REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 206 of 2001

MOSES ONYANGO DIANGA …….,…… APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD ……,,,,…….. RESPONDENT

(An appeal from the judgment and decree of Senior Resident Magistrate's court Kisii,

Civil Suit No.733 of 1998 dated 27th July 1999 by N. Owino – S.R.M)

JUDGMENT

In a plaint filed by the appellant on 6th November, 1998, he stated that on or about the 10th day of December, 1995 the respondent contracted him to grow and sell to it sugarcane at his parcel of land, plot No.26B, measuring 1.7 hectares in field number 8 Zone B, Kanyimach Location, Migori District. The appellant signed the agreement and was given account number 410697 and duly planted the sugarcane as agreed. The appellant stated that it was an express and/or implied term of the contract that the commencement date of the agreement would be 10th December, 1995 and the same was to remain in force for a period of five years or until one plant and two ratoon crops of sugar cane were harvested on the said plot, whichever was less. It was also a further term that the respondent was not bound to purchase any cane that was burnt but in the event that it agreed to purchase such cane, the respondent was not liable to pay for such cane until the time when such cane would have been due for harvest and that it would be entitled to deduct a penalty of ten shillings per tonne or such amount as would from time to time be agreed upon from the payment for such cane.

The appellant alleged that the respondent breached the agreement by failing to harvest his cane at twenty-four months. On or about the 25th day of October, 1997, an arsonist caused the cane to catch fire and burn. The appellant reported that happening to the respondent. The respondent requested for a stack of the burnt cane for sampling and laboratory test before harvest of the same. According to the appellant, the respondent accepted to harvest the cane but failed to do so. The appellant contended that the respondent's failure to purchase his cane was in breach of the said agreement, wrongful and oppressive, the respondent having represented to the appellant that it had accepted to purchase the burnt cane. In paragraph 12 of the plaint, the appellant pleaded as hereunder:

"The average cane proceeds per acre was 135 tonnes and the plaintiff's claim against the defendant is for payment of 135 tonnes of cane at the rate of Kshs.1553/= per tonne being the average yield unharvested by the defendant together with punitive damages."

In its statement of defence, the respondent admitted that it had entered into the said contract with the appellant, save that it was not bound to purchase from the appellant any cane which was burnt and found by sampling to have a first expressed juice with apparent purity below 83%, which was the case with the appellant's sugar cane. The respondent denied having agreed to harvest the burnt cane. The respondent further pleaded that performance of the contract became impossible because of force majeure and specifically referred to violent tribal clashes that frustrated the contract. The respondent added that the appellant lacked capacity to determine the tonnage of its cane.

By way of a counterclaim, the respondent claimed against the appellant payment of loans and advancements which it had extended to him at his own request plus interest thereon at commercial rates.

During the hearing, the appellant produced the contract dated 10th December, 1995. He stated that the sugar cane was due for harvest in January 1996. The period that the first crop took before it was ready for harvest was 22 months, meaning that the cane had been planted before the contract was entered into. The appellant added that he had been supplied with fertilizer and seedlings by the respondent long before the contract was entered into. He further stated that after the cane got burnt on 25th October, 1997, he reported the incident to the respondent. The respondent later took some of the burnt cane for testing and they indicated that the sugar content was satisfactory. However, the respondent failed to harvest the same. The appellant added that he used to get over 135 tonnes of sugar cane and the price was Kshs.1553/= per acre. However, in cross-examination, the appellant stated that he expected an average of 600 tonnes.

The respondent called one witness, Samuel Okello Ndegwa, an Agricultural Superintendent who was employed by the company. He confirmed that they had entered into the said contract with the appellant but the respondent did not harvest the sugar cane after it was burnt. He said that the appellant's land was 1.7 hectares and the expected yield was 160-170 tons of cane. He added that the cane was not ripe for harvest at the time it got burnt.

However, in cross-examination, he admitted that the cane had been planted in January, 1995 and was expected to mature after 24 to 25 months and therefore by October, 1997 the same had matured. He said that the respondent could not harvest the cane because of tribal clashes in the area where the cane had been grown.

The trial court held that the contract had been frustrated by the arsonist's action of burning the appellant's sugar cane. The trial court further held that the respondent had also invested in the burnt cane and dismissed the appellant's case with costs.

The appellant, being aggrieved by the aforesaid judgment preferred an appeal to this court and set out the following grounds:

"*1. The learned trial magistrate erred in law and in fact in failing to sufficiently and adequately consider the evidence in favour of the plaintiff's case.*

2. The learned trial magistrate erred in law in wrongly holding as she did that as the contract period of five years had not elapsed when the cane got burnt, the defendant in neglecting to harvest the cane was in breach of the agreement whereas the clause 1 of the agreement specifically provided for three harvests of the cane within a five year period.

3. The learned trial magistrate erred in law and in fact, after finding that the cane was well beyond its harvesting period, she went on to absolve the defendant from liability on account of arson, when in the circumstances, it was not applicable to do so.

4. The learned trial magistrate erred in fact and in law in relying on the evidence on tribal clashes when the same was neither proved or applicable.

5. *The learned trial magistrate failed to assess the damages payable had the plaintiff succeeded in the*

claim."

The role of the first appellate court was well stated in SELLE & ANOTHER VRS ASSOCIATED MOTORS BOAT CO. LTD & OTHERS [1968] E.A.123. The court is not bound to follow the trial court's findings of fact if it appears that the court failed to take into account particular circumstances

of the case. The appellate court must reconsider the evidence, re-evaluate it and draw its own conclusions.

It is trite law that issues relied upon in a claim must be pleaded. A court ordinarily pronounces judgment on the issues arising from the pleadings on record. See ODD JOBS VS MUBIA [1970] E. A. 476 & GALAXY PAINTS COMPANY LTD VS FALCON GUARDS LTD, Civil Appeal No.219 of 1998.

In the plaint that gave rise to the appeal herein, the appellant specifically pleaded that he entered into a contract with the respondent on 10th December, 1995. He stated that the agreement was to commence on the aforesaid date and remain in force for five years or until one plant and two ratoon crops of sugar cane were harvested, whichever period was to be less. As per the pleadings, time began to run on 10th December, 1995 and not earlier.

The appellant further pleaded that the sugar cane was due for harvest twenty four (24) months from 10th December, 1995 but in his evidence in chief he stated that it was to be ready for harvest twenty-two (22) months after planting. The appellant also testified that he was supplied with seedlings and fertilizer by the respondent on 1st January, 1995. He added that the cane was due for harvest in January 1996. That evidence contradicted his pleadings. In his plaint, he did not state that he had planted the sugar cane before 10th December, 1995. If he planted the same on that date, then it could only have been due for harvest in December 1997 or thereabout. If he planted the same on 1st January, 1995, (which is not pleaded) the cane was ready for harvest by December, 1996.

However, the appellant was bound by his pleadings, and so it must be taken that the contract, having commenced on 10th December, 1995, the cane was ready for harvest twenty-four months thereafter.

In his written submissions, Mr. Oduk for the appellant stated that his client had entered into a verbal agreement with the respondent on 1st January, 1995 when he was supplied with seed cane and the contract was reduced into writing on 10th December, 1995.

With, respect, if that was the position, the pleadings did not state as such. The Appellant's evidence in chief was also not to that effect. Submissions, whether written or oral, cannot supercede a party's pleadings. The purpose of pleadings is to give a fair notice of the case which has to be met so that the opposite party may direct its evidence to the issues as disclosed by the pleadings. See PLOTTI VS THE ACACIA COMPANY LTD [1959] E.A 248.

Going by the commencement date of 10th December 1995 as stated in paragraphs 3 and 5 of the plaint, the sugar cane was not yet due for harvest by 25th October 1997 when the same was set on fire. Twenty-four months were to expire on 10th December, 1997. Supply of the farm inputs in January 1995 did not constitute any agreement between the appellant and the respondent. That being the case, it cannot be said that the respondent had breached the contract regarding harvest of the cane. Although the respondent's witness (DW1) agreed that the sugar cane was planted in January 1995 and that by October 1997 it was over mature, that did not alter the commencement date of the signed agreement.

If the respondent had been in breach of the contract by its failure to harvest the sugar cane, it would have been estopped from relying on the doctrine of frustration of the contract. As correctly submitted by Mr. Oduk, the doctrine of frustration does not apply where a party has breached a contract and not an external supervening event for which neither of the parties is responsible which renders its performances impossible, see ALIBHAI GULAM VS MOHAMED YUSUF [1946] EACA 25.

Regarding the burnt cane, the appellant testified that the respondent agreed to purchase the same and proceeded to test its sugar content and found it satisfactory. However, there was no proof of that allegation. The respondent, having denied in its defence that it agreed to purchase the burnt cane; it was upon the appellant to prove his allegation on a balance of probabilities but he failed to.

I now turn to the appellant's claim for damages. The appellant knew the acreage of his farm and the yield that he expected. He also knew the price of the expected yield per tonne. In paragraph 12 of his plaint he stated that the average yield per acre was 135 tonnes and the price per tonne was Kshs.1553/=. His farm was 1.7 hectares, which is easily convertible to acres. The appellant was saying that he had already suffered financial loss which was easily quantifiable by multiplying the aforesaid figures. Where the loss suffered is capable of exact mathematical calculation, that loss is special damage and must be specifically pleaded and strictly proved, see JIVANJI VS SANYO ELECTRICAL CO. LTD [2003] 1 E.A. 98. In every respect, the appellant's claim for the burnt sugar cane constituted special damage and not general damages. The appellant should have pleaded his loss as special damage and thus specify the same.

In conclusion I dismiss this appeal, though for different reasons from those stated by the learned trial magistrate. The appellant shall bear the costs of the appeal.

DATED, SIGNED and DELIVERED at KISII this 14th day of October, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Oduk for the Appellant

Mr. Odhiamb for the Respondent.

D. MUSINGA

JUDGE