REPUBLCI OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 18 OF 2015

SOUTH NYANZA SUGAR CO. LTD ….....APPELLANT/RESPONDENT

VERSUS

AWINO OREKO ….....RESPONDENT / APPLICANT

JUDGMENT

(An appeal from Judgment of Z. K. Nyakundi (PM) delivered on 30/04/2014 in Rongo PMCC No. 108 of 2012)

1. **SOUTH NYANZA SUGAR COMPANY LTD (the Appellant)** contests the decision where judgment was entered against it in favour of **AWINO OREKO (the Respondent)** and awarded damages in the sum of Kshs. 343,119 less expenses for services provided plus costs and interest. The decision is contested on ground that this sum was awarded as damages for breach of contract, which was neither pleaded nor proved at the trial. Further that the awarded sum should have been considered on the basis of net loss (which was factual) instead of alleged gross yield (which was speculative).

2. The trial Magistrate is faulted for failing to take into account the proven scientific fact that sugarcane crop decreases in yield from the plant crop which yields more to the second ratoon which yields less, and therefore erroneously ordered the appellant to pay the Respondent an alleged equal loss on yield in respect of all the three crop cycles.

3. The trial Magistrate was also faulted for finding that the respondent's plot could yield 135 tons of sugarcane per hectares in respect of plant crop ratoon 1 and ratoon 2 crops, when in actual fact only the plant crop had been developed by the respondent. Further that the judgment did not appreciate the fact that the Respondent only developed the plant crop with the assistance of the appellant who provided in-puts and carried our essential services. This it is stated resulted in an award in respect of the ratoon crops which never existed.

4. It is also pointed out that in awarding compensation to the Respondent in respect of the plant crop, (1st and 2nd ratoon crop cycles), the trial magistrate failed to pay regard to the principle of reasonable expectation of the parties to the effect that the Respondent was to be paid only the net proceeds from only such cane as had been developed less the deductions in respect of costs, of in-puts and services, cane harvesting and cane transport expenses which could not have ended in the farmer's pocket in any event.

5. The appeal was disposed of by way of written submissions. What triggered off this appeal was the claim filed by the Respondent seeking damages for breach of contract against the Appellant with interest at Court rates from 19th September, 2003 until payment in full. The basis for this was that on the aforementioned date, the Appellant contracted the Respondent to grow and sell to it sugarcane on his

land parcel No. 48A in field No. 10 in Kongudi Sub-location measuring 10 hectares.

6. The Respondent signed an agreement and was assigned account No. 490112, and the cane was planted as agreed. It was an express and implied term of the contract that the contract would remain in force for a period of five (5) years or until one plant and two ratoon crops of sugarcane were harvested - whichever period would be less.

7. It was pleaded that further an implied or express term and practice that:-

(a) Within the agreed referred period, the plant crop and ratoon cane would be harvested at the ages of 22 – 24 months and 16-18 months after planting and subsequent harvest respectively.

(b) The defendant would under the contract, be bound to exercise due care while harvesting and taking delivery of the cane.

8. The Respondent claimed that in breach of the agreement, the appellant failed to harvest the plant crop when it was mature at 22-24 months, and the cane started deteriorating. The Respondent thus suffered loss and pleaded that the parcel of land was capable of producing an average of 135 tonnes per hectares for the plant crop and 135 tonnes per hectare for the ratoon crop; whose rate of payment then was Kshs. 2,015 per tonne. The plaintiff complained that she suffered damages for three crop cycles as follows:-

(**a) Expected yield for plant crop 135 tonnes x 1ha x 2015 = 272,025.**

(b) Expected crop yield per 1st ratoon crop 135 tonnes x 1ha x 2015 = 272,025

(c) Expected crop yield for 2nd ratoon 135 tonnes x 1ha x 2015

TOTAL 816,075/=

9. The Appellant denied the existence of any contract but argued that if such contract existed then it was the Respondent who breached its terms by failing to develop cane on the plot from which a satisfactory yield of sugarcane capable of being cost effectively harvested and transplanted to the Appellant's for milling could be obtained.

10. The Appellant however admitted that it was a practice within the sugar industry that sugar cane supply / contracts usually run for a period of five (5) years and/or the duration it takes for three sugarcane crop cycles to be harvested from the plot if developed, whichever period is less.

11. The appellant denied failing to harvest the crop when it had matured saying it is the Respondent who failed to develop the cane. It was the appellant's contention that the average sugarcane yield per acre in the South Nyanza Sugar Zone is 60 tonnes and not 135 tonnes as claimed.

12. Further that even if the crops yield was 135 tonnes, the payment of such yield ought to have been subjected to deductions either contractual or statutory and based on the applicable sugarcane price.

13. The Respondent in her evidence told the court that her land measured 2 ½ acres and upon planting the crop she was issued with certificates including a job completion certificate (after being supplied with fertilizer). She expected 3 harvest seasons which would realise 130 tonnes and she had maintained the crop to maturity.

14. On cross examination the Respondent confirmed that she did not develop the ratoon because it was damaged and explained on re-examination as follows:-

"The ratoon could not be developed because the plant crop was not harvested. The crop in the field dried up."

15. The Appellant's field administrator (RICHARD MUOKI) confirmed the Appellant had a contract with the respondent to develop cane as from 19/9/2003. He explained that she was required to grow the cane, apply fertilizer and weed it. The Appellant ploughed the land at a cost of Kshs. 6,711 and he gave an expenditure break down as follows:-

Ploughing	**Kshs. 6,711/=**
Harvesting	**Kshs. 3,433/=**
2nd Harvest	**Kshs. 3,034/=**
Harrowing	**Kshs. 1,400/=**
Surveying	**Kshs. 278/=**
Seed cane	**Kshs. 26,040/=**
Fertilizer	**Kshs. 4,182/=**
Urea	**Kshs.3,732/=**
TOTAL	**KSHS. 48,810/=**

He explained that the services were not for free and the appellant would recover them after harvesting the first crop.

16. In addition there were harvesting charges Kshs. 200/= per term, transport Kshs. 399 per ton less Kshs. 1% of the total cane value.

He claimed that the cane was planted but never maintained; fertilizer was not applied, manual weeding was not done, and it was abandoned. He contended that the plant crop yield would have been 61.65 tonnes and Ratoons 46.77 tonnes as per the crops production report produced as DEX1. He explained that the cost of 1 tonne then was Kshs. 2,000/= and blamed the Respondent for not availing the cane.

17. It was further argued that the contract at Clause 13 provided that in the event of a dispute the same would be referred to the Sugar Tribunal yet the Respondent did not adhere to this.

18. On cross examination DW1 confirmed that the cane would have been harvested three times and said that when the appellant's officers went to visit the farm they did not find any cane. He explained that in such an instance a report would be made about the finding, but in this instance no such report was presented. He also conceded that although 61.65 tonne per acre is the average mean yield, a farmer can get a better or worse yield.

19. The Trail Magistrate considered the evidence and noted that there was no dispute that there existed a development contract between the appellant and Respondent as of 19/9/2003for a period of 5 years, covering the plant crop and the ratoons.

20. The trial magistrate held that there was no evidence presented to confirm that the cane had been abandoned as there was nothing to show when the cane was abandoned, what level of growth the cane had reached when it was abandoned, and any warning letter to the Respondent regarding the abandonment.

21. In calculating the quantum of damages, the trial magistrate noted that the crop was planted on an area measuring 1.0ha and he relied on the figures presented by the appellant's field administrator in the productivity report thus using 61.65 tonnes as the expected yield per hectare, and the price of Kshs. 2,000/= per tonne to work out at 1.0 x 61.65 x 2000=123,300.

22. The trial magistrate also pointed out that since the crop planted on 19/09/2003 would have matured for harvest in the year 2005 and the expected yield would have been 46.77 tones and by the year 2007, the price per ratoon was Kshs. 2200/= 102,894.

23. He also considered that the 2nd ratoon expected yield would have been 46.77 by the year 2007 (which would be the date of harvesting, and the price would be Kshs. 2,500/= which worked out at 46.77 x 2500 = 116,925/=. This resulted in a total of Kshs. 343,119 less expenses for services provided .

24. The appellant's counsel submitted that the award for breach of contract on the basis of an alleged gross yield was speculative, and in any event such damages are special in nature and must be specifically pleaded. While conceding that the same were clearly pleaded it is argued that the respondent never proved that there existed sugarcane on her farm other than the plant crop which went to waste when the appellant failed to harvest it.

25. Counsel argued that from the Respondent evidence, it was clear that she only developed the plant crop with the assistance of the appellant and this should have been the only basis of compensation. It was also argued that the award should have been based on net loss and not gross loss – reference was made in the decision in **GULTAMED MOHAMEDALI JIVANJI t/a JIVANJI AGENCIES =vs=SANYO ELECTRICAL CO LTD (2003) eKLR** where the Court of Appeal held that only net profits or yields are recoverable and not gross

26. It was also submitted that the trial court ought to have taken into account whether the respondent took any step to mitigate her loss – referring to **Kenya Power and Lighting Co Ltd =vs= Henry Wafula Masibaji [2013] eKLR** was cited.

27. In this regard, counsel contended that the Respondent ought to have developed the 2nd crop by simply removing the 1st plant crop after it had started to dry up; instead she abandoned the entire farm and allowed the crop to dry up and remain there, then hopes to benefit from such action.

28. It is also submitted that although interest was awarded, the trial magistrate did not specify when such interest was to be calculated and the applicable rate resulting in the presumption that it was worked at court rates of 14% per annum

29. Mr. Oduk submitted on behalf of the Respondent that there was a specific amount pleaded and the trial magistrate adopted the tonnage for plant crop and ratoons as provided by the appellant's own adminidtrator, so the trial magistrate could be faulted on that. Counsel also pointed out that the judgment took care of the Respondent's actual expenses and judgment was entered less theservices provided for – which meant it was based on net loss and not gross. The evidence of cost of services provided by respondent was given as Kshs. 48,000/=.

30. The court was urged to take note that there was no evidence presented for harvest and transport charges – in any case the two respective events never took place. He asked the court to be guided by the views expressed by V**aughan Williams L. J. in CHAPLIN =vs= HICKS (1911) 2 KB 789 at 791 – 792** that a wrong doer cannot escape paying damages for his breach of contract.

31. Counsel pointed out that there was nothing the Respondent could do to mitigate her loss because the contract constrained her a actions by clause II which gave exclusive right to harvest, load and transport the Appellant at a time to be determined by the Appellant Company. In any event uprooting the dried cane was out of question because clause II (d) forbade respondent from disposing of he r cane without written consent from the appellant, so there was no room for mitigation.

32. Counsel pointed out that once there was a complete destruction of the 1st crop due to the Appellant's negligence mitigation was not possible and the plea of mitigation would not displace the duty to fully compensate the Respondent. Further that it was the failure to harvest the 1st crop that led to the non development of the 1st and 2nd ratoon – which fault cannot be visited on the Respondent.

33. As regards rate of interest Mr. Oduk asks the court to be guided by the following considerations:-

a) When was the contract made

b) When did breach occur

c) When was the suit filed

d) Not when judgment was delivered

The basis for this submission is that the aim of the law is to ensure that the person who suffer s the breach of contract ought to be placed as near as possible in the same position as if it had not been breached. He also referred to the Court of Appeal decision in **Richard Okuku Oloo =vs= South Nyanza Sugar Co Ltd CA No. 278 of 2010.**

34. Counsel urges this court to disregard the issue on jurisdiction saying Section 3 of the Magistrates Court Act gives the Court Jurisdiction and the Sugar Act does not contain any provisions for awarding compensation – he referred to the decision in **Chogley =vs E. A. Bakery [1953] 26 KLR 31.**

35. It is counsel's contention that the Sugar Tribunal did not replace the courts as was pointed out in the case of **JOHN MARANGO and OTHERS =vs= WEST KENYA CO LTDS.**

36. The issues for determination are as follows:-

(1a) Was the cane planted

(1b) Whether the sum awarded as damages being Kshs. 34,3119 comprised gross profit and failed to take into account expenses fro services provided by the appellant.

(2) Did the trial magistrate fail to take into account the fact that sugarcane crop decreases in yield own the three crop cycles.

(3) What tonnage was the calculation based on?

(4) Should the Respondent have been awarded for the expected yield from the 1st and 2nd ratoon or should the award have been limited to the 1st crop which went to waste.

(5) Did the trial magistrate err in failing to take into account that the Respondent did not take any steps to mitigate her loss.

(6) Did the trial magistrate err in the manner he awarded interest.

37. The appellant's counsel seems to blow hot and cold as regards whether cane was planted, although there seems to be a repeated refrain that the Respondent did not prove that she had planted any cane. The appellant's field Supervisor DW1 (**MUOKI**) confirmed to the trial court on cross examination that:-

"The farmer planted cane and we supplied them with services."

This witness also confirmed that the company' offers extension services - which means visiting the farmer. He also confirmed that if the appellant's official visit a field and find no cane grown, or cane is abandoned, then a report would be available – yet in this instance no such report was presented. With the greatest of respect to the appellant's counsel, once his witness confirmed that the farmer had planted cane, then the position later on adopted became superfluous.

38. It was a common ground that the cane was not harvested – but each party gave a self serving reason for such state of affairs. I think this is where the trial magistrate posed the question that if indeed the

Appellant's officials visited the field and found it abandoned, at what level of growth was it abandoned, and at what point in time was it abandoned. It was the absence of any explanation from the Appellant with regard to these concerns that led the trial magistrate to state that the defendant had failed to adduce any evidence confirming such abandonment hence the breach. I cannot fault that reasoning – indeed on a balance of probabilities from the evidence that was presented to the trial court the Respondent did plant crop and the Appellant failed to harvest it.

39. Once the first crop begun to deteriorate then as the Respondent explained, she could not plant a 1st ratoon or a second ratoon. The explanation is clear, the contract had a restrictive clause limiting the Respondent as to what she could do with the cane once it was planted. Certainly the 1st and 2nd could not have realised the same yield because the cane yield deteriorates with time and would;d not have a constant equal three cycle yield. However the trial magistrate used the same equation for the 1st ratoon and the 2nd ratoon regarding expected yield when infact there was no ratoon developed and consideration was not given regarding the cane deterioration per cycle factor. It is not clear how there could be an expected yield for the non -existent ratoon which were not planted – of course the breach in failing to harvest affected this but I do not think it justifies such speculation. The Respondent did not plant the ratoon, weed or even apply any farm inputs. Certainly the farmer expected 3 harvest seasons but not when there were no ratoon developed – the cane had dried and dissipated and no further work was done.

40. Indeed I am alive to the sentiments expressed in the case of M**artin Akama Lango =vs= South Nyanza Sugar Co Ltd HCCA No. 20 of 2000 (KSM)** that:-

> ***"The contract must be interpreted in the spirit that it was made, and that is ….. it was meant to benefit both parties unconditionally and for the appellant to maximize his profits, the more harvests he makes the more profits he would make. I think the trial magistrate interpreted the provision of clause 1 of the said agreement narrowing and she applied the literal interpretation.***
>
> ***….. The clause says the agreement remains in force for a period of five years or until one plant and two ratoon crops are harvested on the plot..... To my mind what that means is that one plant and two ratoon crops must be harvested in fulfillment of the obligation of the parties agreement. When the Respondent failed to do the harvesting..... The respondent was in breach of contract and liable to pay damages."***

41. I agree totally with the view expressed by P. K. Birech (Commissioner of Assize) in the afore cited case BUT is payment of damages to be worked out compensatorily t on what was not planted or would it be payment of damages for breach of contract.

42. I agree with Mr. Oduk that the Appellant did not plead that the Respondent failed to re-develop the ratoon crops BUT it is also a fact admitted by both parties that the ratoons were not developed.

43. The Lango (supra) case is easily distinguishable from this case as in that case, the 1st crop was actually harvested and the 1st ratoon was planted but was not harvested as it was set on fire by unknown arsonists, whats more in that case the burnt cane was actually analysed and found to be within the required purity. There was also the question as to how long the cane was to be left on the field – which is not the case here.

44. I think it makes legal and moral sense to award damages on the 1st crop as that was planted, tended but not harvest. However to award damages for crops that never were planted in my view amounts to unjust enrichment and cannot fit in with unconditional benefit in maximizing profits. I think what should have been sought was damages for breach of contract affecting the three crop cycle but not for fields that were never developed .

45. As to whether the Respondent ought to have taken steps to mitigate the loss, I think the restrictive clause placed constraint s on the Respondent. I take cognisance of the observations made by Gikonyo (J) **in Kenya Power and Lighting Co Ltd =vs= Henry Wafula Masibayi (2013) e KLR** that:-

"... a claim for loss of income is not unlimited. The claimant must always mitigate his losses by taking such reasonable steps as are appropriate (emphasis mine) in each case. This law was formulated … in order to prevent unscrupulous claimant who will do nothing but wait for the loss to continue as long as possible just because the party on the wrong will compensate. Such conduct will be tantamount to unjust enrichment, and it is not far-fetched that a victim to a wrongful act may be tempted not to do anything in order to get maximum benefit out of his misfortune."

In this case, it was not possible for the respondent to take any reasonable steps to mitigate the loss.

46. What tonnage did the trial magistrate use as a basis for the calculations? The trial magistrate was very meticulous and set out the figures worked out very clearly – the trial magistrate did NOT find that the farm could yield 135 tonnes – nay far from it, infact the trial magistrate used the figures proposed by the Appellant's witness both in terms of tonnage per acre and amount payable. Indeed the appellant's counsel agreed that the trial magistrate was right in finding that an acre could have yielded 61.65 tonnes at a price of 2,000/= from the plant crop, and to that extent there was no error in the damages awarded with regard to the 1st crop and I would adapt and confirm the calculations at:-

1.0ha x 61.65 x 2000 = 123,300/=.

The trial magistrate may not have specified the total amount of cost of services given by the Appellant, but the judgment clearly indicated this was a factor borne in mind as the judgment is well worded to the effect that the sum is less expenses of services provided. For the sake of clarity, and indeed as Mr. Oduk points out – what was proved by the Appellant's witness as actual costs expended was Kshs. 48,000/= so that the sum awarded would be Kshs. 123,300 less 48,000

i.e. 123,300

48,000

75,300

47. The issue about cost of transport and harvest being factored does not arise as this never happened so no sum was expended by the Appellant. I would therefore reduce the sum awarded for the first crop by setting aside the same and substituting it with Kshs. 75,300/= as the net loss suffered by the Respondent.

48. With regard to the 1st and 2nd ratoons, from the earlier observations made, I am persuaded that that compensating the Respondent for gross loss over plants that never existed was unfair to the Appellant and what ought to have been considered was exemplary damages for breach of contract which is what I think was the spirit in comments by Vaughan (L. J) in the case of **CHAPLIN =vs= HICKS (1911) 2KB 789 at 791 – 792** that:-

".... I do not agree with the contention if certainty is impossible of attainment, the damages for breach of contract are unassessible. I agree however that damages may be so unassessible that the doctrine of averages would be inapplicable... but the fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying damages for his breach of contract."

49. Certainly in the present case the damages for the 1st and 2nd ratoon could have been assessed as there were figures available necessary for working out to detail what would have been due to the respondent had the 1st and 2nd ratoon been developed BUT they were not, so the Respondent cannot be compensated by way of damages for that BUT would be entitled to exemplary damages for breach of contract – which is why I place emphasis on the last part of Vaughan J's remarks. Damages for breach is regarded as general damages which are compensating in nature to cover the loss involved by the injured party and must be a proximate consequence to the breach. This is what was well deserved for the first

crop. The 1st and 2nd ratoon were not developed – indeed as a consequence of the initial breach but to my mind what ought to be awarded here are exemplary damages so as to send a message that for such consequential conduct punitive measures will be taken. To that extent then the the subsequent sums be and are hereby set aside and substituted with exemplary damages.

50. There was also the issue of when interest on breach of contract ought to run. Section 26 (1) of the Civil Procedure Act provides that:-

> ***"26 (1) Where and in so far as a decree is for the payment of money, the court may in the decree order interest at such rates as the court deems reasonable to be paid on the principle sum adjudges from the date of the suit to the date of the decree, in addition to any interest adjudged in the principal sum for any period before the institution of the suit with further interest at such rate as the court deems reasonable on the aggregate sum as adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."***
>
> ***(2)Where such decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6% per annum"***

51. Mr. Odero correctly points out that it follows that interest can only be awarded at the court's discretion and indeed the trial magistrate did award interest on the decree but did not specify when such interest was to be calculated and the applicable rate. The justification for an award of interest on the principle sum is indeed to compensate a claimant for the deprivation of money or specific goods through the wrongful act of the party sued. I do not think I need to belabour the matter, Section 26 (2) address the scenario prevailing here, the decree was not silent in respect of interest in the aggregate sum awarded – there was interest awarded, only that it did not specify the date from which it would be calculated – to my mind that interest ought to run from the date of filling suit and it shall be at court rates.

52. As regards jurisdiction, my understanding is that the now repealed Sugar Act at Section 29 provided for Sugar Industry Agreements with regard to growers, miller, growers and out-growers institutions and part 5 of Schedule provided for reference to the Sugar Arbitration Tribunal to the effect that:-

> ***"Any question or dispute as to the responsibility to fulfill the term of the specified agreement due to the reasons stated above shall be referred to the Sugar Arbitration Tribunal."***

53. If this was a bone of contention then , it ought to have been addressed at the initial stage as a preliminary objection. In any event that situation is now overtaken by events as the Sugar Arbitration Tribunal is now defunct following the repeal of the Sugar Act. The horse has already bolted and the issue must be laid to rest.

54. The upshot is that the appeal succeeds in part to the extent that:-

> **a) The damages awarded with regard to the 1st crop are set aside and substituted with the sum of Kshs. 75,300/=.**
>
> **b) The Respondent is also awarded Kshs. 100,000/= as exemplary damages for breach of contract resulting from opportunity to realize the 1st and 2nd ratoon.**
>
> **c) Interest is awarded on the sums above at court rates from date of filing suit.**
>
> **d) The Appellant shall bear ½ the costs of this appeal**

DATED and SIGNED at MIGORI this 25th day of November, 2016.

H. A. OMONDI

JUDGE