REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 141 OF 2006

SOUTH NYANZA SUGAR COMPANY LTD…..…..
…..APPELLANT
-VERSUS-
SEPHANIA OUKO AGWAYA…….……..……
RESPONDENT
JUDGMENT

(Appeal arising from the Judgment and Decree of Hon . David Kimei Esq-Resident Magistrate's Court at Rongo dated 19th May, 2006 in Rongo SRMCC.NO. 73 OF 2004)

The appellant was the defendant whereas the respondent was the plaintiff in a suit filed in the Resident Magistrate's court at Rongo being Rongo **SRMCC.NO. 73 of 2004**. In the said suit, the respondent sought from the appellant an order directing the appellant to pay him the current value of sugar cane at the current rate per tonne as damages for the expected lost yield of cane on the plant crop, ratoon I and II, interest and costs.

The suit was informed by the fact that by a written agreement dated 18th July, 1996, the appellant contracted the respondent to grow and sell to it sugar cane on his land parcel No. 469 in field No.3 "A" Kakmasia sub-location measuring 2.9 hectares. The contract was to commence on 18th July 1996 and remain in force for a period of 5 years or until one plant crop and 2 ratoon corps of sugar cane were harvested which ever period shall be earlier. It was a further term of the contract that within 5 years or less, the plant crop and ratoon cane would be harvested at the age of 22-24 months and 16-18 months after planting respectively. Finally that the appellant would be bound to purchase all the cane that was available in the field on maturity.

In breach of the said contract however, the appellant failed to harvest the plant crop when it matured at 22-24 months of age and or at all. The cane deteriorated and was wasted and the respondent lost the opportunity of developing ratoon 1 and II. Thus the respondent lost income expected from one crop cycle and therefore suffered loss and damage hence the suit.

The suit was defended. In its statement of defence, the appellant denied breach of contract and or that it failed to harvest the plant crop and the ratoon crops or at all either in time or to take delivery thereof. It was the appellant's case that, despite having supplied the respondent with various farm inputs to enable him develop the cane, he failed to do so to the extent that there was no cane or ratoon 1 and II to be harvested. The appellant further denied the allegation that the average sugar cane proceeds on the respondent's farm assuming that he had developed the same would have yielded 240 tonnes but perhaps 65 tonnes per hectare nor that the rate of Kshs. 1,553/= per tonne applied to his cane. Further it was the appellant's case that it was entitled to deduct from the cane proceeds in the event that there was any cane developed and delivered to it for milling, the value of the various farm inputs, implements and services which it had advanced to the respondent and which now remained unrecoverable as a result of the respondent's breach of the contract. In a nutshell it was the respondent and not the appellant who was in breach of the contract between them. Finally, the appellant averred that the respondent's suit in any event was statute barred.

In support of his case, the respondent testified that on 17th July, 1996, he entered into an agreement with the appellant in respect of plot no. 469 and was given account no. 260917. He tendered in evidence the contract. Later the appellant ploughed his plot aforesaid and supplied him with seed cane which he

planted. He maintained the cane upto maturity. However the appellant failed to harvest the same and it over matured to 48 months. Thus the respondent was unable to develop ratoons I and II. The cane was supposed to be harvested at 24 months. He blamed the appellant for his consequential loss. An agricultural officer visited the plot and assessed the extent of loss in his assessment report dated 19th August, 2004. He thus sought compensation from the appellant.

Under cross-examination by **Mr. Okong'o,** learned counsel for the appellant, he stated that his plot was 2.9 Ha. However it was not indicated in the agreement. He planted the crop in January, 1997. He had nothing to show that the plot had been surveyed. The crop dried up after a period of 48 months. The appellant was meant to harvest the cane at 24 months. Despite his complaints, the appellant had failed to harvest the crop when due. He did not know the average tonnage of sugarcane in the area. He conceded though that such tonnage was dependant on how the crop was managed. He also conceded that the appellant was entitled to deduct its expenses. He maintained though that he had planted the cane.

The next witness called by the respondent was**, Samuel Wambupa**, an agricultural economist. He recalled that in August, 2004 he prepared an assessment of report of the loss incurred by the respondent at his invitation. He tendered in evidence the said report.

Cross examined, he stated that the valuation was not always exact. That he did not see any sugar cane on the plot. He conceded that he valued sugar cane crop which he hadn't seen. He only estimated the potential yield on the information given to him by the respondent.

In defence the appellant through **Francis Abongo**, Senior agricultural supervisor, testified that a contract was entered into between the respondent and appellant vide contract Account no. 442333 in respect of plot 456 on field 124 North Kanyajuok measuring 0.5 ha. Inputs in the farm on account of surveying, ploughing, fertilizer, were supplied by the appellant. The respondent developed the cane but it got burned before it was mature. They were never told who had burnt the cane. It was the respondent's duty to develop the cane and guard it until it was harvested. The appellant was not bound to harvest cane vide clause 10(1) of the contract. The cane was already in bad shape and could not be harvested. The contract was not performed and it was upon the respondent to tell the appellant who had burnt the cane.

Cross-examined by **Mr. Owade,** learned counsel for the respondent, he stated that the cane was burnt before it matured, he did not know the period that the cane was to mature and that he did not know the age of the cane at the time it was burnt.

The learned magistrate having carefully evaluated the evidence on record as well as respective written submissions found the respondent's claim proved on a balance of probability and awarded the respondent a sum of Kshs. 330,988/= plus costs and interest.

That judgment and consequential decree is the subject of this appeal. The appellant faulted the judgment and decree aforesaid on 5 grounds to wit that:-

"1. The learned trial magistrate erred in both law and infact in awarding General Damages for Breach of contract in the sum of Kshs 330,988/= 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 (sic) 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 in fact in failing to appreciate that he did not have jurisdiction to entertain the claim by virtue of the provisions of section 29 as read with sections 31 and 4 of the Sugar Act, Act no. 10 of 2001.

4. The learned trial magistrate erred in both law and in fact 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 in fact 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 up for hearing before me on 14th June, 2010, **Mr. Odhiambo** learned counsel appeared for the appellant whereas **Mr. Ochoki,** learned counsel as well appeared for the respondent. They agreed to pursue the appeal by way of written submissions. Subsequently, they filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

As a first appellate court, I am not bound to follow the trial court's findings of fact if it appears that the trial court failed to take into account particular circumstances of the case. I have a duty to reconsider and re-evaluate the evidence tendered in the trial court afresh so as to reach my own conclusion. See **Selle & Another .v. Associated Motor boat Co.Ltd (1968) E.A. 123.**

It is common ground that there was an out growers cane Agreement entered into between the appellant and respondent dated 18th July, 1996. It also common ground that the said agreement was breached. According to the appellant, it was the respondent who breached the agreement by, according to its defence, not developing the cane despite having been supplied with the necessary inputs. Hence there was nothing to be harvested. Yet when its witness testified he attributed the respondent's breach on the cane being burnt and the respondent's failure to inform the appellant who had burnt the same. On the part of the respondent, it was his case that the appellant breached the agreement by failing to harvest the cane when due in terms of the cane agreement aforesaid. The cane remained in the plot for over 48 months unharvested until it dried up. Yet it was meant to be harvested within 22-24 months. Between the two versions as to the breach, the learned magistrate opted to believe the respondent. On the evidence on record, I do not think that he can be faulted. There was no credible evidence that the cane was indeed burnt by arsonists as claimed by the appellant. There was evidence that the respondent planted cane as opposed to the assertion by the appellant to the contrary. Otherwise on what basis would he have been issued with a job completion certificate. In any event a party is bound by his pleadings. The appellant in its defence took the position that despite having supplied the respondent with various farm inputs to enable him develop the cane, he failed to do so to the extent that there was no cane to be harvested. Yet in its evidence it made a quick about turn and claimed that though the respondent had planted cane, it had been burnt by arsonists but the respondent had failed to inform the appellant those responsible. Clearly the appellant's evidence is at variance with its defence. This can only mean that the appellant was being less than candid to the court. The appellant's evidence was therefore not credible nor believable. The learned magistrate was right in discounting it in my considered judgment. He was thus right in holding that indeed it was the appellant who was in breach.

The learned magistrate having found the appellant liable for the breach proceeded to award damages. It is trite law that damages cannot be awarded on a claim anchored on a breach of contract. On this issue the court of appeal in the case of **Joseph Urigadi Kedeva.v. Ebby Kangishal Kaval KSM C.A. 239 of 1997 (UR)** empathically stated ***"……As 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…… We respectfully agree. There can be no general damages for breach of contract……"*** On the basis of this binding authority, if the award aforesaid was in the nature of general damages, then it was unfounded in law.

Could it however pass as special damages? It is trite law that special damages must be pleaded and strictly proved See **Jivanji .v. Sanyo Electrical Co. ltd (2003) 1 E.A 98** and **Coast Bus Service Ltd .v. Murunga & others (1992) LLR,318.** In this case the pleading in paragraph 8 of the plaint cannot pass the threshold of being specific. Neither was the evidence led, specific enough to prove the special damages. I have no doubt at all in my mind that the respondent should have done a better job in his pleadings with regard to special damages. After all he had in his possession a valuation report by PW2 that showed his total accumulated loss. His claim was for loss which he had already incurred and which was capable of mathematical computation had he been diligent in pleading his claim. So that even if the trial court had treated the respondent's claim as special damages, it was bound to fail for the above reasons. Finally I note that the ground of appeal based on limitation was abandoned by the appellant in this submissions.

In the result, much as the trial court and I have held that the appellant breached the contract, nonetheless the respondent failed to plead and prove his claim as required, same being for special as opposed to general damages. In the premises, I allow this appeal with costs. Judgment and decree of the learned magistrate is set aside. In substitution I order that the respondent's suit be dismissed with costs.

Judgment dated, signed and **delivered** at Kisii this 16th July, 2010.

ASIKE-MAKHANDIA

JUDGE