REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 72 OF 2009

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

MASIGA MIKWANGA.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. S. Wewa, SRM at the Chief Magistrates Court at Kisii in Civil Case No. 1497 of 2004 dated 18th March 2004*)

JUDGMENT

1. The parties herein entered into a written agreement dated 4th January 1998, the appellant contracted the respondent to grow and sell to it sugarcane on his land parcel being Plot No. 282A in field number 17B in Kakmasia Sublocation measuring 0.3 Hectares. The respondent alleged that the appellant failed to harvest the plant crop when it was mature and ready for harvesting leading to loss and waste. He claimed that he suffered loss for the 3 cycles and prayed for damages as follows;

> *(a) Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of sugarcane on 0.3 hectares of land at the rate of 135 tons per hectare and payment of Kshs. 1,730 per tonne.*

2. The appellant admitted the agreement but denied that the respondent was entitled to damages as claimed. It averred in the alternative that the average cane yield for the area is 65 tonnes per hectare as this was the average yield of the plant crop in the area. It contended that that the respondent's plot measuring only 0.3 hectares could only have produced 19.5 tonnes and would be subjected to other deductions like SOC levy, presumptive tax, harvesting and transport charges.

3. The trial magistrate found that the respondent had proved his claim on the balance of probabilities and awarded compensation for the plant crop, *"Kshs. 121,000/- as made up as follows: Kshs. 1730 X 70."*

4. The appellant's case in this appeal was summarized by Mr Odero, counsel for the appellant, who submitted that the plaintiff did not plead his claim with particularity and that the same was not proved. He noted that the trial court did not take into account deductions in making the award and the respondent was only entitled to the net amount after the necessary deductions.

5. Mr Oduk, counsel for the respondent supported the judgment. He pointed out that the trial magistrate accepted the appellant's evidence in reaching the award and that she took into account all the relevant facts.

6. As this is the first appeal, I am alive to the responsibility of the court. This court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.* [1968] EA 123** and ***Kiruga v Kiruga & Another* [1988] KLR 348**).

7. In his evidence, the respondent (PW 1), testified that his plant crop was never harvested and as such he lost three harvests under the contract. He stated that the harvest would have yielded 138 tonnes at Kshs. 1730 per tonne.

8. As regards the ground that the claim was not pleaded with particularity, I am satisfied that the nature of the respondent's claim was clearly set out in paragraph 3, 4, 5 and 6 which set out the nature of the agreement, paragraph 7 which pleaded the breach and the particulars of loss were set out in paragraphs 8 and 9 and the prayer for relief which I have set out above. The purpose of a pleading is to enable the opposing party understand the nature of the claim and answer it. In this case, the appellant was able to answer the claim in its defence. It accepted the agreement and put forth an alternative basis for calculating the damages. The nature of this claim has not escaped attention from the Court of

Appeal. 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 were 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.*

9. I therefore find and hold that the claim was pleaded as required. As regards proof, the evidence, which I accept was that the respondent's plant crop was not harvested meaning that the respondent could not benefit from the 1st and 2nd ratoon. This was clearly a breach of the contract (see ***Adongo v South Nyanza Sugar Company Limited*** **MGR HCCA No. 28 of 2016**). The appellant did not contest the price per tonne but urged that the trial magistrate erred in finding that the yield per hectare was 70 tonnes.

10. It is not clear from the evidence whether the 70 tonnes was for the respondent's piece of land. However, this calls for the court to evaluate the evidence on this point. The appellant pleaded and stated in his testimony that yield per hectare was 130 tonnes. The issue is a question of fact and I would also point out that yield per hectare is within the knowledge of the appellant as it has expertise in that area. Hence, as Mr Oduk pointed out, the admissions by DW 1 were critical in assessing the evidence.

11. In the defence, the appellant pleaded that the yield was 65 tons per hectare. In examination in chief, DW 1 stated that the yield per hectare would be 21 – 70 tons per hectare while in cross examination, he stated that one hectare could have produced 180 tons. Based on this evidence, I cannot fault the trial magistrate for choosing 70 tons per hectare in reaching the decision.

12. The respondent did not cross-appeal against the failure of the trial magistrate to make an award for the 1st and 2nd ratoon. The only error committed by the trial magistrate is that she omitted to calculate the amount taking into account the area of the respondent's plot. The total amount would therefore work out as follows: 0.3Ha X 70 tonnes per Ha. X 1730/= 36,330/-.

13. The appeal is allowed only to the extent that judgment is entered for the respondent against the appellant for the Kshs. 36,330/- together with interest thereon from the date of filing suit until the date of judgment. As this is a 2009 appeal which was only prosecuted after the court prompted the appellant and threatened dismissal, I will award interest thereon for one year only and thereafter interest at court rates from the date of this judgment.

14. Since the appeal has failed save for the correction of the subordinate court judgment, I decline to award costs.

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

D.S. MAJANJA

JUDGE

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

Mr Oduk instructed by Oduk and Company for the respondent.