



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 244 OF 2011**

**BETWEEN**

**MARY OKELO ONDONDI ..... APPELLANT**

**AND**

**SOUTH NYANZA SUGAR COMPANY LTD ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. P. L. Shinyada, SRM at the Chief Magistrates Court at Kisii in Civil Case No. 1520 of 2004 dated 26<sup>th</sup> October 2011)*

**JUDGMENT**

1. The appellant’s case was dismissed for failure to plead and prove her case specifically. This issue is easily disposed of as it has been the subject of the Court of Appeal decision in **John Richard Okuku Oloo v South Nyanza Sugar Company Limited KSM CA No. 278 of 2010 [2013]eKLR**, the Court expressed the view that;

*We have in the judgment set out in full this averment by the appellant at paragraph 12 of the plaint where it was pleaded that the average cane yield per acre was 135 tonnes which the appellant claimed at the rate of Kshs. 1,553 per tonne being the average yield unharvested by the respondent.*

.....

*We have shown that the pleadings on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standards nor offered sufficient proof.*

2. I have looked at the plaint and it seeks damages for breach of the written agreement dated 7<sup>th</sup> December 1994. The respondent contracted the appellant to grow and sell sugar cane on her land parcel being Plot No. 171 in field no. 3B in Kanyamamba Sub-location measuring 0.4 Ha.

3. The appellant pleaded that respondent only harvested the plant crop and the 1<sup>st</sup> ratoon crop but failed to take delivery or harvest of the 2<sup>nd</sup> ratoon crop when it was ready for harvesting thus causing it loss and damage. The appellant claimed that she lost three crop cycles and suffered loss and damage. She therefore claimed:

*(a) Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of the 2<sup>nd</sup> ratoon crops on 0.4 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730 per tonne.*

4. The trial magistrate held that had the claim been properly proved, she would have awarded Kshs. 207,600/- made up as follows; Kshs. 1730 X 0.5 Ha X 120 X 2.

5. Since there was no cross-appeal on this award, I therefore set aside the judgment of the trial court, and substitute it with a judgment for the appellant against the respondent for the sum of Kshs. 207,600/-.

6. Since the appellants claim is for special damages, the appellant would ordinarily be entitled to interest on that claim from the date of filing suit until payment in full. I note that the suit was filed in 2004 and judgment rendered in 2011. A period of 7 years. The appeal was lodged in 2011 but the appellant only managed to have it heard 7 years later after the court had issued notice to dismiss it. In my view, the respondent

should not be punished for the appellant's tardiness in prosecuting the suit and appeal.

7. In **Kengeta Beer Distributors Limited v Kubai Kiringo and 2 Others MRU HCCA No. 4 of 2008 [2018]eKLR**, I took that view that the court had discretion to award interest under **section 26** of the **Civil Procedure Act (Chapter 26 of the Laws of Kenya)** and may take into account the time it has taken to prosecute the appeal or suit in awarding interest. The Court of Appeal commented on the same issue in **Peter M. Kariuki v Attorney General NRB CA Civil Appeal No. 79 of 2012 [2014]eKLR** 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.*

8. Taking into account the factors I have outlined, I award interest at court rates on the judgment before the trial court from the date of filing suit until the date of judgment before the trial court and thereafter for one year only. Interest shall thereafter accrue at court rates on this judgment from the date hereof until payment in full.

9. 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 21<sup>st</sup> 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.