



NO. 2748

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

CIVIL APPEAL NO. 6 OF 2007

**SOUTH NYANZA SUGAR CO. LTD.....
APPELLANT**

-VERSUS-

MAIL

ADERARESPONDENT

JUDGMENT

(Being an appeal arising from the judgment and decree of Hon. Mr. M. K Serem Resident Magistrate

at Kehancha RMCC No. 111 of 2004 dated and delivered on 8th December, 2006).

The respondent, **Mail Adera**, 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 dated 6th July, 2005 that by a written agreement entered into in or about the year 1996 between himself and the appellant, it was agreed that he would cultivate sugarcane on his plot number 101, field no. 5 vide account number 251312 and by the terms of the said agreement, the appellant was to harvest it on maturity, transport the same to the factory for milling and pay the respondent the value thereof. Pursuant to the said agreement, the respondent duly grew the sugarcane on the said plot measuring 0.5 Ha 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 plant crop, 1st and 2nd ratoon crops thereby causing loss to the respondent estimated at Kshs. 1,730/= per tonne of the harvested cane. On the basis of the foregoing, the respondent lodged the suit as aforesaid 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 tonne.

c. Costs of the suit.

d. Interest on A, B and 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 it 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, 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 was being asked to pay by 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, protect it against waste and damage under the contract. The appellant further denied that the plot could have yielded 42 tonnes or the price of raw cane per tonne then was kshs. 1,730/=. Infact it was kshs. 1,553/= and further, the same was 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 1995 he entered into an agreement with the appellant for growing of sugar cane. The appellant was to harvest the cane three times. He had planted and weeded the cane on his plot aforesaid pursuant to the agreement. However the cane was not harvested at all for the three cycles for no reasons at all. He estimated that he would have got 60 tonnes from the plot crop, 50 tonnes from both the 1st and 2nd ratoon crops. The cost per tonne was kshs. 1,730/=. He therefore prayed for the value of the lost tonnes.

Cross-examined, he stated that the appellant was to harvest the cane three times. He removed the plant crop in 1990 out of annooyance. The appellant never consented to the removal of the cane nor of the 2nd crop. He did not know the exact tonnage that the plot would have yielded, but was informed by an agricultural officer from Rongo whose report he did not have at the time of his testimony. At the end of his testimony, the advocates for both parties recorded a consent on 4th April, 2000, in terms:- ***“...The evidence of PW2 in CC No. 80 of 2004 to apply. The plaintiffs case be marked as closed ...”.*** Unfortunately the evidence of PW2 aforesaid did not form part of the record in this appeal. Therefore this court is in the dark as to the essence of such evidence.

Be that as it may, **Mr. Francis Agalo**, an Agricultural supervisor of the appellant testified that he was aware of the agreement between the appellant and respondent. However, the respondent never planted the 1st crop though he was supplied with all inputs and the plot ploughed by the appellant. The respondent therefore frustrated the agreement. No cane was harvested from the plot. The appellant was not obliged to notify the respondent of the frustrated agreement as clause 4 of the agreement was applicable. The appellant had no documentation for the respondent’s crop since no job completion certificates were issued for the three crop cycles. Job completion certificates were mandatory at the end of each season. That

though the appellant surveyed, ploughed the respondent's plot and supplied him with inputs, the respondent did not however plant the cane. The respondent's claim was thus not well founded and therefore ought to be dismissed.

Cross-examined, he stated that the job completion certificates were not covered in the agreement. Nonetheless it was the appellant's policy. The appellant did not supervise the planting of cane by the respondent. He had visited the respondent's plot and found no plant crop. With that the appellant closed its case.

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 agreement produced in court as an exhibit clearly spells out the roles of both parties to the contract. It provides in clause 4 thereof what steps the defendant company should take in the event that it felt the plaintiff was in breach of the agreement. There was no evidence from the defendant that the plaintiff breached the contract and that clause 4 of the agreement was called into effect. Clause 10(e) of the contract/agreement provides that the defendant would harvest sugarcane in the quantities and dates specified unity from time to time to the outgrower. The defence witness did not show to the court any writing that was done requiring the plaintiff to avail his sugarcane for harvesting and that it was found to be non-existent. There was still no evidence from the defendant that it resorted to clause 10(a) if at all the plaintiff had failed to develop the sugarcane. The plaintiff told the court that he had planted the plant crop and maintained both the ratoons which were not harvested at all. The plaintiff produced copies of debit advice notes for the plant crop. In the circumstances, I am of the finding that the defendant was in breach of the contract agreement. The plat crop was estimated to produce 60 tonnes whereas both the ratoons 50 tonnes each. PW2 testified on optimum yields per Ha of sugarcane at 100 tonnes. The plaintiff plot was 0.5 Ha, Optimum production would be 50 tonnes as per the evidence of PW2. However, taking other factors into account like weather and maintenance, I would approximate the yield on the plant crop at 40 tonnes and 1st ratoon at 30 tonnes and the 2nd ratoon at 20 tonnes totaling about 90 tonnes. The cost per tonne at the time was kshs. 1,730/= I shall therefore, make the following awards namely:-

1. $90 \times 1730/=$ kshs. 155,700/=
2. Cost 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 that:-

"1. The learned trial magistrate erred in both law and infact when he failed to hold that there being no reply to defence filed on record, the respondent was deemed to have admitted all the allegations of facts against him as pleaded in the defence and in the circumstances no findings of breach of contract could be found against the appellant.

2. The learned trial magistrate erred in both law and infact when he held that the respondent was entitled to a sum of kshs. 115,700/= as damages for breach of contract which amount had neither been

pleaded nor proved by evidence at the trial.

3. There being no reply to defence filed by the respondent on record, the trial magistrate erred in both law and in fact when he failed to hold that the respondents 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 in not holding that the respondents suit was statute barred and had been filed outside the period of limitation as pleaded by the appellant in her plaint and without leave.

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 appellants pleadings of want of jurisdiction in the defence.

6. The learned trial magistrate erred in both law and in fact when he held without evidence that the respondents plot could have yielded 40 tonnes of sugar cane on the plant crop 30 tonnes of cane on ratoon 1 and 20 tonnes of cane on ratoon 2 and in proceeding to award damages on the basis of such yields which he plucked from the air when the same had neither been pleaded and or when there was no evidence led in that regard in the circumstances.

7. 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.

8. 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, though such directions had actually been given earlier by **Gacheche J.** on 28th February, 2007, parties further agreed 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 -vs- 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 such breach. 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 1st December, 1995. The agreement involved the respondent growing and selling sugar cane to the appellant from his plot at a fee. The issue then is whether or not the terms of the agreement were honoured by the parties to the same. In so far as the respondent was concerned, he had planted and husbanded the cane crop as required in terms of the agreement. However, the appellant failed to harvest the same when mature and in breach of the agreement. Had the appellant adhered to the

covenants of the agreement and harvested the plant crop, 1st and 2nd ratoon crops, the respondent 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 as no cane was grown and developed by the respondent as required under the agreement. The respondent did not also develop the 1st and 2nd ratoon crops. The respondent's claim was therefore hinged on a non-existent cane crop. Thus the respondent frustrated the contract by failing to develop and maintain the plant, 1st and 2nd ratoon crops 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 enter into an agreement, have his plot surveyed, ploughed and be supplied by inputs by the appellant if the evidence of **Francis Agalo** is anything to go by, and then for no apparent reason fail to plant the cane as required. Having invested heavily in the project, one would have expected that the appellant would take keen interest in the same so that its resources are not squandered and seen to go to waste. I do not think that it makes business sense at all for a party to a contract who having spent considerably to see the agreement to fruition to suddenly relax the efforts, fold his hands and sit back without as much as taking efforts to see whether the other side to the agreement is honouring its obligation. It is in this light that I agree with the learned magistrate in his finding that if indeed the respondent had breached the agreement, why then did the appellant invoke clauses 4 and 10(e) of the agreement. On the other hand the respondent testified forcefully that he had planted the plant crop and maintained both ratoons but were not harvested. To back up his claim, he tendered in evidence copies of debit advice notes from the appellant. It is also clear that the appellant's representatives never visited respondent's plot. I do not believe at all the evidence of **Francis Agalo** to the contrary. How would the appellant then have known whether or not the respondent developed and maintained the cane crop?

In the result and on the basis of the foregoing, 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 un harvested sugar cane at the rate of Kshs. 1730/= per tonne...***” 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 –vs- Augustine Riwa Abiero, Civil Appeal No. 251 of 2001 (UR)**, 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 –vs- 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 a bit 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. However in his written submissions in this appeal, the respondent is categorical that “...*by their nature, the reliefs, sought by the respondent were damages for breach of contract...*”.

It is trite law that there can be no award of general damages for breach of contract. In the case of **Joseph Ungadi Kedera -vs- Ebby Kangisha Karai, C.A No. 239 of 1997 (UR)** the Court of Appeal was emphatic “...*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. 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 – vs- 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 and as confirmed by his counsel in his written submissions 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 -vs- Sanyo Electrical Company Limited (2003) 1 E.A 98**. It delivered itself thus quoting from Coast **Bus Service Ltd –vs- 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 –vs- Nakaye (1972) E. A 446, Ouma –vs- 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 I 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 tonne specifically pleaded in the plaint. In my view the pleading in paragraph 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.

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 not raised nor canvassed during the trial or in this appeal.

In the result I find and hold that the appellant breached its agreement 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 this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE