REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 54 OF 2018

BETWEEN

ADERO OJANO ……..……. APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD ……..…….. RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon .N.S. Lutta, SPM dated 18th July 2018 at the Chief Magistrates Court at Kisii in Civil Case No. 503 of 2009*)

JUDGMENT

1. This appeal is only against the award of damages following breach of the agreement dated 15th April 2005 in which the respondent contracted by the appellant to grow and sell sugarcane on his land parcel being Plot No. 27 field number 31B measuring 0.4 hectares in Kakmasia Sub-location by a contract dated 15th April 2005. It was a term of the agreement that it would commence on 15th April 2005 and remain in force for a period of 5 years or until one plant and two ratoon crops of sugarcane are harvested on the appellant's land which period is less.

2. The trial magistrate held that the respondent failed to harvest the plant crop between the ages of 22 to 24 months and as stipulated in the agreement. He further held that when the crop reached 32 months it got burnt. He only awarded damages for the plant crop on the ground that;

> *The 1st and 2nd ratoon shall not be considered as the arson happened presumably when the case was about 32 months old and the same was not mature for harvest. In any case, the defendant's contract was very specific that the defendant was not bound to purchase burnt case as per clause 6.2 of the contract.*

3. The appellant appealed against the award of damages based on the memorandum of appeal dated 7th August 2018 on two grounds. First, that the trial magistrate failed to consider or take into account relevant factors in assessing damages and the sum awarded to the appellant was grossly and inordinately low as to be erroneous. Second, that the award of interest in the judgment ought to have been expressed from the date of filing suit rather than from the date of judgment. Counsel for the appellant. Mr Oduk, also submitted that the appellant was entitled to compensation for the two ratoon crops as the respondent had already breached the agreement by the time the arson took place.

4. Mr Odero, counsel for the respondent, agreed with the trial magistrate that the appellant could not be

compensated following arson under the agreement. He contended that there was no evidence that there 1st ratoon was ever cultivated or event lost. He submitted that in the event that the damages were awarded, this was a proper case for nominal damages.

5. I agree with the learned trial magistrate that since the plant crop was never harvested, the respondent was in breach. The question is whether, in light of the breach, the appellant was entitled to be compensated for the 1st and 2nd ratoon. The answer to this issue was stated in ***Martin Akama Lango v South Nyanza Sugar Company Limited*** **KSM HCCA No. 20 of 2000** where the court observed 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.*

6. I therefore find and hold that the trial magistrate erred in awarding damages for the plant crop only as the appellant was entitled to the three crop cycles in light of the breach by the respondent.

7. The appellant produced a document titled *"Cane Productivity Subloactionwise"* which showed the yield hectare for the region to prove its case. It showed that the yield per hectare for the plant crop in Kakmasia Sub-location was 148.8 tonnes, the trial magistrate awarded 65 tonnes per hectare. This finding was not contested. What is however clear is that the document shows that the yields for the 1st and 2nd ratoon would be lower and I award the following:

1st ratoon 60 tonnes per Hectare X 0.4 Ha X Kshs. 2015 per tonne= Kshs. 48,360.00

2nd ratoon 55 tonnes per Hectare X 0.4 Ha.X Kshs. 2015 per tonne = Kshs. 44,330.00

8. In conclusion, I set aside the judgment and substitute it with the judgment for the appellant against the respondent for **Kshs. 145,080/-** made up as follows;

Plant crop Kshs. 52,390/-

1st ratoon Kshs. 48,360/-

2nd ratoon Kshs. 44,330/-

9. At paragraph 14 of its defence, the respondent pleaded that there were certain contractual and statutory deductions made from the gross sum due to the appellant. The respondent's witness was simply that there was no contract between the appellant and respondent. The averments in the defence were not proved hence there is no basis to make the deductions as the statement of defence remains that; a mere statement.

10. On the issue of interest, under **section 26** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** the court has discretion to award interest but such discretion is to be exercised judiciously bearing in mind established principles. In this case the principle to be applied is that interest on special damages is from the date of filing suit. The trial magistrate did not explain why he departed from the principle by awarding interest from the date of the judgment. I would therefore set aside that order.

11. However, I would also depart from the general principle because the case before the trial court took 9 years to be tried. The respondent should not be penalized for the appellant's tardiness when it had in fact applied to dismiss the suit for want of prosecution at one stage. I would therefore award interest on the

sum awarded to run from the date of the first hearing, which is 11th May 2015. On that day, the appellant was heard and closed his case and left the respondent to pursue its defence.

12. In conclusion, I now enter judgment for the appellant against the respondent for the sum of Kshs. 145,080/- with costs thereof in the subordinate court. The sum shall accrue interest at court rates from 11th May 2015 until payment in full.

13. I award costs of the appeal to the appellant which I assess at Kshs. 15,000/- exclusive of court fees.

DATED and DELIVERED at KISII this 21st day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Oduk instructed by Oduk and Company for the appellant.

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