REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 104 OF 2008

SOUTH NYANZA SUGAR CO. LTD …….APPELLANT

-VERSUS-

ESTHER AUMA OKAL…….....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and decree of the Resident Magistrate Hon. J. R Ndururi in Kehancha RMCC. No. 113 of 2004 dated and delivered on the 5th June, 2008)

The respondent, **Esther Auma Okal**, sued the appellant, South Nyanza Sugar Company Limited, in the Resident Magistrate's court at Kehancha for a declaration that the appellant was in breach of the cane contract agreement with her, payment of the value of unharvested sugar cane at the rate of Kshs. 1,730/= per tonne, costs of the suit as well as interest. The suit was anchored on the fact that in or about 1995 the appellant contracted the respondent to grow sugar cane on her plot number 1056A field number 38 vide account number 331096 and by the terms of the said contract, the appellant was to purchase and transport the sugarcane to its factory on maturity and pay the respondent the value thereof. Pursuant to the said contract, she grew sugar cane on the said plot measuring 0.3 hectares and on maturity requested the appellant to harvest or purchase the same but the appellant unreasonably, negligently, recklessly and in total breach of the contract refused to harvest the sugar cane which ended up drying on the plot thereby causing loss to the respondent.

The appellant filed a statement of defence to the respondent's claim in which it essentially admitted the contract aforesaid but denied its breach. The appellant further averred that it was the respondent's duty to plant, tend and avail to it cane that could achieve satisfactory yield when milled which the respondent failed to do hence no liability accrued in respect thereof. The respondent never availed cane to be harvested and or milled. That infact it was the respondent who abandoned the cane and left it to dry up. The appellant further denied that the plot could have yielded 25 tonnes and that the price per tonne was Kshs. 1,553/= gross and not of Kshs. 1,730/= which was subject to deductions an account of Sony Outgrowers company levy, presumptive income tax, harvesting and transport charges and cess. Finally, the respondent pleaded that the respondent's suit was statute barred and bad in law in that there can be no award of general damages for breach of contract.

The hearing of the suit commenced before **Hon. M.K.K Serem R.M** on 11th April, 2005. The respondent testified that she entered into an agreement with the appellant sometimes in 1995. The agreement was for cultivation of sugar cane. The appellant was to plough, supply the seeds, fertilizer, harrow and farrow her plot no. 1056A. On her part she was to weed and tend the cane. She did so and the 1st and 2nd crops were harvested and paid for by the appellant. For the 3rd crop, however, she was not paid though she had reported to the appellant that her cane had matured and was due for harvest. The appellant however failed to harvest the same much as it had over matured by 20 months. The said crop was 25 tones and at per Kshs. 1730/= per tonne she expected to be paid Kshs. 44,015/=. This is the amount she prayed that she be paid plus costs and interest.

Cross-examined, she confirmed that she was claiming Kshs. 44,015/=. However she could not recall when the appellant breached the agreement. Nonetheless she conceded that it must have been over 5 years ago. In fact she conceded that it was 9 ½ years since the agreement had been entered into. She could not recall how much she had been paid for the 1st and 2nd crops much as the harvest declined with each successive harvest. She was sure though that the amounts paid were not the same. Her loss was not assessed by an agricultural officer.

By the time of the defence hearing, the case had been taken over by **Hon. J. R Ndururi, R.M**. The

fields supervisor and extension officer of the appellant, **Evans Otieno Mbai** testified on behalf of the appellant that it entered into an agreement with the respondent. According to his records they had harvested her plant crop and ratoon 1. She was paid for the 1st crop and 1st ratoon. However she failed to avail the 2nd ratoon. He stated that it was impossible to get 25 tonnes from 2nd ratoon. The tonnage for the 1st ratoon was 5 to 7 tonnes. No price per tone was indicated in the agreement.

Cross-examined, he stated that according to the agreement it was mandatory to harvest the crop thrice. However, the 2nd ratoon was not harvested. From his records, the 1st crop yielded 41 tonnes. The 2nd crop however yielded only 5 tonnes. He attributed the decline to poor management by the respondent. Price per tonne then was Kshs. 1,730/=.

On 5th June, 2008, the learned magistrate delivered his judgment. He found the appellant liable for breach of the contract and ordered it to pay the respondent Kshs. 1730/= per tonne for 25 tonnes as damages plus costs and interest.

Aggrieved by the judgment and decree of the learned magistrate, the appellant lodged the instant appeal. He faulted the learned magistrate on 9 grounds. These are:-

"1.The learned trial magistrate erred in both law and infact when, despite the clear provisions of section 3(1) of the Sugar Act, Act No. 10 of 2001 as read with section 4 (2) (e) of the same act, he still held that he had jurisdiction to entertain the suit.

2. The learned trial magistrate erred in law when in determining the suit he ousted the jurisdiction of the Sugar Arbitration Tribunal established pursuant to the provisions of section 31 of the Sugar Act, Act No. 10 of 2001.

3. The learned trial magistrate erred in both law and infact, when he awarded to the respondent 25 tonnes of cane at the rate of Kshs. 1,730/= as damages without specific pleading and or strict proof thereof.

4. The learned trial magistrate erred in both law and in fact when he failed to appreciate the fact that for breach of contract claims, only special damages are awardable and such damages must be specifically pleaded by quantification and thereafter proved strictly by way of evidence which was not done.

5. The learned trial magistrate erred in law when he awarded to the respondent as against the appellant 25 tonnes of cane without proof or evidence being led in that regard.

6. The learned trial magistrate erred both in law and in fact when in the absence of a reply to defence envisaged by the provisions of order VI rule 9 (1) of the Civil Procedure rules by the respondent, to the appellants pleadings in the defence, he still found for the respondent on the face of clear admissions of all the matters of fact pleaded against respondent in the defence and in ignoring the appellants submission before him.

7. The learned trial magistrate erred in both law and infact when he held that the respondent having developed the plant crop and ratoon 1, it went without saying that ratoon 2 must have been developed and the respondent failed to harvest it in breach of contract when absolutely no evidence in that regard was led at the trial.

8. The learned trial magistrate erred in both law and in fact when in his judgment he shifted the burden of proof to the appellant contrary to the hallowed principle that he who asserts must prove.

9. The learned trial magistrate erred in both law and in fact when he decided the case against the weight of evidence."

When the appeal came up for directions before me on 31st May, 2010 it was agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently however, only the appellant filed its submissions. The respondent for reasons which are not apparent failed to file her submissions. I have carefully read and considered the appellant's authorities as well as cited authorities.

As a first appellate court, I am duty bound to re-assess and re-evaluate afresh the evidence tendered before the trial court so that I may reach my own independent decision. In so doing however, I must bear in mind that I neither saw or witnessed the witnesses as they testified and therefore not in a position to assess there demeanour. I must thus make due allowance for such. See **Selle & another –vs- Associated Motor boat Co. ltd & Others (1968) E.A 123.**

In so far as breach of the contract is concerned, I do not think that anyone can fault the learned magistrate on his findings that infact it was appellant who breached the contract. There was unassailable evidence in this regard. The appellant having harvested the 1st crop and 1st ratoon, it is not possible therefore that all of a sudden the 2nd ratoon would disappear into thin air. In any event under the terms of

the contract, if there was such an occurrence, the appellant was duty bound to notify the respondent. It did not do so. Further and as correctly found by the learned magistrate, there was no evidence, documentary or otherwise from the appellant that it ever visited the plot and found no cane thereon. Again the learned magistrate was right in concluding that the suit was filed within time. In any case, the appellant did not lead any credible evidence in this regard. In fact it appears that the appellant abandoned this ground of defence all together in its evidence. Further, even its written submissions the appellant has abandoned this ground of appeal.

Where the learned magistrate erred however is in the award of damages. 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)**. In his judgment the learned magistrate did not indicate whether the award was in the nature of general or special damages. However, if it was in the nature of general damages then on the basis of the foregoing authority, it was unfounded in law. On the other hand, if it was in the nature of special damages, the claim would still fail on the basis that it was neither pleaded specifically and proved with a degree of certainity. 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. If anything, the respondent merely prayed for a declaration. Prayer 2 is with regard to the value of unharvested sugarcane at the rate of Kshs. 1,730/= per tonne. However, there is no nexus between that prayer and a claim for special damages.

In the end I hold that much as the appellant breached the contract as correctly held by the learned magistrate, the appellant was nonetheless not liable to pay the respondent general damages, since such damages are not recoverable on a breach of contract. Secondly, if in awarding the damages as aforesaid, the learned magistrate treated the same as special damages, he was still in error since the special damages were neither pleaded and or proved with a degree of certainity and particularity as required. Consequently I allow the appeal, set aside the judgment and decree of the learned magistrate. In substitution I order the dismissal of the appellant's suit with costs. The appellant shall have the costs of this suit as well.

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

ASIKE-MAKHANDIA

JUDGE