No. 115

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 209 OF 2001

JOHN RICHARD OKUKU OLOO……APPELLANT

VERSUS

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

JUDGMENT

(Being an appeal arising from the Judgment and Decree of N. Owino Senior Resident magistrate at Kisii dated 22nd July, 1999 in Kisii SRMCC no. 798 of 1998)

The Appellant filed a suit against the Respondent in the Chief Magistrate's Court at Kisii being **Kisii CMCCC No 798 of 1998** alleging inter alia breach of contract. He pleaded that by a written contract dated 27th April, 1995 the respondent contracted him to grow and sell to it sugar cane on his **Plot No. 9L** measuring 0.2 hectares in field number 83, Zone B, Kanymach East, Migori District.

It was a term of the contract that it would come into effect from 27th April, 1995 and remain in force for a period of five years or until one plant and two ratoon crops of sugarcane were harvested whichever period would be less. In breach of the said contract however, the respondent failed to harvest the plant crop either in time or at all. On or about 22nd October, 1997 an arsonist torched the cane and it burned. The Appellant therefore prayed for:-

"a) Payment for 135 tonnes per acre of cane being the average cane yield per hectrare for the 0.2 hectares.

b) Aggravated/punitive damages.

c) Costs of this suit.

d) Interest thereon at court rates from 30th June, 1997 until payment in full".

The respondent filed a statement of Defence in which it denied the existence of the contract and or its breach. However, it went on to plead that the agreement was frustrated by violent tribal clashes which occurred in the contract area and that under the outgrowers agreement it was not bound to perform its part of the contract due to force majeure such as fire and arson. Further under the same contract, it was not

bound to purchase any cane which was found by sampling to have a first expressed juice with apparent purity below 83%. Finally, it pleaded that there was no provision for penalty on burnt cane that could be revised on mutual agreement.

At the hearing of the suit the appellant testified that he bought a Parcel of land with sugarcane on it. The respondent agreed to the transfer the outgrowers contract it had initially entered into with the owner of the land one, **Margaret Amuga Oketch** to the appellant. When the sugarcane matured for harvesting the appellant asked the respondent to harvest the same to know avail. In October 1997 the cane was burnt by an arsonist. He reported the incident to the respondent who send an agronomist. The agronomist took the sample for testing. He was later told that the cane was fine and that it would be harvested the following day. This was not to be however and the cane ended up drying on the farm. The average ton per cane acre was 80 tonnes. The price per tone was Kshs.1553.35. The area covered by sugarcane was 0.2 hectares. He concluded his testimony by stating that he was claiming to be paid for the burnt cane at the above rates. That marked the close of the appellant's case

For the defence, one, **Tom Ocharo** the cane supervisor of the respondent testified: He stated that the respondent had a contract with the appellant. The acreage was 0.2 hectares. The average yield expected was 28 tonnes. There was no breach of the contract however since 5 years had not lapsed. Further it was not bound to harvest the burnt cane. There were tribal clashes in the area and thus the cane could not be harvested in time. In any event even if the cane had been harvested it would have realized an amount less than what the respondent had invested therein in terms harrowing, ploughing, fertilizers and seed cane. In other words the appellant would not have reaped any benefits from the said contract. Finally it was the respondent's case that it did not at all breach the terms of the contract. It was frustrated by forces beyond its control.

The learned magistrate having carefully evaluated the evidence tendered by the respondent as well as the appellant reached the verdict in favour of the respondent and dismissed the suit.

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

1. The learned trial magistrate erred in law and in fact in failing to sufficiently and adequately consider the evidence in favour of the plaintiffs case.

2. The learned trial magistrate erred in law in wrongly holding as she did that as the contract period of five years had not elapsed, when the cane got burnt, the defendant in neglecting to harvest the cane was not in breach of the agreement whereas clause 1 the agreement expressely and impliedly provided for three harvest of the cane within five year period.

3. The learned trial magistrate erred in law and in fact, in that, after finding that the cane was well beyond its harvesting period she went on to absolve the defendant from liability on account or (sic) arson, when in the circumstances it was not applicable.

4. The learned trial magistrate erred in law when failing to assess the damages payable had the plaintiff succeeded in the suit.

When the appeal came before me for hearing on 31st May, 2010, parties agreed that the same be canvassed by way of written submissions. An order in those terms was subsequently made. Parties then filed and exchanged their respective 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 conclusion 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 the consequences ensuing therefrom. It is common ground that there was a valid written contract between one, **Margaret Amunga** and the respondent that was later transferred to the appellant. It was to last for a period of five years commencing on 22nd January, 1993. Much as the respondent has blown both hot and cold in its defence, with regard to the contract, the fact of the matter is that there was such a contract. In their evidence on record, parties have conceded to that fact. The contract involved the appellant growing and selling sugar cane to the respondent from the plot he had purchased from **Margaret Amunga Oketch**. It is also common ground that the respondent never lived up to terms and expectations of the contract. Despite the crop having matured and being ready for harvest, the respondent refused to do so reason being that the period of the contract of 5 years had not expired and also due to alleged tribal clashes in the area. The sugarcane was subsequently burnt by unknown arsonists. However in so far as the appellant was concerned, had the respondent adhered to the terms of the contract and harvested the crop within the contract time lines, the crop would not have been burnt and therefore he would not have suffered loss and damage.

On the other hand, the respondent takes the position that it could not have complied with the terms of the contract with regard to the harvesting of the crop because of frustration as a result of tribal clashes and arson which was force majeure. In its evidence though the respondent introduced another angle to the dispute. It now claimed that it did not harvest the crop in time or at all because, the contract period was not yet over.

From the forgoing, it is clear that there was indeed a breach of the contract. 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 would go along with the position taken by the appellant unlike the learned magistrate. The fact that the crop was torched and destroyed by arsonists when it was past time of harvesting was not disputed or discounted at all by the respondent. The contract did not provide that the harvest of the same would be dependent on the period of the contract. The crop should therefore have been harvested when it reached the agreed maturity period. That the respondent did not harvest the same as aforesaid was in clear breach of the terms and conditions of the contract aforesaid. Had the respondent harvested the crop in time, there would have been no crop for the arsonist to burn. Accordingly there would have been no breach of the contract again on that basis.

The respondent in its defence and evidence alluded to the contract being frustrated due to tribal clashes. I do not think that this defence was available to the respondent. Neither was it tenable. Of course clause 7 of the contract exempted either party from liability due to force majeure. Arson and civil commotion and such like incidents fell under force majeure. No doubt the cane was burnt. Both parties are agreed on that. However, there is doubt as to whether there were tribal clashes in the locality as to amount to civil commotion. No credible evidence was led by the respondent in that regard. It is the respondent who made the allegation. It was bound to prove it by credible and cogent evidence in terms of section 109 of the evidence Act. The appellant had denied such an occurrence. The respondent never went out of its way to adduce the evidence regarding the occurrence of tribal clashes. There must have been victims of the same if indeed it occurred. Alternatively there must have been witnesses to same. Besides if it was true, the Provincial Administration would have been in the know, and or even the police. Why could any of these personnel be called upon to back up the respondent's assertion. That no such other evidence was forthcoming on this claim by the respondent can only mean one thing, there were no such tribal clashes witnessed in Kamagambo. I would therefore discount that aspect of the case.

Still the defence of frustration of the contract is not available to the respondent on account of the cane having been burnt by arsonists. To the extent that the crop had not been harvested by the respondent when due as required by the terms of the contract and was infact over mature at the time when it was set on fire, the respondent was already in breach of the contract. In other words by the time the crop was set on fire by the arsonist, the respondent was already in breach of the contract. In the case of **Alibhai Gulam V Mohamed Yusuf (1946) EACA.25**, it was held ***"…The doctrine of frustration does not apply where it is a breach of the contract and not external supervining events for which neither of the parties is responsible which renders its performance impossible…".*** See also ***Martin Akama Lango V south***

Nyanza sugar Col Ltd, KSM C.A. NO. 20 OF 2000(UR). The respondent having failed to harvest the cane on maturity, the tribal clashes if they had been proved and the burning thereof when they were over mature was but not a supervining event. There was in the circumstances of this case no external supervining event which could have rendered the performance of the contract by the respondent within the time stipulated impossible. The fact that the appellant's crop was at the time it should have been harvested not harvested as the contract allegedly was still alive is not an external supervining event either. Had the learned magistrate borne in mind the foregoing, I am certain that she would not have come to the conclusion as she did that the contract was frustrated due to the cane being burnt by forces beyond the control of the respondent.

Clause 10(1) of the contract seems to absolve the respondent from liability and or purchase of the appellant's cane which had been burnt. There is however uncontested and unchallenged evidence of the appellant that he submitted samples of the burnt cane to the respondent for testing. It was done and he was told that the cane was fine and that it was harvested the following day. That promise was however not honoured. Accordingly, the respondent cannot absolve itself from liability on the basis of the aforesaid provision in the contract. In any event and as already stated, the respondent had already breached the contract long before the cane was burnt.
It is trite that where a trial court dismisses a suit for damages, it should proceed to assess damages it would have otherwise awarded in the event that the party suing had succeeded. It was so stated in the case of **R.J. Fernandes V Rosterman hold mines(1954) 21 EACA.97**. It was therein observed ***"…we would like to take this opportunity to suggest to court of first instance that they should adopt the practice in England, when a claim for damages is dismissed of stating what damages would have been awarded if the claim had been allowed…"***

This was unfortunately not done. However in view of the decision I have reached on whether on not damages are recoverable on breach of contract, I need not belabour the point.

Having held so that the respondent breached the contract, is the appellant entitled to the damages? I do not think so. It is instructive that the appellant in his written submissions categorically and specifically state:-

"…The remedy for breach of contract is damages". Nothing can be further from the truth. Again in the plaint the appellant specifically asked for aggrevated as well as punitive damages. It is also important to observe that the said plaint was drawn and filed in court by an advocate. Had perhaps the appellant acted in person, different considerations would have arisen. As it is therefore, the appellant was clear in his mind that he wanted aggravated and punitive 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. 250,000/- 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 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 whether aggravated or punitive are not recoverable or awardable on a breach of contract. Is it however open to me to treat the pleading in paragraphs 12 of the plaint as a case of special damages and therefore recoverable by the appellant? I do not think so as well.

It is trite law again 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 the case of **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 appellant neither pleaded specifically the special damages nor did he specifically prove the same. If understand the appellant's case properly he is saying that I should award him 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. In my view the pleading in paragraph 12 of the plaint aforesaid 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 appellant has pleaded in the plaint the alleged special damages, it is speculative, comparative, mere estimation and left to conjecture which is not permissible. Infact he was inviting the court to calculate the special damages on his behalf.

Finally, it is instructive that in the very 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 same or the rights or liabilities of the parties thereunder should 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 and in this appeal.

In the result I find and hold that the respondent breached its contract with the appellant. However damages are not awardable for the said breach. The appellant should have treated her loss as special damages and pleaded specifically and with particularity. However he failed to do so nor was he able to specifically prove the claim as required in law. The foregoing notwithstanding, this appeal is for dismissal with no order as to costs. It is so ordered.

Judgment dated, signed and **delivered** at Kisii this 30th day of June, 2010.

ASIKE – MAKHANDIA

JUDGE.