REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 8 OF 2007

SOUTH NYANZA SUGAR CO LTD……APPELLANT

VERSUS

DOMINIC ERICK ANGILA…….RESPONDENT

JUDGMENT

(Being an appeal arising from the Judgment and Decree of Mr. M.K. Serem Resident Magistrate in Kehancha RMCC.NO. 121 of 2004 dated and delivered on 8th December, 2006).

The Respondent, **Dominic Erick Angila** filed a suit against the appellant, **South Nyanza Sugar Co. Ltd,** in the Resident Magistrate's court at Kehancha alleging inter alia breach of contract. He pleaded in an amended plaint that by a written agreement entered into in or about the year 1997 between himself and the appellant, it was agreed that he would cultivate sugarcane on his plot number 1057B, field No. 203 vide Account number 21106 and by the terms of the said agreement, the appellant would harvest it on maturity and transport the same to factory for millingand pay the respondent the value thereof. Pursuant to the said agreement, the respondent duly grew the sugarcane on the said plot and on maturity requested the appellant to harvest the same. However, the appellant negligently and in total breach of the agreement refused to harvest the second ratoon, thereby causing loss to the respondent estimated at Kshs. 1,730/= per tonne. On the basis of the foregoing, the respondent lodged the suit in the Resident magistrate's court at Kehancha praying for:-

"a) A declaration that the Defendant is in breach of the cane contract with the plaintiff.
b) The value of unharvested sugar cane at the rate of Kshs. 1,730/= per tone.
c) Costs of the suit
d) interest on A,B & C above at court rates…".

The appellant filed a statement of defence in which the existence of the agreement was admitted but denied each and every other allegation contained thereafter in the amended plaint with regard to alleged breach of the agreement. It further averred that it was specifically the duty and obligation of the respondent to plant, tend and avail to the appellant cane that could achieve satisfactory results when milled. However no such cane was cultivated by the respondent in total breach and complete disregard of the provisions of the agreement and even after he had received necessary inputs and services from the appellant at a considerable costs and expense. The appellant further pleaded that the respondent never availed to it any cane to be harvested and milled, whose value thereof it could pay over to the respondent. If the respondent suffered any loss, then the same was solely attributable to or occasioned by himself and the appellant ought not to be blamed in respect thereof, as it was the sole responsibility of the respondent to take care of his plot to protect it against waste and damage under the contract. The appellant

denied that the plot could have yielded 34 tonnes or the price of raw cane per tonne was Kshs. 1,730/=. In fact it was then Kshs. 1,553/= and was further subject to certain deductions, to wit, Sony out growers company levy, presumptive tax, harvesting and transport charges as well as cess. Finally the appellant pleaded limitation.

At the hearing of the suit the respondent testified that in 1996 he entered into an agreement with the appellant for growing of sugar cane on his plot no. 203. The appellant was to plough, harrow and farrow, provide fertilizers and survey the plot. On his part, he was to plant and maintain the crop. The plant crop and 1st ratoon crop were duly harvested by the appellant and he was not paid. However, the 2nd ratoon crop was not harvested and he was not paid. He testified that the cost per tonne was Kshs. 1,730/= and his claim was for 34 tonnes that he expected the plot to yield. He relied on the agricultural records for that computation. The 2nd ratoon crop ended up drying in the plot though. He thus blamed the appellant for the resultant loss. He therefore prayed for the value of the 2nd ratoon crop and the costs of the suit.

Peter Akida, an Assistant accountant on behalf of the appellant testified that the 2nd ratoon crop was not maintained nor developed by the respondent. It was the duty of the respondent to call upon the appellant to harvest the crop. He did not do so. The respondent's claim was thus based on a non-existent 2nd ratoon crop and therefore the appellant was not in breach of the agreement. Instead it was the respondent who was in breach.

The learned magistrate having carefully evaluated the evidence tendered by the respondent as well as the appellant and the written submissions filed and exchanged between the respective parties reached the verdict thus:-

"……The plant crop and the 1st ratoon were harvested. What is now in dispute is the 2nd ratoon which the plaintiff alleges was not harvested. The defendant informed the court that the plaintiff did not maintain the 2nd ratoon and that there was nothing to be harvested. However, the defendant did not show by evidence how the plaintiff failed to maintain the 2nd ratoon.

The contract entered between the plaintiff and the defendant clearly spells out what steps the defendants should take where it is of the opinion that the plaintiff is not maintaining the field satisfactorily. The defendant through its defence witness who testified in court admitted that they did not take any of those steps in clause II(5) and (II). The defence witness also admitted that no officer of the defendant company visited the plaintiff's field during the growth of the 2nd ratoon. No notices were ever served on the plaintiff at all.

PW2, gave the optimum yields per Ha of sugarcane. The plaintiff's plot was 0.6Ha. The plant crop had fetched 64.29 tonnes, the 1st ratoon fetched 50 tonnes. I would make a finding that the plaintiff could have fetched about 37 tonnes of sugarcane in the 2nd ratoon. The defendant was in breach of contract for not harvesting the plaintiff's 2nd ratoon. The costs per tone at the time was Kshs. 1730/=.

At the end, I shall make the following awards namely:-

1) ***37x1730/= Kshs. 64,010/=***
2) ***Costs of the suit***
3) ***Interest on the decretal amount at court rates till payment in full….".***

The appellant was aggrieved by the judgment and decree of the learned magistrate. Accordingly it lodged the instant appeal blaming the magistrate on the following grounds:-

1. The learned trial magistrate erred in both law and in fact when he held that the appellant did not show by evidence how the respondent had not developed the 2nd ratoon crop as by doing so he shifted the evidentiary burden of proof on the appellant while it was incumbent upon the respondent to prove that the appellant had failed to harvest the 2nd ratoon crop.

2. The learned trial magistrate erred on both law and infact when he found without evidence that the respondent(sic) plot could have yielded 37 tonnes from the 2nd ratoon when the same had neither been pleaded or proved at the trial.

3. There being no reply to defence filed by the respondent on record, the trial magistrate erred in both law and infact when he failed to hold that the respondents(sic) suit in the court below had been filed outside the period of limitation and without leave of court first being sought and obtained.

4. The learned trial magistrate erred in both law and infact when he awarded Kshs. 64,010/= as damages for breach of contract against the appellant when the same had neither been pleaded nor proved at the trial.

5. The learned trial magistrate erred in both law and infact when he seized himself of the jurisdiction to try and determine the suit despite the clear provisions of the sugar Act, act number 10 of 2001, and the pleading on want of jurisdiction in the defence.

6. The learned trial magistrate erred in both law and infact in failing to discount the damages awarded to the respondent by the appropriate costs of input and services extended to the respondent and in failing to award lesser damages.

7. The learned trial magistrate erred in both law and infact in failing to hold that the respondent had failed to prove his case on a balance of probabilities and in failing to dismiss it with costs.

When the appeal came before me for directions on 6th October, 2010, among the directions sought and agreed on by the parties was that the appeal be canvassed by way of written submissions. Accordingly a direction in that regard was made. Subsequent thereto parties filed and exchanged written submissions and authorities which I have carefully read and considered.

This is the first appellate court. As such it is bound to subject the evidence tendered in the trial court to fresh and exhaustive examination and re-evaluation so as to reach its own independent conclusions as to whether the judgment of the trial court can stand. See ***Selle & Anor V Associated Motors Boat Co. Ltd & Anor(1968) E.A.123.***

As I see it the issue for determination in this appeal and which was before the trial court is whether there was a breach of contract and whether damages are recoverable in the event of a breach of such contract. It is common ground that there was a valid written agreement between the appellant and the respondent to last for a period of five years commencing on 7th July, 1997. The agreement involved the respondent growing and selling sugar cane to the appellant from his plot number 203. It is also common ground that the appellant initially honoured the agreement by harvesting the 1st plant crop and 1st ratoon crop. However, when it came to the 2nd ratoon crop, the appellant apparently defaulted. Despite the 2nd ratoon having matured the appellant refused to harvest the same and it ended up drying in the field. In so far as the respondent was concerned, had the appellant adhered to the terms of the agreement and harvested the 2nd ratoon crop within the agreed time lines, the crop would not have dried up in the field and therefore he would not have suffered the loss.

On the other hand, the appellant takes the position that it could not have complied with the terms of the agreement with regard to the 2nd ratoon crop as there was none grown and developed by the respondent as required under the agreement. The respondent did not develop the 2nd ratoon crop nor maintain the same to the required standard. The respondent's claim was therefore hinged on a non-existent 2nd ratoon crop. Thus the respondent frustrated the contract by failing to develop and maintain 2nd ratoon crop and in the process breached the agreement himself.

From the foregoing, it is clear that there was a breach of the agreement. The appellant blames the respondent for the breach whereas the respondent blames the appellant for the same. Between the two,

who should be believed? From the totality of the evidence on record, I think I am inclined to go along with the position of the respondent. It does not make sense to me at all that the respondent would properly husband the 1st plant and 1st ratoon crops and all of a sudden ignore or fail to develop and maintain the 2nd ratoon crop for no apparent reason. Yet the agreement entered into between the parties was for the respondent to grow and maintain at least three crops. Under cross-examination by **Mr. Kerario**, learned counsel for the respondent in the court below and who also appeared for the respondent in this appeal, **Mr. Peter Adida** , the appellant's witness conceded that the 2nd ratoon crop germinates from the 1st ratoon crop. There is no evidence that, that did not happen. Nor is there evidence that the respondent destroyed such crop. In any event, **Mr. Akida** was categorical that he never visited the respondent's plot after the 1st ratoon crop. How would he then have known whether or not the respondent developed and maintained the 2nd ratoon crop. He was also not aware whether any other officers of the appellant visited the plot in that regard. He further stated that the appellant did not recover all its deductions. How could he have been talking of such deductions if indeed the respondent had not developed the crop. Those expenses, could have included costs of ploughing, harrowing, farrowing and provisions of fertilizers which the appellant was duty bound to provide. Finally he stated that the appellant did not serve notice to the respondent for failing to develop the 2nd ratoon crop. Had indeed the respondent failed to develop and maintain the 3rd crop, the appellant, no doubt will have been aware and would have issued and served a notice to him. That it did not do so can only mean one thing that indeed the respondent had developed and maintained the 2nd ratoon crop.

In the result, I hold just like the learned trial magistrate did that it is the appellant who breached the agreement and a declaration in terms of prayer (a) in the plaint was therefore in order.

Having held so, was the learned magistrate however, right in awarding the respondent damages? I do not think so. It is instructive to note that in prayer(a) of the plaint, the respondent specifically pleaded ***"… the value of unharvested sugar cane at the rate of Kshs. 1730/= per tone…"*** It is also important to observe that the plaint was drawn and filed in court by an advocate. Had perhaps the respondent acted in person, different considerations could arise or apply. As it is therefore, the appellant was clear in his mind that he wanted damages of sorts for breach of contract. The damages alluded to could have been either general or special. However the respondent was not clear on the nature of the damages he sought. Herein then lies his undoing. As stated in the case of **Thabiti Finance Company Limited** & **anor .v. Augustine Riwa Abiero, Civil appeal no. 251 of 2001**, the necessity of pleading the sought of damages claimed is a general requirement of any statement of claim as it puts the defendants on their guard and tell them what they have to meet when the case comes to trial. This gives rise to the plaintiff's undoubted obligation to plead and particularize the nature of damages sought. Damages are either general or special. The difference between special and general damages was explained by **Lord Macnaughten in Stoms broks Aictic Bolog .v. Hutchinsai (1905**) **AC51**. thus ***" General damages are such as the law will presume to be the direct natural or probable consequence of the action complained of, special damages on the other hand, are such as the law will infer from the nature of the act. They do not follow the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly…..".***

I have taken abit of time on this issue of damages, because the respondent did not specifically plead in his amended plaint the nature of damages he was seeking. Whether special or general. Different considerations flow depending on the kind of damages the claimant is seeking. Indeed the pleading is not the same in respect of general or special damages.

It is trite law that there can be no award of general damages for breach of contract. In the case of ***Joseph Ungadi Kedera V Ebby Kangisha Karai, C. A. No. 239 of 1997(UR)*** the Court of Appeal was emphatic ***"…As to the award of Kshs. 250,00/- as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract. In addition, there is no evidence on which this can be supported. We respectfully agree. There can be no general damages for breach of contract. Mr. Ombija submitted that general damages lay and relied on FOAMINOL LABORATORIES LTD V BRITISH ARTION PLASTICS LTD(1941) 2 all.er 493. We are satisfied that even on the basis of that case there is no evidence to support an award of Kshs. 250,000/-…"*** The upshot of the foregoing is that

general damages are not recoverable or awardable on a breach of contract. To the extent that the learned magistrate may have made an award, on that basis he was in error. I have no doubt in my mind that the learned magistrate was alive to that fact. However in a rather convoluted manner, he went on to treat the award as though it was hinged on special damages.

Even if the learned magistrate was right in that regard it is still trite law that special damages must be pleaded and specifically proved with a degree of certainty and particularity. That is what the Court of Appeal said in the case of **Jivanji V Sanyo electrical Company Limited;(2003) IEA. 98**. It delivered itself thus quoting from ***Coast Bus Service Ltd V Murunga and others(1992) LLR 318(CAK) "….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 304…"*** In the circumstances of this case, the respondent neither pleaded specifically the special damages nor did he specifically prove the same. If understand the respondent's case properly he is saying that the learned magistrate was right in awarding the said damages since the same was specifically stated in the claim in the form of the expected tonnage and the then applicable price per tone specifically pleaded in the plaint. In my view the pleading in paragraph 7 and 8 of amended the plaint cannot by any stretch of imagination amount to specific pleading of special damages. Specific damage is all about what one has lost and or incurred. It can never be left to speculation. It must be real. The way the respondent has pleaded in the plaint the alleged special damages, it was speculative and left to conjecture which is not permissible. And even when it came to the evidence tendered in that regard between the appellant and respondent there was no agreement on the price of the tonne of sugar cane then and the expected yields from the plot.

The respondent's claim could easily have passed for special damages, if only his counsel was perhaps diligent in his pleading. Before lodging the suit in court, the respondent had previously benefited from the appellant when the plant and 1st ratoon crops were harvested and paid for by the appellant. He knew exactly the amount he was paid. Indeed in the testimony of **Peter Akida,** the respondent was paid Kshs.51,228/90 for the 1st plant crop after deductions and Kshs 71,225/90 for the 1st ratoon crop, again after deduction. He knew the price and expected to tonnage for the 2nd ratoon crop. Thus the appellant was capable of assessing with a high degree of certainty or particularity his expectation in monetary terms from the 2nd ratoon crop. Thus he was in a position to specifically plead the special damages and be in a position to poof the same. He did neither of the foregoing.

Finally, it is instructive that in the contract, there was a specific clause that any dispute or question which may arise at any time between the parties regarding the construction of the contract or the rights or liabilities of the parties thereunder shall be referred to arbitration. This provision was couched in mandatory terms. It may well be in the light of the foregoing that perhaps the trial court may have lacked jurisdiction to entertain the proceedings. However this issue is neither here or there as it was never raised nor canvassed during the trial or in this appeal.

In the result I find and hold that the appellant breached its contract with the respondent. However general damages are not awardable for the said breach. The respondent should have treated his loss as special damages. However he failed to do so nor was he able to specifically prove the claim as required in law. Consequently, I allow the appeal and set aside the judgment and decree of the learned magistrate. In substitution, I order that the suit be dismissed with costs. The appellant too shall have the costs of this appeal.

Judgment dated, **signed** and **delivered** at Kisii this31st day of March, 2011**.**

ASIKE-MAKHANDIA
JUDGE.