REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. 95 OF 2015

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD …..……. APPELLANT

AND

FREDRICK OGOLLA ……..…….. RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon.P. Y. Kulecho, RM at the Chief Magistrates Court in Migori in Civil Case No. 545 of 2014 dated 30th April 2015*)

JUDGMENT

1. The respondent's case originated from the Sugar Arbitration Tribunal established under ***Sugar Act, 2001***. After the ***Act*** was repealed by the ***Crops Act, 2013***, the Tribunal was dissolved. As a result the matter was transferred to Magistrate's Court for determination.

2. The respondent filed a claim against the appellant for breach of contract for failing to harvest his sugarcane crop. He claimed Kshs 3,600,000/- being the value of sugarcane for the three crop cycles; the plant crop, 1st and 2nd ratoon. The value was based on land size of 4.0 Hectares (Ha.) yielding 100 tons per Ha. at a price of Kshs. 2,800/- per ton of sugarcane.

3. After considering the appellant's testimony and submissions, the learned magistrate awarded the respondent Kshs. 1,519,920/- being the net value of the plant crop and 1st ratoon.

4. The appellant appealed against the judgment and decree. Although the appellant raised several grounds of appeal in the memorandum of appeal dated 18th May 2015, the gravamen of the appeal as contended by Mr Odhiambo, learned counsel for the appellant, was that the learned magistrate erred in relying on the price of Kshs. 2,800/- per ton to calculate the value of the crop yet the same was not supported by the evidence. He further submitted that the learned magistrate did not take into account the fact that it was common knowledge that the value of the sugarcane in each crop cycle reduced by 10%. As a result, he contended that the value of the 1st ratoon ought to have been reduced.

5. In response, Mr Marwa, learned counsel for the appellant, supported the judgment of the subordinate court and contended that it was informed by the submissions which were filed before the court. He submitted that the appellant could not be heard to complain as it had failed to file its submissions hence the court could not fault in reaching the decision it did.

6. As this is a first appeal, I am expected to review the evidence and come to an independent decision as whether or not to uphold the appeal having regard to the fact that I never saw or heard witnesses (see

***Selle v Associated Motor Boat Co.* [1968] EA 123**).

7. The appellant did not call any testimony or produce any evidence hence the respondent's testimony was unchallenged. From the respondent's testimony, it was not contested that he was a contracted farmer and that his crop had not been harvested. The respondent also produced yield assessment report dated 11th August 2009 authored by Paul Simo who opined that the respondent's land could produce 361 tons of sugarcane per Ha. Neither the respondent nor hos expert testified as to the price per ton. In the written submissions filed on behalf of the respondent before the Tribunal, the respondent claimed Kshs. 2,850/- per ton for the plant crop and Kshs. 3,500/- per ton for the 1st ratoon.

8. In determining this issue, the learned magistrate stated in the judgment that for the plant crop, the pleaded sum of Kshs. 2,800/- per ton would be adopted as the price per ton. As regards, the 1st ratoon, she stated, *"In the absence of any justification to vary the expected yield and in the absence of the price list to justify the variation in the price of sugar cane as proposed by the plaintiff the court shall adopt the same figures for the plant crop …"* [Emphasis mine]

9. It was clear then that the only indicator of the price was the pleading which the court adopted for the plant crop. I find that the price of the sugarcane was an essential element of the respondent's claim and the claim being in the nature of special damages ought to have been pleaded and proved with particularity. This legal position has been re-stated in many cases among them ***Hahn v Singh* [1985] KLR 716**, ***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)**.

10. Although the respondent pleaded the price of sugarcane per ton, he did not prove the price hence there was no basis for making the award. Likewise, the respondent's submissions on various prices in respect of the plant crop and 1st ratoon were not supported by any evidence. Unless there are admissions or agreed facts, submissions are not a substitute for proof of facts. In ***Douglas Odhiambo Apel & Another v Telkom Kenya Limited* NRB CA Civil Appeal No. 115 of 2006 [2014]eKLR**, the Court of Appeal expressed the view that;

[W]e find that the learned judge was entirely correct in holding that at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his case. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

The need for proof is not lessened by the fact that the claim is for special damages. Unless a consent is entered into for a specific sum, then it behooves the claiming part to produce evidence to prove special damages claims.

11. Although the aforesaid ground is sufficient to dispose of the appeal, I would like to deal with the other matter raised by the appellant regarding the reduction in value of the crops subsequent to the plant crop. It is trite law that he who asserts must prove (see **section 107** of the ***Evidence Act (Chapter 80 of the Laws of Kenya***). It was the appellant's burden to establish the fact that the value of the subsequent crops diminished by 10%. It did not call any evidence to prove this fact. Furthermore, the diminishing value of each crop cycle is not a matter for which the court could take judicial notice under the provisions of **section 59** of the ***Evidence Act***.

12. In view of the findings I have made, this appeal is allowed and the judgment of the subordinate court is hereby set aside. It is substituted with an order dismissing the respondent's claim with costs.

13. The appellant shall have the costs of the appeal.

DATED and **DELIVERED** at **MIGORI** this **21st day of July 2015.**

D.S. MAJANJA

JUDGE

Mr Odhiambo instructed by Otieno, Yogo and Company Advocates for the appellant.

Mr Marwa instructed by Kerario Marwa and Company Advocates for the respondent.