REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 10 OF 2016

SOUTH NYANZA SUGAR CO. LTD..... APPELANT

VERSUS

JOSEPH O. ONYANGO.....….....RESPONDENT

(Being an appeal from the judgment and decree by Hon. L. N. Sindani, Resident Magistrate in Migori Senior Principal Magistrate's Civil Suit No. 67 of 2015 delivered on 27/01/2016).

JUDGMENT

1. This is an appeal involving a sugar cane farmer and a sugar miller in respect to an arrangement they had towards cane growing and harvesting.

2. The farmer, **JOSEPH O. ONYANGO,** who is the Respondent in the appeal entered into an Outgrowers Cane Agreement/Contract (herein after referred to as **'the Agreement'**) with the Appellant herein, **SOUTH NYANZA SUGAR CO. LTD,** sometimes on 06/11/2002. According to the agreement the Respondent was to plant some cane on his parcel of land according to and with the guidance and assistance of the Appellant in terms of technical expertise and the supply of the cane seeds and fertilizers and on maturity the Appellant was to harvest the cane and accordingly pay the Respondent the value thereof less its expenses.

3. It appears that the parties' expectations in the agreement were not fully realized and the Respondent filed a suit against the Appellant before the Migori Senior Principal Magistrate's Court being Civil Suit No. 67 of 2015 (herein after referred to as **'the suit).** The suit, which was based on the Appellant's failure to harvest the Respondent's cane on maturity, was heard and a judgment rendered in favour of the Respondent on 27/01/2016. In the judgment the Appellant was ordered to pay the Respondent the sum of Kshs. 84,360/= with costs and interest from the date of filing the suit.

4. Being dissatisfied with the said judgment and decree, the Appellant preferred an appeal and filed a Memorandum of Appeal in this Court on 15/02/2016 where it raised four main grounds of appeal. The said grounds were tailored as follows:

> ***1. The Learned Trial Magistrate erred in both law and in fact when she awarded damages for breach of contract in the sum of Kshs. 84,360/= which was an amount had neither been pleaded in the Plaint nor proved at the trial as is required by law.***
>
> ***2. The Learned Trial Magistrate erred in both law and in fact when she failed to appreciate and to give due regard to the Defendant's submissions and evidence entirely therefore resulting in a finding prejudicial to the Appellant.***

3. The Learned Trial Magistrate erred in both law and in fact when she awarded global compensation to the Respondent in respect of crop cycles which were never developed by the Respondent and therefore never existed at all, thereby failing to take into account a relevant fact and circumstances that the Respondent was under a duty to mitigate his / her losses and in failing to apply the principle of mitigation of losses.

4. The learned Trial Magistrate therefore on the main decided the case against the weight of evidence, contrary to the law and unknown legal principles, thereby exercised his discretion wrongly when he failed to dismiss the Respondent's suit in the case below with costs".

5. Directions were subsequently taken and at the hearing the appeal was canvassed by way of oral submissions where **Mr. Nicholas Bosire**, instructed by the firm of Moronge & Company Advocates appeared for the Appellant and **Mr. Jura**, instructed by the firm of Kerario Marwa & Company Advocates appeared for the Respondent.

6. Mr. Bosire in arguing the appeal dealt with two issues. The first one was that the trial court had erroneously awarded the Respondent two cycles of the cane crop being the main Plant Crop and the First Ratoon Crop instead of only awarding him the main Plant Crop since the Respondent did not mitigate his losses. According to Counsel the Respondent failed to mitigate loss by terminating the Agreement upon realizing that there was a failure by the Appellant to harvest the main plant crop and that equity expected him to act with diligence so as to avoid further loss.

7. The second issue was that the trial court erred in relying on the guidance in respect to the expected crop yields by the Kenya Sugar Research Foundation ((herein after referred to as '**the Kesref Yields Guide**') instead of the one developed by the Appellant.

8. In opposing the appeal Mr. Jura submitted that the agreement was clear on the obligations of each party with its defined remedies and had no provision for equity. It was further submitted that even under the repealed Sugar Act the responsibility to harvest the cane was on the miller.

9. 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).**

10. In discharging the foregone duty I will now look at the two grounds as argued in the appeal. On the first ground I will start by stating that this Court has carefully perused the Agreement. The same is a contract. The agreement creates several rights and obligations on both parties. Since there is consensus that the Appellant breached the Agreement by not harvesting the cane at maturity, this Court is only called to determine whether the Respondent was entitled to the proceeds from the first crop alone or also the proceeds from subsequent expected yields, that is the ratoons.

11. When a farmer enters into a contract with a miller like in the case in this matter, that farmer on one hand expects to reap the returns on such investment. That is why such a farmer will endeavour to discharge the obligations on his/her part accordingly. Likewise a miller on the other hand is also expected to discharge its obligations so that no party suffers loss as a result of the undertakings under the agreement. It therefore goes that a party which acts contrary to the terms and conditions of the agreement without any legal justification must be ready to face the attendant consequences. One of such consequences is to pay for the expected returns on the investment.

12. In this matter the Appellant's Counsel rightly pointed out that the Respondent was entitled to the proceeds from the main crop plant. As to whether the Respondent was entitled to the expected proceeds from the ratoons, I will first relook at the Agreement. Under Clause 1 thereof the Agreement came into

force on 06/11/2002 and it was to remain in force for a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. The Agreement also provided the acreage of the farm to be 0.4 Hectares and other particulars including being Field No. 20A, in K/IIB sub-location which was in Zone B of the Appellant's sugar zones and was 15.9 kms away from the Appellant's factory.

13. The Respondent through the Statement of the Claim filed before the Sugar Arbitration Tribunal (hereinafter referred to as '**the Tribunal**') particularized the loss under paragraph 6 as follows:

> *"**Amount = 1.1 (Ha) x 100 tons yield per (Ha) x price per tone Kshs. 2,500/= x 2 cycles = Kshs. 200,000/=."***

14. The Appellant's position was that the Respondent was only entitled to the expected proceeds from the main crop and not from the ratoons since he failed to mitigate his loss. According to the Appellant the Respondent would have terminated the contract with the Appellant and sought to sell the cane elsewhere and since the Respondent failed in so doing then equity which aids the vigilant and not the indolent would not come to the aid of the Respondent.

15. That being so I will venture into a look at the legal remedies available when a contract of this type is breached. 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 Kavai 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....."***

16. 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))".***

17. 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 insists upon more would be the vainest pedantry."

18. 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..."

19. 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 incapble 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 b e 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 necessary of paying damages for his breach of contract."

20. In this matter however I am of the very considered view that looking at the nature of the Contract and how the loss occured and the claim as tailored, the Respondent clearly pleaded his claim as special damages and for that matter claimed the sum of **Kshs. 200,000/=**. In affirming such a 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."***

21. I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.

22. Looking at the Agreement, there are several restrictive clauses such that it would not be possible for the Respondent to take any reasonable steps to mitigate the loss unless the Appellant takes the first step in informing the Respondent of its intended breach of the Agreement. The Appellant's argument that the Respondent failed to mitigate its loss cannot stand and is hereby rejected.

23. I therefore find that the Respondent was entitled to the proceeds from the ratoons. The learned trial magistrate was hence right in awarding the expected proceeds of the first ratoon. The first ground fails.

24. Turning to the second ground, the agreement is silent on the expected yield of the crop. That being so, a party seeking direction on the issue will have to get some guidance from outside the confines of the agreement. It appears that the Appellant developed its own Expected Crop Yield Schedule. That is the one on page 41 of the Record of Appeal. On the other hand there is another one developed by the now defunct Kenya Sugar Research Foundation which I have referred to above as **'the Kesref Yields Guide'**. 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 **Kesref Yields Guide.**

25. Looking at the guide developed by the Appellant and the one developed by the defunct Kenya Sugar Research Foundation I am inclined to accept the usage of the guide as developed the defunct Kenya Sugar Research Foundation instead. I say so because to me the Kesref Yields Guide is a product of extensive research and it also has a sound technical basis attached. On the other hand, I cannot tell of the basis upon which the Appellant came up with its guide. I therefore find that the learned trial magistrate did not err in adopting the use of the so-called Kesref Yields Guide in determining the expected crop yields for the main crop plant and the first ratoon.

26. Having so dealt with the twin issues raised in the appeal, the upshot is that the appeal is unsuccessful. The appeal is hereby dismissed with costs.

27. Pursuant to the directions taken in **Migori High Court Civil Appeal No. 11 of 2016** on 08/12/2016, this judgment shall also apply to that appeal.

Orders accordingly.

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

A. C. MRIMA

JUDGE