REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 53 OF 2018

BETWEEN

MICHAEL S. ODONGO.....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. 933 of 2004*)

JUDGMENT

1. This appeal is only against the award of damages following breach of the agreement dated 20th August 1995 in which the respondent was contracted by the appellant to grow and sell sugarcane on his land parcel being Plot No. 1868 field number 21 measuring 1.4 hectares in Kakmasia Sub-location. 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 although the appellant's cane had matured, the respondent refused to harvest it and it went down to waste. The court took the view that had the respondent adhered to the timelines under the agreement, the crop would not have gone to waste. He therefore awarded damages based on loss of the plant crop amounting to Kshs. 242,200/-.

3. The appellant appealed against the award of damages based on the memorandum of appeal dated 24th July 2018 on two grounds. First, that the trial magistrate erred in law and in fact in awarding a disproportionately low award and failed to take into account relevant factors and material in assessing damages. Second, that the award of interest 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 trial magistrate failed to assign reasons for why he did not award the appellant compensation for the two ratoon crops as the appellant had established breach of the agreement.

4. Ms Anyango, counsel for the respondent, opposed the appeal. She submitted that the respondent never developed the 1st and 2nd ratoon as such he was not entitled to compensation. She also pointed out that by a letter dated 10th June 1996, the respondent issued a warning to the appellant notifying him that he had decided to abandon his plot as it was being grazed by livestock and that there was no proper manual weeding.

5. I agree with the counsel for the respondent that the trial magistrate did not deal with the letter dated 10th June 1996 and its effect on the agreement. As this is the first appellate court, I am entitled to review that entire evidence and come to an independent conclusion bearing in mind that I neither saw nor heard the witnesses testify (see ***Selle and Another v Associated Motor Boat Company Ltd*** **[1968]EA 123**).

6. The respondent's case was supported by its witness, George Ochieng (DW 1), was that the appellant failed in crop maintenance. In the letter dated 10th June 1996 title, *"Warning"* the appellant was informed that he had abandoned his plot as it had not been weeded and livestock were grazing on it. After setting out the specific acts and omissions, the letter concluded that, *"Your action is tantamount to breach of contract and we therefore request you to inform us within 14 days how intend to clear the outstanding bill you owe us arising from the services already rendered, failure to comply we shall have no option but to seek legal redress."* It is clear to me that the letter was intended to be a warning. It was not a notice of termination as this would have been clear that it was indeed such a notice and not a warning. At any rate, the respondent, whose burden it was to prove that it amounted to a letter of termination, did not surmount that burden.

7. The purport and effect of a similar letter was considered by the court in ***Joseph Akech Nundu v South Nyanza Sugar Company Limited*** **MGR HCCA No. 36 of 2016 [2017]eKLR** as follows;

[14] From the foregone and looking at the wording of the warning letter it is apparent that the letter was at variance and inconsistent with the contract. I say so because the letter stated that the Appellant was in breach of the contract and called him to indicate how he was intending to clear the bills for the services rendered by the Respondent whereas the contract gave room to the Respondent to intervene and salvage the crop in such circumstances. The letter therefore even if it was found to have been properly served as required could not be used to oust clear provisions of the contract and that letter on its own could not have made a court to find that the Appellant was in breach of the contract. The Respondent ought to have adduced further and better evidence in pursuit of its defence.

8. At the end of the day, the respondent did not terminate the agreement as it was entitled to do in the event of breach on the part of the appellant. I therefore agree with the learned trial magistrate that since the plant crop was never harvested, the respondent was in breach. The question then is whether, in light of the breach, the appellant was entitled to be compensated for the 1st and 2nd ratoon. Again in ***Joseph Akech Nundu v South Nyanza Sugar Company Limited*** the court expressed the view with which I agree as follows:

[17] Having found that the Appellant was entitled to judgment, the remedy available to him from the breach of contract is what the Appellant would have reasonably received as the proceeds under the contract crystallized as special damages and not damages at large or general damages. (See the Court of Appeal case of Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR). In this case the contract provided a period of 5 years or until one plant crop and two ratoons of sugar cane were harvested from the subject land whichever event occured first. Further the contract under Clause 1(f) indicated that the plant crop was expected not later than 24 months from planting whereas the first ratoon crop was expected not later than 22 months after harvesting the first crop and the second ratoon crop was expected not later than 22 months after harvesting the first ratoon crop.

9. 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 appellant yet the same was pleaded. I now turn to calculate the amount due to the appellant on the 1st and 2nd ratoons.

10. Although the appellant had pleaded that the yield per hectare was 135 tonnes, the trial magistrate awarded 100 tonnes per hectare. 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 173.5 tonnes and 153.3 tonnes for the 1st and 2nd ratoon for the year 1996/97. The evidence of DW 1 was that the ratoon crop would yield 60 tonnes per hectare. The respondent did not cross-appeal against the finding by the trial magistrate in respect of the plant crop. However, taking the evidence from both sides I can only conclude by the trends that the yields for the 1st and 2nd ratoon would be lower than that of the plant crop. I therefore award the following:

1st ratoon 60 tonnes per Hectare X 1.4 Ha X Kshs. 1730 per tonne= Kshs. 146,160.00

2nd ratoon 55 tonnes per Hectare X 1.4 Ha.X Kshs. 1730 per tonne = Kshs 133,210.00

11. PW 1 admitted that the respondent supplied seed cane and fertilizer. In cross-examination, PW 1 agreed that the respondent did ploughing and furrowing whose costs would be recovered from him.PW 1 did not contest the cost of inputs which DW 1 put at Kshs. 57,932/-.

12. In conclusion, I set aside the judgment and substitute it with the judgment for the appellant against the respondent for **Kshs. 330,428/-** made up as follows;

Plant crop Kshs. 242,200/-

1st ratoon Kshs. 146,160/-

2nd ratoon Kshs. 133,210/-

Less (Kshs. 57,932/-)

13. Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (see ***African Highland Produce Limited v Kisorio*** **[1999] LLR 1461 (CAK)**). Although the respondent contended that the appellant could have mitigated his loss and suggested in the submissions that the wasted crop could be sold, this was not brought out in evidence to show that it was in fact a practical and realistic possibility.

14. As regards interest I agree that 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 and direct that interest on the judgment run from the date of filing suit.

15. I therefore enter judgment for the appellant against the respondent for the sum of Kshs. 330,428/- together with costs of the trial court. Interest of that sum shall accrue at court rates from the date of filing suit until payment in full. 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.