REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 103 of 2006

SOUTH NYANZA SUGAR CO……..………..PLAINTIFF

VERSUS

HEZRON NDARERA MOGWASI..........RESPONDENT

JUDGMENT

(Being an appeal arising from the Judgment and Decree of Mr. Benard J. Ndeda Esq. the Resident Magistrate in Migori PMCC.NO. 257 of 2005 dated and delivered on 19th April, 2006)

The Respondent **Hezron Ndarera Mogwasi** filed a suit against the appellant, **South Nyanza Sugar Company Limited** in the Principal Magistrate's court at Migori alleging inter alia breach of contract. He pleaded that by a written agreement dated 5th July 1994, the Appellant contracted him to grow, maintain and sell to it sugar cane on Plot **No. 1461** in field **No. 342B** within North Kanyajuok sub-location measuring **1.7 Ha**. In the process he was assigned **Account No. 441252**.

It was a term of the agreement that it would commence from 5th July 1994 and remain in force for a period of five years or until one plant crop and two ratoon crops of sugarcane were harvested whichever period would be less. In breach of the said contract however, the appellant failed to harvest the 2nd ratoon crop when the same was mature and ready at 16-18 months or at all and the cane started deteriorating and wasting. At the age of 30 months however, it got burned. The respondent therefore prayed for:-

"a)An order directing the Defendant to pay the current value of sugar cane at the current rate per tone to the plaintiff as General Damages being the expected lost yield on Ratoon II cycle of the total expected tonnage.

b) ***Interest on (a) above at the rate of 24% p.a w.e.f 13th February, 1998 until payment in full.***

c) ***Costs of the suit.***

d) ***Any other relief that the court may deem fit to grant."***

The appellant filed a statement of Defence in which the existence of the agreement was admitted thereof but denied the particulars of breach of the agreement pleaded in the plaint. Alternatively and on a without prejudice basis, the appellant averred that the respondent abandoned and left unattended the cane crop and that the maximum yield of the cane in the plot was 60 tonnes being the average yield from the plots in the vicinity of the respondent's land. The appellant further contended that the respondent's suit was bad in law for there can be no general damages for breach of contract. Accordingly it prayed that the suit be dismissed with costs.

At the hearing of the suit the respondent testified that the plant crop and 1st Ratoon were harvested and paid for by appellant. The 2nd ratoon crop was however never harvested because it was burnt at night. However it had matured for over 30 months but the appellant had failed, refused or neglected to harvest the same in good time despite the respondent requesting it to do so severally. He thus blamed the appellant for the resultant loss. He had expected to make kshs.247,987/75 or even more from the 2nd ratoon.

Mr. Francis Abongo, on behalf of the appellant testified that the respondent ignored the 2nd Ratoon crop and animals grazed it. Indeed during the appellant's cane census in April 1997 the cane was not there. Further more the respondent did not report to the appellant that the cane had been burnt.

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:-

"No evidence was adduced by the defendants to support allegation that the plaintiff frustrated the contract. I find that the plaintiff has proved his case on a balance of probability and enter judgment in the (sic) favour for breach of contract.

But since the amount for compensation could not be ascertained with precision, it is ordered that defendant pays Kshs.247,987.75/-. There (sic) being similar amount of what the defendant had paid the plaintiff on earlier harvest, the defendant to pay interest on the amount at the current court rates from the date of breach of payment (sic)".

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 both law and in fact in awarding General Damages for breach of contract in the sum of Kshs.247,985.75 in the absence of sufficient proof and in failing to hold that blanket general damages can never be awarded for breach of contract.***

2. ***The learned trial magistrate erred on both law and infact in failing to hold that the plaintiff's claim being in the nature of special damages for breach of contract could not be sustained as it had neither been specifically pleaded and proved at the trial by evidence.***

3. ***The learned trial magistrate erred in both law and infact infailing to appreciate that he did not have jurisidiction to entertain the claim by virtue of the provisions of section 29 as read with sections 31 and 3 of the sugar Act, Act No. 10 of 2001.***

4. ***The learned trial magistrate erred in both law and infact in failing to hold that the Respondent having failed to file a reply to defence and to traverse the matters of fact pleaded in the defence and alleged against him, by dint of the provisions of Order VI rule 9(1) of the civil procedure rules is deemed to have admitted the same and therefore no findings could be made against the Appellant on the face of such admission.***

5. ***The learned trial magistrate erred in both law and infact when he failed to consider the evidence given at trial on behalf of the appellant and in deciding the case against the weight of evidence by awarding a sum as alleged damages for breach of contract which had not been pleaded specifically.***

When the appeal came before me for directions on 10th March, 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 payable in the event of a breach of 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 5th July, 1994. The agreement involved the respondent growing and selling sugar cane to the appellant from his plot number 1461. It is also common ground that the appellant initially honoured the agreement by harvesting the 1st ratoon. However, when it came to the 2nd ratoon, the appellant apparently backslided. Despite

the 2nd ratoon having matured to over 30 months, the appellant refused to harvest the same despite the respondent asking it to do so repeatedly. Later the said sugar cane got burnt by unknown arsonists. 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 been burnt and therefore he would not have suffered the loss.

On the other hand, the appellant takes the position that the appellant would not have complied with the terms of the contract with regard to the 2nd ratoon as there was none. That the respondent had infact abandoned the crop and had it grazed upon. The appellant came by this information during its cane census in April, 1997. Thus the respondent frustrated the contract by failing to maintain the ratoons and in the process breached the contract himself.

From the foregoing, it is clear that there was 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 with the position of the respondent. The fact that the 2nd ratoon was destroyed by arsonists when it was over 30 months old was not disputed or discounted by the appellant sufficiently. The contract provided that the plant crop and ratoon cane would be harvested at the ages of 22-24 months and 16-18 months respectively after planting. The 2nd ratoon should therefore have been harvested when it was between 16-18 months old. That the appellant did not harvest the same as aforesaid was in clear breach of the terms and conditions of the agreement aforesaid. Had the appellant harvested the crop in time, there would have been no crop for the arsonists to torch. Accordingly there would have been no breach of the agreement.

The appellant in its defence and evidence has alluded to the respondent frustrating the agreement by failing to maintain the 2nd ratoon properly. That he had allowed the crop to be grazed upon. According to its cane census in April, 1997 it did not find the 2nd ratoon. However, the appellant did not tender any credible evidence to support the contentions aforesaid. The cane census report if at all must have been in writing. Why was it so difficult for the appellant to tender into evidence such a report. Indeed under cross-examination, **Francis Abongo**, the appellant's sole witness was categorical that ***"…the farmer abandoned Ratoon 2. I have no evidence here in court. I did not carry my copy of evidence to show that ratoon 2 was grazed on…"*** This shows that a report of sorts existed but was not tendered in evidence. The only logical assumption is that the report must have been adverse to the appellant's case and that is why it decided not to tender it in evidence.

In the result, I hold just like the learned magistrate that it is the appellant who reached the agreement.

Having held so, was the learned magistrate 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 ***"…An order directing the***

defendat to pay the current value of sugar cane at the current rate per tone to the plaintiff as *General Damages(emphasise mine)* ***being the expected lost yield on ratoon II cycle of the total expected tonnage…***" 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 general 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 V Ebby Kangisha Karai, C. A. No. 239 of 1997(UR)*** the Court of Aappeal 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 made such an award, 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 8 of 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.

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 1st ratoon was harvested and paid for by the appellant. He knew exactly the amount he was paid. Indeed in his own testimony he was paid Kshs.247,989/75. According to him, he expected to be paid more from the 2nd ratoon. He knew the price. Thus the appellant was capable of assessing with a high degree of certainty or particularity his

expectation in monetary terms from the 2nd ratoon. 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 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 this 30th day of June, 2010.

ASIKE – MAKHANDIA

JUDGE

VERSUS

HEZRON NDARERA MOGWASI……….DEFENDANT

JUDGMENT