



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 53 OF 2017

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

AND

JOSEPH O. OBALA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon J. M. Njoroge, SPM

dated 30th May 2017 at the Chief Magistrates Court at Kisii

in Civil Case No. 1502 of 2004)

JUDGMENT

1. At the hearing of this appeal Mr Odero, learned counsel for the appellant, rightly conceded that the appellant did not dispute breach of the agreement between the parties. The respondent's testimony was undisputed and the only issue raised, despite the rather prolix memorandum of appeal, is whether the trial court was right to award damages for the 3 cycles.

2. It is not disputed that appellant contracted respondent by an agreement dated 9th March 2000 to grow and sell sugarcane on his land parcel being Plot No. 252E field number 4A measuring 0.6 hectares in Kakmasia Sub-location. It was a term of the agreement that it would commence on 9th March 2000 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.

3. Based on the uncontested testimony of the respondent, the trial magistrate awarded him Kshs. 198,666.00 made up as follows:

0.6 Ha X 100 tonnes per Ha. X 1730	Kshs. 103,800.00
Less harvest and transport charges	
& 1% cess	Kshs. 66,222.00
Compensation for 3 cycles	Kshs. 198,666.00

4. In ***Consolata Anyango Auma v South Nyanza Sugar Company Limited MGR HCCA 53 of 2015 [2015]eKLR*** I set out the principles applicable in determining damages to be awarded as follows:

*[15] The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see ***Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR***). The measure of damages is in accordance with the rule established in the case of ***Hadley v Baxendale (1854) 9. Exch. 341*** that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by*

*the parties at the time the contract was made and a probable result of such breach (see **Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR**). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see **Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR)** and **Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)**).*

5. In this case, the agreement was for 5 years. The respondent failed to harvest the respondent's cane. It must therefore bear the consequences of breach. As to whether the trial court could take into account mitigation of damages, I hold that this 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)**). Since the appellant did contest the respondent's claim, it did not show how the respondent could mitigate the loss.

6. In addition, the issue whether there were any deductions to be made on the amount harvested, the yield per hectare for each crop in respect of each ratoon were questions of fact which the appellant ought to have put forth by credible evidence. They are not matters for which this court can take judicial notice under **section 60** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. The respondent's statement of defence is still worth the paper it was written on and could not form the basis of any other factual determination.

7. I dismiss the appeal and award costs of the appeal to the respondent 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.