REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 245 OF 2006

PHOEBE ACHIENG ALUOCH ……..…PLAINTIFF

-VERSUS-

SOUTH NYANZA SUGAR CO. ……..DEFENDANT

JUDGMENT

The appellant was a contracted sugarcane farmer by the respondent. Under the agreement dated 2nd May, 1996, the appellant was required to plant and maintain sugarcane on plot number 24, Kangeso sub location measuring 0.1 hectares. The contract was assigned to the appellant from one, **Nicholas Abich Sino** after he sold and transferred his interest therein to the appellant. The contract was to last 5 years during which period the respondent was to harvest the sugar cane 3 times. The 1st harvest being the plant crop was to be harvested at the age of 16 to 18 months. That 1st crop was duly done on 26th November, 1998. However in breach of the aforesaid contract, the respondent failed to harvest the subsequent crop when due and the same dried up occasioning the appellant loss and damage. According to the appellant, her plot was capable of producing an average of 135 tonnes per acre and the rate payable by the appellant then per tone was Kshs. 1,730/=. She therefore claimed damages for the loss.

The claim was defended. The respondent generally denied the appellant's claim. In particular it denied the existence of the contract, raised the question of privity of contract, that the 1st ratoon was never developed nor made available for harvesting. It further pleaded that it had a policy of not harvesting poorly maintained cane and that the appellant failed to employ the recommended crop husbandry to an extent that the cane was overshadowed and dwarfed by weeds and therefore could not be harvested. The respondent further pleaded that the appellant's cane even if it had been well maintained, was incapable of yielding 135 tonnes per hectare having regard to the previous harvest including the plant crop. Finally, the respondent contested the jurisdiction of the court to hear and determine the dispute.

The suit was duly heard by **A. A Ingutya SRM**. In a rather terse and short judgment delivered on 16th August, 2006, the learned magistrate dismissed the appellant's case holding thus ***"…I have carefully perused this agreement. It was for arbitration in clause 13 thereof. This suit is therefore premature and I dismiss it with costs …"***. I have no doubt in my mind that the learned magistrate treated the case in the most cavalier and casual manner. He paid no attention at all to the evidence on record nor had the issue of the arbitration clause in the contract canvassed before the learned magistrate.

Anyhow, the dismissal of the appellant's suit as aforesaid provoked this appeal. 3 grounds of appeal were advanced in the amended memorandum of appeal filed to wit:-

"1. The learned trial magistrate erred in law and in fact in failing to make a finding on the merits of the case after hearing the suit on the merits.
2. The learned trial magistrate erred in law in dismissing the suit by wrongly invoking the arbitration clause in the parties agreement to dismiss the suit as premature even after going through a full trial.
3. The learned trial magistrate erred in law in failing to make a finding on damages payable; had the plaintiff succeeded in the suit.".

When the appeal came up for directions, it was decided amongst other directions that the appeal be argued by way of written submissions. As fate would have it, it is only the appellant who ended up filing her submissions. The respondent did not see the need to do so written or otherwise. I have carefully read and considered the appellant's submissions and cited authorities.

Indeed the contract provided for arbitration between the parties in the event of a dispute arising. However it was upto the parties to invoke that clause. It was not open to the learned magistrate to invoke and or consider it ***suo moto***. Thus the learned magistrate erred in law in dismissing the suit for being premature on account of the arbitration clause. The respondent did not raise the issue of arbitration clause, let alone agree to it before the suit was filed. It did not also apply to stay the suit pending arbitration as required. However it filed an appearance and opted to defend the suit. In the premises, the respondent lost the right or waived its right to rely on the arbitration clause. It was not open to the learned trial magistrate to re-energise the said arbitration clause. In the case of **Kisumuwalla Oil Industries –vs- Pan Asiatic Commodities (1995-1998) 1 E.A 159**, the court of appeal cited with approval the passage in law and practice of commercial arbitration in England by **Mustill** and **Boyd** 2nd edition thus ***"…again at page 162, the learned author says "It has been said that such a clause postponed but does not***

annihilate the right to access to the court..”. At 14 of the same text, the learned authors further say ***“such clause does not bar the jurisdiction of the court, but it does provide a defence to the actions where there has been no arbitration, and no award. In theory, the defendant is entitled to let the action run on and use the clause to defeat the claim at the trial. This is rarely done in practice, and the usual cause is to employ the clause as a ground for obtaining a stay …..”.*** To the extent that the arbitration clause became inoperative, the moment parties proceeded with the formal hearing of the suit learned magistrate was wrong to invoke it so as to the defeat the appellant’s claim.

In any event having dismissed the appellants claim and since the same was for damages for breach of contract, the learned magistrate was obligated to assess the damages he would otherwise have awarded the appellant had he found for her if at all. She did not do so which again was an error in law on his part.

Was the appellant however entitled to damages in law? I don’t think so. It is trite law that general damages are not awardable on a claim anchored on breach of contract See for instance, **Joseph Ungadi Kedra –vs- Ebby Kangisah Kavai. KSM C.A No. 239 f 1997 (UR)**. Prayer (a) in the plaint filed in the subordinate court was in these terms ***“……Damages for breach of contract and an order that the defendant do compensate the plaintiff for loss of the two (2) ratoon crops on 0.1 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/= per tone for the expected two (2) ratoon crops…..”*** As the claim was in the nature of general damages then on the basis of the foregoing authority, it was unfounded in law. On the other hand, even if the court was to treat the claim as of special damages, it would still fail on the basis that it was neither pleaded specifically nor proved with a degree of certainty as required. It is once again trite law that a claim for special damages ought to be specifically pleaded and proved by evidence. In the case of **Jivanji –vs- Sanyo Electrical Company Limited, (2003) 1 E.A 98**, the court of appeal was emphatic that special damages must be pleaded and proved specifically with a decree of certainity. This was not done in the circumstances of this case. Looking at the plaint as filed one does not come across any specific pleading for special damages in the body of the plaint nor in the prayers of the plaint. In the end I hold that much as the respondent may have breached the contract with the appellant it was nonetheless not liable to pay the respondent general damages, since such damages are not recoverable on a breach of contract. Secondly, even if the court was to treat the claim as special damages, it was still unrecoverable as it was neither pleaded and or proved with a degree of certainity and particularity as required in law.

Much as the trial court erred in dismissing the suit on a technicality that was neither pleaded nor canvassed before it and this appeal ought to be allowed on that basis, it is however my view that the suit in any event was doomed to failure on account of damages not being recoverable for breach of contract. For that reason it will serve no useful purpose at all to allow the appeal and set aside the judgment and decree of the learned magistrate as the end result will be the same. Accordingly this appeal is dismissed with no order as to costs.

Judgment dated, signed and **delivered** at Kisii this 16th day of September, 2010.

ASIKE-MAKHANDIA

JUDGE