



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. 92 OF 2015

JAMES MARANYA MWITA.....APPELLANT

-VERSUS-

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. Phoebe Y. Kulecho, Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 530 of 2014 delivered on 30/04/2015).

JUDGMENT

Background:

1. By a Growers Cane Farming and Supply Contract dated 04/05/2006 (hereinafter referred to as '**the Contract**') the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD**, contracted the Appellant herein **JAMES MARANYA MWITA**, to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 97A measuring 1.2 Hectares in Field No. 63 Maheto in Migori County. Clause 2(a) of the Contract however indicated that the contract was deemed to have commenced on 08/08/2005.
2. The Contract was for a period of five years or until one plant crop and two ratoons of the sugarcane were harvested from the subject parcel of land whichever event occurs first.
3. By a Statement of Claim evenly dated and filed in the then Sugar Arbitration Tribunal (hereinafter referred to as '**the Tribunal**') on 04/04/2008, the Appellant claimed for a declaration that the Respondent had breached the Contract by not harvesting the cane when it matured, compensation for the value of the unharvested cane, penalty interest under the then Sugar Act and interest at court rates.
4. The Respondent filed a Statement of Defence denying the claim and on a without prejudice averred that if at all the Appellant suffered any loss then the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard so as to warrant the crop to be harvested and milled by the Respondent.
5. The Statement of Claim was amended by the consent of the parties as signed and evenly filed on 29/05/2009 where paragraph 4(b) of the Statement of Claim on amendment stated as follows:

“Amount = 2.4 (Ha) x 100 tons yield per (Ha) x price per tone Ksh. 2,015 x 2 cycles.”

6. The claim was fully heard before the Tribunal where both parties were represented by Counsels and as the matter was pending judgment the Sugar Act, which created the Tribunal, was repealed and in its place the Crops Act was enacted. As a result of that development in the law the claim was referred to the Chief Magistrate's Court at Migori for further dealing. The claim was then registered as Civil Suit No. 530 of

2014 and since both the parties' cases had been closed **Hon. Phoebe Y. Kulecho, Resident Magistrate** proceeded to write and deliver the judgment. The court however did not have the advantage of the Respondent's written submissions which it seems the Respondent did not file.

7. In the rendered judgment the lower court found that the Respondent had breached the Contract but declined to award the compensation having found that the Appellant had instead sold the sugar cane to a jaggery and had already made an earning therefrom. The court however awarded the Appellant nominal damages of Kshs. 100/= with costs of the suit.

8. That was the judgment that necessitated the Appellant to file the appeal subject of this judgment.

The Appeal:

9. The Appellant proposed five grounds of appeal in the Memorandum of Appeal dated 18/05/2015 and filed in Court on the following day. The grounds were tailored as under:

“1. The Learned trial Magistrate erred in law and in fact, when she failed to consider and evaluate the evidence given by th Appellant thereby reaching to a wrong conclusion that the appellant sold his cane to jaggery.

2. The learned trial magistrate erred in law when she delivered a judgment that was against the weight of evidence tendered by the parties.

3. The learned trial magistrate misdirected herself in law by finding that the Appellant sold his cane to jaggery, a matter which was never even pleaded by the respondent in their statement of defence dated 15th April, 2008

4. The learned trial magistrate misconceived facts and law by purporting to only award the appellant a paltry sum of Kshs. 100/= as nominal damages yet she had herself found that the respondent was in breach of the contract.

5. The learned trial Magistrate was biased against the appellant.”

10. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions. In his submissions the Appellant collapsed the five grounds of appeal into three being:

a) Whether there was sufficient evidence to support the trial magistrate's finding that the appellant sold his cane to jaggery;

b) Whether the trial court made an error in considering a defence that was never pleaded that the appellant had crushed his cane to jaggery; and

c) Whether the trial court was justified in awarding nominal damages upon a finding of breach of contract.

11. It was the Appellant's contention that the finding that the Appellant had sold his cane to a jaggery was unfounded both in law and in fact on two fronts: first that the Respondent did not plead such a defence in its pleadings and second that the allegation was not proved in law. The Appellant further submitted that the court erred in awarding nominal damages upon finding that the Respondent had breached the contract. Five judicial decisions of the Court of Appeal were cited in support of the twin issues.

12. The Respondent supported the trial court's decision. In taking this Court through the evidence as adduced, the Respondent submitted that the issue of the Appellant having sold the cane to a jaggery was confirmed by two of its witnesses who visited the farm and did not see the cane which was allegedly overgrown due to the failure to harvest the same timely. In supporting the award of nominal damages, the

Respondent relied on one of the judicial decisions referred to by the Appellant.

Analysis and Determinations:

13. As the first appellate Court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**.

14. I have carefully and keenly read and understood the proceedings and the judgment of the Tribunal and the lower court as well as the grounds and the parties' submissions on appeal. In this matter, there is no contention as to whether or not the contract was breached by the Respondent. That fact of the breach is admitted by both parties.

15. The Respondent has by way of its submissions and while admitting that it breached the contract, asked this Court to also make a like-finding that the Appellant was equally in breach of the same Contract for failure to observe the terms and conditions as contained in Clauses 3.5 and 3.7 of the Contract. With tremendous respect to the Respondent, that submission has to fail for one simple reason that the Respondent neither counter-claimed in the Statement of Defence nor did it file any Cross-Appeal. The first time the issue came to the fore is in the submissions and since parties did not highlight on their respective submissions then that renders the Appellant unaware of such a submission. That submission and prayer is hence rejected.

16. Having found that the Respondent breached the contract, the question that now begs an answer is whether the Appellant has any remedy(ies) on law. It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of **Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR)** emphatically expressed itself thus:

".....As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract....."

17. The reason as to why general damages cannot be awarded in cases of breach of a contract was explained in the case of **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR** as follows:

"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))".

18. I fully agree that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity. I however concur with the qualification made by the Court of Appeal at Kisumu in Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (UR) that:

"...the degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the Jivanji case (supra) a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v. Murunga & others Nairobi CA NO. 192 of 1992 (ur) appears in the Jivanji case.

"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v. Nakaye [1972]ea 446, Ouma v. Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v. Chebon Civil Appeal Number 22 of 1991 (ur). In the latest case, Cockor JA who dealt with the issue of special damages said in his judgment:

"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v. Nairobi City Council [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532 - 533 in Ratcliffe v. Evans [1892]QB 524, an English leading case of pleading and proof of damage.

"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damages is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

19. The Court of Appeal in the case of J. Friedman v. Njoro Industries (1954) 21 EACA 172 observed that:-

"...there is no obligation on a trial judge who is in possession of all material facts to enable him to make a fair assessment of the damages to order an enquiry in regard thereto..."

20. In expounding further the foregone the Court in the case of John Richard Okuku Oloo (supra) stated that:

"It was held by the Court of Appeal in England in the case of Chaplin Hicks [1911]KB 786 that the existence of a contingency which is depended on the volition of a third person does not necessary render the damages of a breach of contract incapable of assessment.

The following passage appears in the judgment of Vaughan Williams, LJ in the Chaplin case:

"Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it was possible to apply the doctrine of averages at a;;.I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however, that damages might be so unassessable that the doctrine for averages would be inapplicable because the necessary figures for working upon would not be forthcoming; there are several decisions, which I need not deal with, to that effect. I only wish to deny with emphasis that, because precision cannot

be arrived at, the jury has no function in the assessment of damages.”

Vaughan Williams, LJ goes on to state, and we fully agree, that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.

21. As stated elsewhere above, the Appellant in paragraph 4(b) of the amended Statement of Claim particularized his claim as follows:

'Amount = 2.4 (Ha) x 100 tons yield per (Ha) x price per tone Ksh. 2,015 x 2 cycles.'

22. I am therefore of the very considered view that looking at the nature of the Contract and how the loss occurred, the above Appellant's averment was adequate to make a court assess the special damages accordingly. In affirming the position the Court in the **John Richard Okuku Oloo** (supra) had the following to say:

"In case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.

The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.

We have shown that the pleading 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 standard nor offered sufficient proof.

Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit

23. In this case the trial court did not venture into the foregone assessment of the special damages as it found that the Appellant had instead sold his cane to a jaggery and as such did not suffer any loss. That was the basis of the award of Kshs. 100/= in nominal damages. That finding was vehemently attacked on appeal.

24. In considering the issue I will start with the parties' pleadings. The Respondent's Statement of Defence admitted the fact that the Respondent had entered into the Contract with the Appellant but it specifically and categorically denied being in breach of the Contract or that the Appellant suffered any loss. The Respondent went further and averred on a without prejudice that if at all the Appellant suffered any loss then the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard so as to warrant the crop to be harvested and milled by the Respondent. The Respondent did not therefore raise the issue of sale of the cane to a jaggery in its pleadings. I will follow the binding decision of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281** in buttressing the holding that a defendant must raise by his pleadings all matters which show the suit not to be maintainable.

25. Pleadings aside, if that issue came up during the hearing and there is such evidence that indeed the Appellant sold the cane to a jaggery then that revelation would have had a bearing on the trial court's

approach on the matter moreso in ascertaining whether or not the Appellant suffered any loss as a result of the Respondent's breach of the Contract. But that must be done with the caution as laid by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which re-emphasized the position that since parties are bound by their pleadings any evidence that does not support the averments in the pleadings must be disregarded.

26. Turning to the evidence as it unfolded before the Tribunal, the issue first came up during the Appellant's cross-examination. The Appellant denied receiving the Respondent's letter dated 16/11/2008 which alleged that the Appellant had sold the cane to a jaggery and contended that the overgrown cane was still on the farm as at the time of his testimony before the Tribunal. As to whether the Appellant received the letter in issue, I will refer to Clause 9 of the Contract that deals with service of notices. On a careful perusal of the record I find that there is no evidence that the Respondent served the letter in issue upon the Appellant.

27. Then came **DW1, Gabriel Nyangweso**, who was the Respondent's Harvesting and Transporting Manager. In his evidence-in-chief he stated that *'there was no cane at the shamba because it was crushed to jaggery...I have reports prepared by Mr. Ochieng - Area Agronomist. He works with Sony can be called.'* When Mr. Ochieng, **DW2**, eventually testified he had the following to say:

'...I work with Sony as a field superintendent in charge of sector 6.....

... I last visited the farm on Tuesday this week. I found there was no cane. The plot is fallow.

I am aware there was cane planted on the plot. I know what happened to it. It was crushed to jaggery.....

...I was not able to establish to whom the cane was sold....'

...I did not receive a request to have cane sold to jaggery dealer... (emphasis added).

28. On being cross-examined DW2 admitted that he had not prepared any report on the allegation of the sale of the cane to a jaggery but undertook to shortly prepare one. That report, if at all it was prepared, was not produced in evidence.

29. That was all what the evidence had to say on the issue. It seems that the Respondent was all along aware of its position that the Appellant had sold his cane to a jaggery without its consent. That being so, the Defence remained so silent on it. That is to say the Respondent did not raise the issue as a rebuttal to the Appellant's claim or by way of a counter-claim. The Respondent's position was very clear that it was not in breach of the Contract and that the Appellant suffered no loss but in the event it was proved that the Appellant suffered any loss then the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard so as to warrant the crop to be harvested and milled by the Respondent. What made the Respondent not to make that position as part of its defence remain unknown to this Court. As a result of the foregone, the Respondent's evidence was clearly at variance with the pleadings and as such the evidence did not derive from the pleadings. It is hence to be disregarded.

30. That aside, looking at the evidence in support of the allegation that the Appellant sold the cane to a jaggery, the same falls short of the test in **Section 107** and **Section 109** of the **Evidence Act**, Chapter 80 of the Laws of Kenya. The evidence of DW1 and DW2 rests purely on hearsay and speculation. DW1 visited the farm in November 2008 and did not find the cane but only heard that the cane had been sold to a jaggery. DW2 visited the farm sometimes in October 2008 and also in December 2009 and in not seeing the cane at the Appellant's farm 'knew' that the same had been crushed to a jaggery although his efforts to find out who the jaggery owner was were in vain. But what made DW2 conclude that the cane must have been sold to a jaggery and not otherwise?

31. The evidence of DW1 and DW2 has to be juxtaposed against that of **PW2, Paul Simo**, an Extension

Officer who also visited farm and prepared the Crop Yield Assessment Report dated 14/12/2008 which he produced before the Tribunal. The report clearly states that when PW2 visited the Appellant's farm he saw '**over mature standing canes drying**'. If DW1 visited the farm in November 2008 and did not find the cane how come that PW2 who visited the farm in December 2008 found the cane? Since DW1 did not file any report on his visit to the farm and him being a Harvesting and Transporting Manager as opposed to PW2 who was an Extension Officer and who filed his report, I am persuaded that the evidence of PW2 ought to and hereby triumphs that of DW1. I so find since the evidence of PW2, unlike that of DW1, was corroborated by the assessment report.

32. DW2 who visited the farm in October 2008 and in December 2009 did not also find the cane in both instances. But when the Appellant testified before the Tribunal he stated that the cane was still on the farm although it had dried up. Although the Counsel for the Respondent had indicated his desire for the Tribunal to visit the farm it appears that the issue was not pursued further and the Tribunal did not make any visit as intentioned by the Respondent. If DW2 had already visited the farm in 2008 one then wonders why he again visited the farm in December 2009. That aside, when DW2 found that the cane was missing in 2008 he did not make any report and he told the Tribunal that he had intended to prepare the same shortly after his appearance before the Tribunal, that is over one year later. On a preponderance of probability I find that DW2 visited the farm in December 2009 and not in October 2008. Having filed a claim in April 2008 and in view of the expert report of PW2 having been prepared and also produced before the Tribunal and that the Respondent did not indicate its desire to visit the *locus quo* early enough, it would be unreasonable and indeed a higher calling to expect the *status quo* maintained in the Appellant's farm over one year later.

33. Be that as it may and for argument sake, even if I take it that indeed DW2 visited the farm in October 2008 and found the cane missing still the onus would have remained upon the Respondent to prove that indeed the cane was sold to a jaggery. I say so because there can be several explanations on where the cane would have been including the possibility of the Appellant having cleared it on realizing that he had lost the main crop and that the ratoons were compromised. The Respondent did not therefore discharge that burden.

34. The above analysis now leads this Court to the inevitable finding that the evidence of the cane having been sold to a jaggery is not good evidence and it ought to be disregarded. To that end the finding by the learned magistrate, with tremendous respect, was in error since it was contrary to law. That finding is hereby set-aside accordingly.

35. Having so found, the learned magistrate was then so called in law to assess the special damages from the available material placed before her instead of awarding nominal damages. Needless to say an award in nominal damages would not normally succeed in the circumstances of a case like this one since the loss the Appellant suffered was certain and could be easily quantified. Respectfully, the award on nominal damages of Kshs. 100/= cannot stand is also set aside.

36. As to the special damages payable in this matter, the Appellant was quite clear in paragraph 4(b) of his amended claim. He prayed for the yields in respect of two cycles that is the main crop and the first ratoon. The Appellant however admitted that the Respondent had supplied him with the cane seeds, fertilizers, urea and other inputs whose value was around Kshs. 120,000/= and which amount was to be deducted from the value of the cane once harvested.

37. But there was no consensus on the average cane yield for the area where the farm was situated. Whereas the Appellant proposed 100 tonnes per acre the Respondent proposed between 50-55 tonnes instead. None of the parties laid a basis for the proposal it made. I therefore have to take refuge on the expected yield from the guide developed by the now defunct **Kenya Sugar Research Foundation**. The Kenya Sugar Research Foundation, which was succeeded by the now **Kenya Agricultural and Livestock Research Authority (KALRO)**, was mandated to promote research and investigate all problems related to sugarcane and such other crops, processing into sugar and its by-products, productivity, quality, sustainability of land and all such matters ancillary thereto. That was the institution which in the course of discharging its said mandate came up with the guide.

38. According to the guide developed through a study that was carried out between 1993 and 2001 the average expected cane yield over the whole area forming the Respondent's zones was at **87 tonnes per acre**. I will therefore apply that figure in this matter. Since there was no dispute as to the price per tonne of Kshs. 2,015/= then the expected earnings for the Appellant in respect to the two cycles as prayed would have been Kshs. 841,464/=. Out of this figure I will deduct the sum of Kshs. 120,000/= on the Respondent's expenses. The special damages would then stand at **Kshs. 721,464/=** which sum I hereby enter judgment for the Appellant as against the Respondent. This sum shall attract interest from the date of filing of the Claim before the Tribunal.

Conclusion:

39. Following the foregone discourse, the upshot is that the following final orders do hereby issue:-

- a) The appeal hereby succeeds and the finding of the learned magistrate declining to award special damages and instead awarding nominal damages of Kshs. 100/= be and is hereby set aside accordingly;**
- b) Judgment is hereby entered for the Appellant as against the Respondent for special damages at Kshs. 721,464/=;**
- c) The sum of Kshs. 721,464/= shall attract interest at court rates from the date of filing of the claim before the Tribunal;**
- d) The Appellant shall have costs of the suit as well as costs of the appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of January 2017.

A. C. MRIMA

JUDGE