wherein it was held that the judge erred in dismissing the appeal on the ground that the appellant had not specifically pleaded the same to the required standards nor offered sufficient proof.

15. In the instant case, I have already found that the special damages were specifically pleaded. The trial magistrate stated as follows on the issue of breach of contract:

> **"I am convinced that it is the defendant who breached the agreement."**

16. The trial court was however of the view that the law does not allow for an award of general damages for breach of contract. I find this view to be erroneous and I am guided by the legal principle of equity which states that equity would not allow a wrong to be suffered without a remedy.The correct position is that general damages are not awardable for breach of contract where the damages are quantifiable (**See Dharamishi vs Karsan (1974) EA 41)**.

17. In the instant case, the appellant pleaded that she expected to harvest 135 tonnes of cane per hectare for which the respondent was to pay Kshs. 1730 per tonne and I therefore find that the damages to be awarded were capable of being quantified and indeed the trial court calculated the amount due at Kshs. 46,710/= save that she found that the appellant's case was not proved.

18. It is my humble view that the trial magistrate's finding was confusing and contradictory because while on one hand she found that the respondent was guilty of breach of contract, on the other hand she stated that the appellant's claim had not been proved. Upon finding that there was a breach of contract, the trial court ought to have proceeded to pronounce itself on the amount payable to the claimant for the said breach instead of going back on her own decision and finding that the case had not been proved.

19. In the case of **Chaplin v Hicks [1911] KB 786** Vaughan Williams J. stated:

> ***"Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it was possible to apply the doctrine of averages at all. I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however, that damages might be so unassessable that the doctrine of averages would be inapplicable because the necessary figures for working upon would not be forthcoming; there are several decisions, which I need not deal with, to that effect. I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages."***

20. Taking a cue from the above decision, I find that it was incumbent upon the trial court, upon finding, as a fact, that the respondent was in breach of its contract with the appellant, to move to the next level by assessing the damages payable for the said breach. In the instant case, the trial court properly went ahead to assess the damages due when she stated:

> **"Had the plaintiff properly proved her claim, I would have made the following award in her**

favour. 0.1h x 2 crop cycles x 1,730 x 133 tonnes = 46,710."

21. This being the case, and considering the trite law that an appellate court should not interfere with the trial court's award on damages unless the trial court proceeded on wrong principles or that it misapprehended the evidence in some material aspects thereby arriving at an inordinately high or inordinately low figure such as to represent an entirely erroneous estimate. **(See Jivanji vs Sanyo Electrical Company Ltd (2003) KLR 425**), I find no reason to disturb the trial court's assessment of the award due to the appellant and I hereby uphold it.

22. The upshot of the above is that the appeal is allowed. The lower court's judgment is hereby set aside and substituted with an order allowing the appellant's case and awarding him the sum of Kshs. 46,710/= for loss of his sugar cane crop.

23. The appellant shall also get the costs of this appeal and lower court case.

Dated, signed and delivered in open court this 27th day of February, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Mugun for the Appellant

N/A for the Respondent

Omwoyo court clerk