



No. 179

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 208 OF 2001

**DORCA AKETCH**

**ODUK.....APPELLANT**

**-VERSUS-**

**SOUTH NYANZA SUGAR CO.**

**LIMITED.....RESPONDENT**

**JUDGMENT**

*(Being an appeal from the Judgment and decree of the Chief Magistrate court, Kisii*

*dated the 23<sup>rd</sup> day of September, 1999 Civil Suit No. 349 of 1998, N. Owino SRM)*

The Appellant filed a suit against the Respondent in the Chief Magistrate's court at Kisii being Kisii CMCC.NO. 349 OF 1998 alleging inter alia breach of contract. She pleaded that by a written contract dated 22<sup>nd</sup> January, 1993, the respondent contracted her to grow and sell to it sugar cane on her **Plot No. 172B** measuring 0.209 hectares in field number 19, Zone B, Kanyimach Location, Migori District.

It was a term of the contract, express or implied that it would come into effect from 22<sup>nd</sup> January, 1993 and remain in force for a period of five years or until one plant and two ratoon crops of sugarcane were harvested on the plot aforesaid whichever period would be less. In breach of the said contract however, the respondent failed to harvest the ratoon crop in time and crop when the same was mature and ready at 18 months or at all. On or about 14<sup>th</sup> November, 1997, arsonists torched the crop and it burned. The Appellant therefore prayed for:-

*“a) Payment for 132 tonnes of cane being the average cane yield per acre.*

*b) Aggravated/punitive damages.*

*c) Costs of this suit.*

*d) Interest thereon at court rates from 30<sup>th</sup> June, 1997 until payment in full”.*

The respondent filed a statement of Defence in which the existence of the contract was admitted and acknowledged but its breach denied. It specifically averred that under the contract it was not bound to accept burnt cane but when it did the penalty would be Kshs. 400/= per tone and not Kshs. 10/= per tonne. It was the respondents further contention that the contract was frustrated by events which made its performance impossible. It therefore prayed for the dismissal of the suit with costs.

At the hearing of the suit the appellant testified that she was a farmer at **Kanyimach on Plot No. 173B** measuring 0.29 hectares. She entered into a contract with the respondent. She tendered into evidence the said contract. The contract was to last 5 years and she was entitled to 3 harvests of the cane crop. The cane was however only harvested once. She was to harvest the plant at 22-24 months and the 2<sup>nd</sup> harvest after 18 months. On 15<sup>th</sup> November, 1997 the crop was burnt. It was already overmature and due to be harvested. She reported the matter to the respondent who promised to harvest the same but never did so. The cane ended up drying in the field. In 1995 she had been paid 72,000/= for the cane harvested on the basis of Kshs. 1,553/= per tonne. However she could not recollect the tonnage. She was therefore claiming compensation for the crop left unharvested in the field and her entitlement to 3 harvests. Cross-examined, she stated that she did not know how to read but she was told that she was entitled to 3 harvests and the contract was to last for 5 years. She was also told that the 1<sup>st</sup> and 2<sup>nd</sup> ratoons have better yields. There were no tribal clashes in her area then. She had been given an advance of Kshs. 10,000/= and fertilizer as well. She cared for the crop herself and not the respondent. With that the appellant closed her case.

In defence, **Julius Onduko**, a supervisor with the respondent testified that the contract was not signed by the respondent nor was it dated. They received a report about the burnt cane on 16<sup>th</sup> November, 1997. On 21<sup>st</sup> October, 1997 there were terrible clashes between Kisii's and Luo's and were intense in Kamureri Location. The total tonnage in the area was 71.07 per plot of 0.2 hectares. According to their records the appellants plot could produce 65 tonnes per hectare. However the appellant had been advanced a bag of urea at Kshs. 1,094.05/=, plant weeding at 686/85 and advance payment of Kshs. 6,000/=. The penalty on burnt cane was Kshs. 400/=. According to them, the average yield would have been 15 tonnes. The respondent was to deduct Kshs. 4,035/=. The total services provided to the appellant by the respondent were worthy Kshs. 9,780/40 which the appellant was duty bound to repay to the respondent.

Cross-examined, he stated that after the 1<sup>st</sup> harvest, deductions were made from the appellant's entitlements. The tonnage was 71.07. The average yield was 355 tonnes. The cane was harvested at 21 months. He did not know when the cane should have matured. However harvesting depended on the respondent's programme. The ratoon crop matures faster though. The report of the burnt cane was made by the appellant. There were no clashes in the area in January 1997. He could not tell why the cane was not harvested though.

With that the respondent also closed its case.

The learned magistrate having carefully evaluated the evidence tendered by the respondent as well as the appellant reached the verdict thus:-

***“The defendant cant therefore be compared (sic) to pay damages for cane burnt by unknown persons and thus the contract frustrated (sic) by making services (sic). This would be unfair and unjust.***

***I do find that the plaintiff has not proved his (sic) case on substance (sic) of probability as required by law. I do dismiss the same together with costs....”***

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

***“1. The learned trial magistrate misdirected herself in finding that although the cane crop was reported burnt, tested, sampled and found to be good, the representation to the plaintiff that it was thereafter to be harvested, was not tantamount to accepting to harvest the cane.***

***2. The learned trial magistrate erred in law and in fact in finding that the contract was avoided due to tribal clashes whereas no satisfactory evidence was led in proof of than (sic) event.***

***3. The learned trial magistrate erred in law in absolving the defendant from liability on account of the said clashes (alleged frustrating event) when in the circumstances of the case it was wholly not acceptable and/or permissible***

***4. The leaned trial magistrate failed to assess the damages awardable had the plaintiff succeeded in the suit....”.***

When the appeal came before me for hearing on 29th June, 2010, Mr. **Oduk** and Mr. **odhiambo**, both learned counsel for the appellant and respondent respectively 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 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 the consequences ensuing therefrom. It is common ground that there was a valid written contract between the appellant and the respondent despite the recant by the respondent through its witness. The respondent admitted as much in its written statement of defence. The contract was to last for a period of five years commencing on 22<sup>nd</sup> January, 1993 or until one plant and two ratoon crops were harvested whichever came earlier. The agreement involved the appellant growing and selling sugar cane to the respondent from her plot number 172B. It is also common ground that the respondent initially honoured the agreement by harvesting the 1<sup>st</sup> crop. However, when it came to subsequent crops, the respondent apparently backslided and failed to do so though the cane had matured and ready for harvest. The reason advanced by the respondent for the said failure appears to be threefold. Tribal clashes in the area, the crop not being in their harvest programme and thirdly, the crop being burnt by arsonist. The appellant did not buy these excuses. In so far as she was concerned, the respondent was in breach of the agreement.

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. The fact that the 2<sup>nd</sup> crop was subsequently torched and destroyed by arsonists when it was past time of harvesting was not disputed or discounted at all by the respondent. The contract provided that the crop cane would be harvested on maturity that is between 22-24 months. The contract did not provide that the harvest of the same would be dependant on the harvesting programme to be rolled out by the respondent. The subsequent crops should therefore have been harvested within the

aforesaid period. That the respondent did not harvest the same as aforesaid was in clear breach of the terms and conditions of the contract. Had the respondent harvested the crop in time, there would have been no crop for the arsonists to burn nor be the subject of tribal clashes. Indeed by this time the cane had overmatured and was long overdue for harvest. Accordingly there would have been no breach of the contract 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. 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 in accordance with the contract. 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 believable evidence in terms of section 109 of the **Evidence Act**. The appellant denied such an occurrence. The respondent never went out of its way to adduce evidence regarding the occurrence of tribal clashes, other than to merely make such blunt a statement. There must have been victims of the same if indeed they occurred. Alternatively there must have been witnesses to same. Besides if it was true, the provincial administration would have been in the know. Why could any of these people 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, no such tribal clashes were witnessed in Kamureri. I would therefore discount that aspect of the respondent's defence. Still the defence of frustration 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 in fact over mature and overdue for harvest at the time when it was set ablaze, the respondent was already in breach of the contract. In other words by the time the crop was torched by the arsonists if at all, 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 supervening event 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 or the burning thereof when the cane was overmature was but not a supervening event. There was in the circumstances of this case no external supervening event which could have rendered the performance of the contract by the respondent impossible. The fact that the appellant's crop at the time it was due for harvest was not in the respondent's programme of harvesting is not an external supervening 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 that had been burnt. There is however uncontested and unchallenged evidence of the appellant that she reported the incident to the respondent. Indeed its own witness admitted as much. She was promised that the burnt cane could be harvested. The respondent never honoured its word. Accordingly, the respondent cannot absolve itself from liability on the basis of the aforesaid provisions 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 law 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*. “...**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 or not damages are recoverable on a breach of contract, I need not belabour the point.

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

“...**The remedy for breach of contract is damages**”. Nothing can be further from the truth. It is also instructive that in the plaint the appellant is asking for aggravated 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 is clear in her mind that she wanted 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. 250,000/- 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. Was it however open to the trial court or indeed this court to treat the pleadings as a case of special damages? I do not think so either.

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) KLR304...*" In the circumstances of this case, the appellant neither pleaded specifically the special damages nor did she specifically prove the same. If understood the appellant's case properly, she is saying that I should award her 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 13 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 with regard to the alleged special damages, it is speculative, comparative, mere estimation and at best left to conjecture which is not permissible.

The appellant's claim could easily have passed for special damages, if only his counsel was diligent in his pleading. Before lodging the suit in court, the respondent had previously benefited from the respondent when the 1<sup>st</sup> crop was harvested and she was paid by the appellant. She knew exactly the amount she was paid. Indeed in her own testimony she was paid Kshs. 72,000/=. The price per tone then was Kshs. 1553/=. Thus the appellant knew the price. She was capable of assessing with a high degree of certainty or particularity her expectation in monetary terms from the subsequent crops. Thus she was in a position to prove the same. She did neither of the foregoing.

Finally, it is instructive that in the very contract, there was a specific clause to the effect that any dispute or question which may arise at any time between the parties regarding the construction of the same contract or the rights or liabilities of the parties thereunder would 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 indeed 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 she failed to do so nor was she able to specifically prove the claim as required in law at the hearing. This appeal is therefore, for dismissal with no costs. It is so ordered.

**Judgment dated, signed and delivered at Kisii this 16<sup>th</sup> September, 2010.**

**ASIKE-MAKHANDIA**

**JUDGE**