REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.161 OF 2005

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

AND

PAUL N. LILA.....RESPONDENT

(Being an appeal from the decree of Hon. S.M. Soita, PM, Kisii dated and

delivered on the 4th day of August 2005 in Kisii CMCC No.992 of 2003)

JUDGMENT

1. This is an appeal against the judgment and decree of Hon. S.M. Soita, Principal Magistrate Kisii dated and delivered on the 4th of August 2005 in Kisii CMCC No.992 of 2003. In the said suit the respondent/plaintiff filed suit against the appellant/defendant for damages arising out of an alleged breach of contract.

2. By a plaint dated 9th September 2003 and filed in court on 10th September 2003, respondent alleged that by a written agreement dated 27th April 1995, the appellant contracted the respondent to grow and sell to it sugarcane grown on the respondent's land known as Plot Number 12A in field Number 83 at Kamreri sub location measuring 0.5 Hectares. Subsequent to the execution of the written agreement, the respondent was allocated account number 412091. The respondent planted the sugarcane as agreed.

3. The respondent also averred in his plaint that it was a term of the contract express and implied that the agreement would commence on 27th April 1995 and remain in force for a period of five (5) years or until one plant crop and two ratoon crops of sugarcane are harvested on the plot aforesaid, whichever period shall be less. That it was further agreed impliedly/expressly and by practice that:-

> *a. Within the five (5) year period or less, plant crop and ratoon crop cane would be harvested at the age of 22-24 months and 16-18 months after planting and subsequent harvest respectively;*
>
> *b. The deft would not under the contract be bound to purchase cane that was burnt, but having agreed to accept such cane, the defendant would:* ***i)*** *not be liable to pay such cane until the time when the cane would be due for harvest,* ***ii)*** *be entitled to admit a penalty of ten (10) shillings per tonne (or such amount as may from time to time be agreed) from the payment of such cane.*

1. The respondent averred that the appellant breached the contract by failing to harvest the plant crop when the same was mature and ready for harvesting during the 22-24 months window and as a rresult thereof, the plant crop started deteriorating. Further, that on or about 30th October 1997, the plant crop was about 33 months old, the respondent sent its servant and/or agent to the field where the respondent's crop was situate who cut the cane crop but failed to take delivery of the same causing the cane in the field to go to waste causing loss and damage. The respondent prayed for judgment against the appellant for:-

a. Damages for breach of contract and payment for cane damaged on 0.5 hectares at the rate of Kshs.1730/= per tonne as the estimated yield of 135 tonnes per acre as the estimated yield for each of the three (3) expected.

b. Costs of this suit.

c. Interest thereon at court rates until payment in full.

1. By its defence dated 22nd October 2003, the appellant admitted that it indeed contracted the respondent to grow sugarcane on the respondent's parcel of land measuring 0.5 hectares being Plot Number 12A in Field No.83 Kamreri sub location; that the respondent was assigned account Number 412091. The appellant denied the contents of paragraphs 5,7,8 and 9 of the plaint and also vehemently denied that the respondent's 0.5 hectare piece of land was capable of producing 135 tonnes of cane per acre and instead averred that plots in the vicinity of the respondent's land averages 60 tonnes of cane per hectare and that accordingly, the respondent's 0.5 hectares could only have produced 30 tonnes of cane, which would have been to the appellant at the admitted price of Kshs.1553/= per tonne.

2. The appellant also alleged that the respondent's suit was time barred, having been filed outside the limitation period and without leave; and further that the plant did not disclose any and/or any reasonable cause of action for which the respondent could be compensated. That in any event, the blanket general damages could never be awarded for breach of contract and therefore the prayers sought in the plaint were incapable of being awarded. The appellant prayed that the respondent's suit be dismissed with costs.

3. During the trial, the respondent testified as PW1. He stated that he was a contracted farmer with the appellant, being holder of account number 412091. He also stated that on 30th October 1997, his cane was burnt at the age of 3 years. The fire incident was reported to the appellant after which the appellant went and cut the cane but failed to transport it. The respondent produced some delivery notes (**P. Exhibit I**) which he said were put on the 6 stacks of cane. He also produced as **P. Exhibit 2** harvesting advice notes for 8 stacks. The respondent stated further that the cane that was cut was the plant crop, and that he did not harvest any ratoon crops. He also testified that the agreement book was burnt.

4. During cross examination, the respondent confirmed that he planted the cane in 1995 and that the cane was supposed to be harvested any time between 18 and 24 months of age. He also testified that he had no evidence to show that the agreement book was burnt but stated that by the time the cane got burnt, it was already over mature and had started to dry. The respondent also testified that the appellant was not bound to harvest burnt cane.

5. Regarding the value of the cane, the respondent told the court that he did not get an expert to value the loss he incurred as a result of the appellant not cutting the cane on time, and even after cutting it, for not taking delivery of it. The respondent also testified that his harvest was an estimated 100 tonnes at a cost of Kshs.1700/= (as at 1995) per tonne. The respondent did not call any witness.

6. The appellant did not call any witness, so after carefully appraising the evidence on record, the learned trial magistrate reached the conclusion that the respondent's cane was cut but was not transported to the appellant's factory; that the estimated yield was 90 tonnes at the price of Kshs.1730/= all totaling Kshs.155700/=. Judgment was entered for the respondent as against the said sum of Kshs.155700/= plus costs and interest.

7. The appellant being aggrieved by the lower court's judgment and decree filed the appeal herein setting

out the following grounds of appeal:-

> *1. The learned trial magistrate erred in both law and in fact in awarding damages for breach of contract in the absence of specific pleading and strict proof contrary to known legal principles that only special damages may be awarded for breach of contract and only if the same are specifically pleaded and strictly proved at the trial.*
>
> *2. The learned trial magistrate erred in both law and in fact inholding that the respondent was entitled to 90 tonnes at the price of Kshs.1730/= per tonne and in proceeding to award to the respondent the sum of Kshs.155,700/= without evidence being led in that regard.*
>
> *3. The learned trial magistrate erred in both law and in fact in holding that the respondent's cane was harvested but was never transported to the appellant's factory, yet the delivery notes exhibited at the trial by the respondent had evidence of the said cane having been transported by the appellant.*
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> *4. The learned trial magistrate erred in both law and in fact in awarding compensation to the respondent against the appellant on the basis of estimates on alleged harvesting advice without strict proof being led by way of evidence in that regard.*
>
> *5. The learned trial magistrate erred in both law and in fact in awarding interest to the respondent without stating the rate of such interest and or the date from which such interest would be calculated.*
>
> *6. The learned trial magistrate erred in both law and in fact in failing to dismiss the respondent's suit with costs and in deciding the suit on the basis of insufficient evidence.*

1. The appellant therefore prayed that the appeal be allowed and the respondent's suit in the lower court be dismissed with costs. When the appeal came up for hearing both counsel agreed to canvass the same by way of written submissions. The submissions and relevant supporting authorities were filed and exchanged.

2. I have carefully read through the submissions. Mr. Odhiambo Kanyangi, duly instructed by the firm of Okongo, Wandago & Co. Advocates submitted, concerning ground I, that the respondent did not plead special damages nor did he specifically prove the same, and that accordingly, the claim should be dismissed.

3. It was contended that if the claim was a special damages claim, the amount would have been known from the very beginning and appropriate court fees paid. That in the circumstances of the respondent's claim, it was more of a general damages claim which relates to intangible loss that cannot be awarded in breach of contract claims. Reliance was placed on the case of **Joseph Ugadi Kodera -vs- Ebby Kangisha Kavai – Court of Appeal at Kisumu, Civil Appeal No.239 of 1997** (unreported) in which the Court of Appeal sitting at Kisumu held that there can be no award of general damages for breach of contract.

4. Counsel also cited two authorities to support the proposition that a claim for special damages ought to be specifically pleaded and proved by evidence. These cases are **a) Jivanji -vs- Sanyo Electrical Company Limited – Court of Appeal at Nairobi, Civil Appeal No.225 of 2001[2003]1 E.A 98** and **b) Margaret Muga Oduk -vs- South Nyanza Sugar Company Limited – Kisii HCCA No.207 of 2001** (unreported).

5. The appellant also submitted that the respondent having failed to file Reply to defence is denied to have admitted the allegations of fact contained in the defence. Reliance was placed on **Order VI Rule 9 (1)** (now **Order 2 Rule II**) of the **Civil Procedure Rules** which provides that an allegation of fact in pleadings shall be deemed to be admitted by the opposite party unless it is traversed by the other party in his pleadings made either by denial or by a statement of non-admission and either expressly or by

necessary implication. Also see **Unga Maize Millers Limited -vs- James Munene Kamau, Eldoret HCCA NO.16 of 2001** where it was observed thus **"----- there was no reply to appellant's claim that the respondent acted negligently and he was to blame. It is trite law that he who does not file a reply to such a defence is deemed to have admitted the said allegation."** This was also the holding in **Mount Elgon Hardware -vs- United Millers – Court of Appeal at Kisumu Civil Appeal No.19 of 1996**.

6. The appellant in this case contends that since the respondent admitted to not having filed Reply to Defence, what the learned trial magistrate should have done was to make a finding that the respondent had failed to prove his case on a balance of probability and proceeded to dismiss the suit with costs since he (respondent) had admitted the negligence as alleged by the appellant.

7. Regarding grounds 2, 3 and 4 of the appeal, counsel submitted that since parties are bound by their pleadings, the price of sugarcane per tonne should have been Kshs.1553/= as per the plaint and not Kshs.1730/= as per the judgment of the learned trial magistrate. That the price applied by the learned trial magistrate was a material departure from the pleadings.

8. Further that since it was agreed in writing and the respondent confirmed it in evidence that the appellant was not bound to harvest burnt cane, it was a matter for the discretion of the appellant to harvest or not harvest the respondent's burnt cane.

9. Counsel also contended that there was material discrepancy between the pleadings and the evidence in court concerning the age at which the respondent's cane was harvested. Was it at 33 months as pleaded in the plaint, or was it 36 months as per the respondent's testimony or was it 28 months as per Harvest Advice Note – **P. Exhibit 2**? It was submitted that because of these discrepancies, it is clear that the age of the sugar cane was an exaggeration by the respondent.

10. Finally, the appellant raised the issue of interest as per ground 5 of appeal; arguing that interest ought to apply from the date of judgment and not any other date.

11. Ground 6 of appeal is to the effect that the respondent's suit in the court below was time barred as the same was filed some eight (8) years from the date when the cause of action arose, contrary to **Section 4 (1)** of the **Limitations of Actions Act, Cap 22 Laws of Kenya**. The section reads as follows:-

"4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued -

> **a. actions founded on contract;**
>
> **b. actions to enforce a recognizance;**
>
> **c. actions to enforce an award;**
>
> **d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**
>
> **e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."**

1. Section 27 of **Cap 22** provides for extension of limitation period in case of ignorance of material facts in actions for negligence etc. Such extension under **Section 27** can only be made upon application for leave of court in accordance with **Section 28** of **Cap 22**. **Section 28 (1)** reads:-

> **"28(1) an application for the leave of the court for the purposes of Section 27 shall be made exparte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action."**

2. Reliance for the above proposition was placed on the case of **Divecon Limited -vs- Samani [1995-1998] EALR 48**. The court was urged to allow the appeal with costs.

3. The appeal was opposed. Mr. Oduk appearing for the respondent submitted that the arguments floated by counsel for the appellant concerning ground I of the appeal is a pure misconception of the law and the facts of the case. Counsel submitted that the respondent's claims against the appellant was well ventilated vide paragraphs 3, 8 and 9 of the plaint and prayer (a) of the reliefs sought. It was counsel's contention that the High Court decisions in **Kisii HCCA No.207 of 2001 – Margaret Muga Oduk -vs- South Nyanza Sugar Co. Ltd.**; **Kisii HCCA NO.103 of 2008 – South Nyanza Sugar Co. Ltd. -vs- Hezron Ndarera Mogwas**i and **Kisii HCCA NO.206 of 2001 – Moses Onyango Dianga -vs- South Nyanza Sugar Co. Ltd.**; were all wrong because the High Court did not analyze the particular pleadings in these cases. Reliance was placed on the Court of Appeal decision in the case of **John Richard Okuku Oloo -vs- South Nyanza Sugar Co. Ltd – Civil Appeal No.278 of 2010** delivered on 20th December 2013.

4. In the **John Richard Okuku Oloo case** (supra) the appellant, as plaintiff sued the respondent, as defendant in Kisii CMCC NO.798 of 1998. The appellant's case was very similar to the case now before this court and the appellant alleged that inspite of an agreement entered into between the appellant and the respondent for the latter to harvest the appellant's cane within the time stipulated in the contract, the respondent failed to do so or at all and during the currency of the contract, an arsonist torched the sugarcane causing it to catch fire and to burn. A report was made to the respondent and after sampling the burnt cane, it was found to still be good for harvesting. Those findings notwithstanding the respondent failed to harvest the cane, thereby rendering the appellants efforts a total loss. In the plaint, the appellant prayed for:-

a. payment for 135 tonnes of cane being the average cane yield per hectare for 0.2 hectares;

b. aggravated/punitive damages;

c. costs of this suit;

d. interest thereon at court rates.

1. The respondent pleaded **"force majecire"** in its defence. After hearing the case at first instance, the appellant's suit was dismissed and his appeal to the High Court (Makhandia J as he then was) was also dismissed. On appeal to the Court of Appeal the learned judges of Appeal allowed the appeal and the respondent in the instant appeal has urged this court to find that the pleading on special damages suffered by the respondent was clearly set out in the plaint and that the respondent's pleadings prove the respondent's claim to the required standard as held by the Court of Appeal in the **John Richard Okuku Oloo case** cited above. Counsel also wants this court to find and to hold that the authorities relied on by the appellant in support of ground I of the Memo of Appeal are no longer good law. Counsel also cited a number of other authorities decided by the High Court at Kisii to support his submissions that the respondent's claim was proved to the required standard.

2. On whether or not the respondent ought to have filed reply to defence, counsel for respondent relied on the provisions of **Order 2 Rule 12 (1)** and **12 (4)** of the **Civil Procedure Rules** and asked this court to find and to hold that there was a joinder of issue on the defence which "operates as a denial of every material allegation of fact made in the appellant's defence.

3. Regarding grounds 2, 3 and 4 of the Memorandum of Appeal, counsel submitted that these grounds have no merit. See **John Richard Okuku Oloo case** cited above. He also submitted that the Harvesting Advice Notes – **P. Exhibit 2** contain information showing sugar cane on the ground and not cane transported to the factory and that the respondent clearly stated during the hearing of the case that the appellant did not transport the cane to the factory inspite of cutting the same and stocking it.

4. On ground 5 of appeal, counsel submitted that the same was a mere plea and not a ground of appeal as such. He asked this court to dismiss the appeal and to order that interest on the amount awarded start

running from the date of filing suit.

5. Regarding ground 6 of appeal, counsel submitted that the respondent's suit was filed on 10th September 2003, some 3 years after the breached contract came to an end; that the breached contract which was for 5 years from 27th April 1995 came to an end on 26th April 2000. That there was clearly a breach of contract as no harvests were done in accordance with the contract. Counsel also submitted that the case of **Divecon Ltd. -vs- Samani** (supra) has no relevance to this appeal as the issue therein concerned extension of time under **Section 22** of the **Limitation of Actions Act, Cap 22**. Counsel prays that this appeal be dismissed for lack of merit.

6. As a first appellate court, this court is duty bound to re-assess and re-evaluate afresh the evidence tendered before the trial court so that it may reach its own independent decision bearing in mind that it neither saw nor heard the witnesses as they testified and therefore not in a position to assess their demeanour – **Selle & another -vs- Associated Motor Boat Co. Ltd. & another [1968] E.A. 123**.

7. In this case it is not in dispute that there was a valid five years contract between the appellant and the respondent dated 27th April 1995 where the appellant contracted the respondent to grow and sell to it sugarcane at his land being Plot No.12A field No.83 Kamreri sub location measuring 0.5 hectares. It is also not in dispute that the respondent was assigned account number 412091.

8. It is noted that the evidence relied on by the respondent herein was not challenged. PW1 (the respondent) told the lower court that he was contracted by the appellant to grow cane and was assigned account number 412091. He grew the cane on Plot No.12A Kamreri sub location. The cane was cut by the appellant but never transported to the appellant's factory. Apparently the cut sugar cane had been burnt. The lower court found that the harvesting advice notes estimated the yield at 90 tonnes at the price of Kshs.1730/= and entered judgment in favour of the respondent herein for Kshs.155,700/= together with costs and interest.

9. Having gone through the evidence and the pleadings and submissions by both parties herein, I find that the claim herein was adequately and sufficiently particularized at paragraphs 3, 8 and 9 and prayer (a). This conclusion is guided by the Court of Appeal holding in the **John Richard Okuku Oloo case** (above) where the court stated after analyzing the pleadings that:-

> **"We have shown that the pleadings on special damage suffered by the appellant was clear and sufficient enough and the 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."**

I am bound by the finding of the Court of Appeal that where there is no prayer for a sum certain the same can be construed from the pleadings as is the case herein. Therefore I find that ground 1 of the appeal has no merit and accordingly dismiss it.

10. On the issue of failure to file a reply to defence raised by the appellant, this court is properly guided by the provisions of the **Civil Procedure Rules Order 2 Rules 12 (1)** and **(4)** (supra). I find that failure to file a reply to defence was not fatal to the respondent's suit.

11. This court has noted hereinabove that the plaintiff's/respondent's evidence was not challenged and the magistrate found as a fact that at the time of breach the price of sugarcane per tonne was Kshs.1730/=. Exhibits were produced being harvesting advice notes number 501032 and 500346 as **P. Exhibit 2** made by the defendant showing that 30 and 60 tonnes of cane were harvested. The delivery notes exhibits were also produced being farm copies which were issued to enable transporters identify the farmer. I find no reasons for interfering with the lower court's findings having relied on the evidence and exhibits on record.

12. I do agree with the respondent herein that this case is founded on contract which was to last upto 26th

April 2000 and any suit based on that contract was capable of being filed all the way to 26th April 2006. It was agreed that the contract was to last for 5 years that is from 27th April 1995 to 26th April 2000. The cause of action herein arose on the 30th October 1997 when the appellant went to the plaintiff's farm cut the sugarcane but failed to take delivery thereof leaving the sugarcane. The suit herein was filed on 10th September 2003 within the six (6) year limitation period provided under **Section 4 (I)** of the **Limitation of actions Act, Cap 22**.

13. On the issue of interest, the same shall run from the date of judgment of the lower court.

14. In conclusion, appeal herein lacks substance and the same is dismissed. The respondent shall have the costs of this appeal.

Delivered, dated and signed at Kisii this 29th day of October, 2014

R.N. SITATI

JUDGE

In the presence of:-

M/s Chepkurui h/b for Odhiambo Kanyangi for Appellant

Mr. Ochwangi for Oduk for Respondent

Mr. Bibu - Court Assistant