



**South Nyanza Sugar Company Ltd v Liech (Civil Appeal  
001 of 2020) [2023] KEHC 19682 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19682 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 001 OF 2020  
PN GICHOHI, J  
JULY 6, 2023**

**BETWEEN**

**SOUTH NYANZA SUGAR COMPANY LTD ..... APPELLANT**

**AND**

**SILERMINA A. LIECH ..... RESPONDENT**

*(Being an appeal from Judgment and Decree of Hon. N. S. Lutta Chief Magistrate  
Kisii dated and delivered on 11th December, 2019 in CMCC No. 1473 of 2004)*

**JUDGMENT**

1. The background of this appeal is that Silermina A. Liech ( Respondent) had entered into a written agreement dated 23<sup>rd</sup> August 1996 with South Nyanza Sugar Company Ltd (Appellant) where the Appellant contracted the Respondent to grow and sell the sugar cane on his land parcel 84 D in field No. 107 in Kakmasia Sublocation and measuring 0.4 ha. For any dealing between the Appellant and the Respondent, the Respondent was assigned account number 261001.
2. The agreement provided that the contract was to last for five (5) years or until the plant crop and two (2) ratoon crops had been harvested. Further, the plant crop was to be harvested at Twenty-Two (22) to Twenty-Four (24) months. The ratoon crops were to be harvested between Sixteen (16) to Eighteen (18) months. However, the Appellant only harvested the plant crop but failed to harvest the 1<sup>st</sup> and 2<sup>nd</sup> ratoon capable of producing 135 tonnes per ha at the rate of Kshs. 1,730/= per ton. As a consequence, the Respondent lost the two crop cycles. The Respondent therefore sued the Appellant vide plaint dated 12<sup>th</sup> November 2004 and filed on 23<sup>rd</sup> November 2004 seeking judgment against the Appellant for;
  - a. Damages for breach of contract and order that the Appellant do compensate the Respondent for loss of the 1<sup>st</sup> and 2<sup>nd</sup> ratoon crops on 0.4 ha of land at the rate of 135 tonnes per ha and payment of Ksh. 1,730/= per ton.



- b. Costs of the suit
  - c. Interest at court rate from 28<sup>th</sup> August 1996 until payment in full.
  - d. Any other relief that this court would deem just and expedient to grant.
3. The Appellant filed a statement of defence dated 16<sup>th</sup> December 2004 and filed on 16<sup>th</sup> December 2004 and denied the claim. The Appellant however admitted the contract between it and the Respondent but denied that it breached by only harvesting the plant crop but failing to take delivery or harvest the 1<sup>st</sup> and 2<sup>nd</sup> ratoon. He pleaded that the failure was due to tribal clashes that existed between the neighbouring communities and which were beyond the Defendant's control.
  4. The Appellant pleaded in the alternative and without prejudice, that the Respondent's plot could have only produced a maximum of 65 tonnes per ha which is the average yield of plant crop from the plots in the vicinity of the Respondent's land. The Appellant further pleaded and without prejudice, the 0.4 ha would have produced 26 tonnes and no more and whose price would have been subjected to deductions in respect of Sonny Outgrowers (SOG) Levy , presumptive tax, transport and harvesting charges and cess. The Appellant therefore pleaded that such deductions would have been made from the gross yield of 135 tonnes.
  5. The Respondent was the only witness in her case but no witness testified for the Appellant though counsel for the Appellant attended the hearing of the Respondent's case. After close of the case, the trial magistrate rendered his judgment dated 11<sup>th</sup> December 2019 and in favour of the Respondent against the Appellant at 100% liability on breach of contract and damages at Kshs. 186,840. He also awarded the Respondent interest from the date of filing the suit and costs of the suit. Aggrieved by the judgment, the Appellant filed this appeal and raised seven (7) grounds in its memorandum of appeal dated 15<sup>th</sup> January 2020 as follows:
    1. The Learned Trial Magistrate erred in law and fact in failing to find that the respondent was himself in breach of the contract in issue in the suit before him and in failing to take the respondents proven breach of contract into account, while deciding the merits of the suit before him and thus reached wrong conclusions of fact and law in awarding damages.
    2. The learned trial magistrate erred in both law and fact in failing to find and hold that the evidence which the respondent led in an attempt at proving his claim before the trial court was fatally and fundamentally at variance with and departed from the respondent's plaint, in material aspects, like estimated yields and cane prices. And in failing, afterward to give due allowance for such variance and departure, in the respondent's evidence from the respondent's pleadings and in so doing, he entered judgment for the respondent in error.
    3. The learned trial magistrate erred in fact and in law in finding and holding that the respondents plot could yield an average of 135 tons of sugarcane per hectare and in applying that estimate in reckoning the special damages due to the respondent, which finding and holding were based on no evidence at all and on the trial courts misapprehension of the evidence led on it.
    4. The learned trial magistrate therefore erred in law and fact when he entered judgment for the respondent against the appellant for the principal sum of Kshs. 186,840/=, whilst that amount was neither pleaded specifically, with sufficient particularity, nor proved strictly as required by law and which award,



at any rate was beyond the scope of the pleadings and far in excess of the sum of the respondent would otherwise have been entitled to as damages due.

5. The learned trial magistrate erred in law and fact in failing in his judgment to consider, determine and give due allowance for the issues raised by the appellant via the appellants written submissions as against the respondents claim thus entering an erroneous judgment.
  6. The learned trial magistrate erred in law and in fact after he had assessed damages in his judgment as Kshs 186,840/= and after so awarding the respondent the Kshs 186,840as damages for breach of contract, on the basis of that assessment he ordered that the interest on the principal award of Kshs. 186,840/= was to be computed from the date of filing of the suit, as opposed to such interest being computed from the date of the judgment and without assigning his reasons for so ordering and, whereas in the circumstances of that suit, it was altogether unlawful, unjust and disproportionate to award interest from the date of filing of that suit before that subordinate court and therefore he exercised his discretion wrongly.
  7. Altogether, the learned trial magistrate erred in law and fact when he determined the claim before him against the weight and totality of the evidence in disregard of relevant principles.
6. The Appellant therefore urges the Court to allow the appeal and dismiss the Respondents suit with costs. He also seeks orders that any interest on a sum of money awarded in damages , if any, be calculated form the date of judgment, if the Court were to find that damages are due.
  7. The appeal was canvassed by way of written submissions. The Appellant’s submissions are dated 3<sup>rd</sup> October 2022 and filed through the firm of Okongó , Wandago & Co Advocates for the Appellant while the Respondent’s are dated 5<sup>th</sup> May 2022 and filed by the firm of Oduk & Company Advocates for the Respondent. The Appellant submitted that the Respondent exposed herself to losses by developing the second ratoon cycle despite the first one going to waste. Counsel submitted that compensation ought to be in respect to the first ratoon and that the amount realized in the first crop could not be the same quantity as the 1<sup>st</sup> and 2<sup>nd</sup> ratoon. It was submitted that the learned magistrate’s adoption of the average of 135 tons of sugar cane per hectare was unjust, unaffordable absurd and it had the effect of unjustly enriching the respondent. That the credible price per tone was Kshs 1558/=.
  8. The Respondent submitted that the estimated yield of crops was 135 tons per hectare and one (1) hectare would produce 14 tractor loads of cane and compared to previous seasons, the trial magistrates estimate was conservative and reasonable. It was submitted that the Respondent’s prayer of damages was supported by evidence and the Appellant’s attempt to produce evidence at the submissions level was disallowed by the trail court.

### **Determination**

9. After considering the lower court record, the grounds of appeal and submissions , the broad issues for determination are ;
  1. Whether evidence can be led through submissions before trial court.
  2. Whether there was breach of contract by the Appellant.
  3. Whether damages awarded were specifically pleaded and proved.



4. Whether interest should have been awarded from date of filing the suit or date of judgment.
10. This being a first Appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions while bearing in mind that unlike the trial court, this court has neither seen nor heard the witnesses when they testified as stated in *Selle & another v. Associated Motor Boat Co. Ltd & others* (1968) EA 123.
11. As this Court has highlighted herein, only the Respondent testified before the trial court and produced documents in support of her case. She was cross examined by counsel for the Appellant. The Appellant did not call any witness. Both the Respondent and Appellant's case was marked as closed. Submissions were filed by both parties where the Appellant attempted to introduce evidence which they had failed to produce during trial.
12. A look at the judgment by the trial court after evaluating the evidence before him and the submissions by parties, reveals that the trial magistrate was alive to this issue and which he captured while citing the case of *Fibre Link Limited v Star Television Production Limited* [2015] eKLR that where it was held that pleadings and submissions are not evidence. The trial magistrate;
- “When the matter came up for defence hearing , the defendant failed to call any witnesses and their case was marked as closed . In the light of foregoing the , the only evidence available for this court to direct its mind is the evidence of the Plaintiff since it has remained unchallenged.”
13. That is the correct position in law and trial magistrate was properly guided. The Appellant has attempted even in this appeal to adduce evidence in submissions. This court emphasises that the Appellant cannot use submissions in lieu of evidence it would have adduced during trial for the other party to have a chance to cross examine and after which the court to ultimately consider the same in its judgment. To attempt to do that would be a mockery of justice and throwing well established rules of procedure in the dustbin.
14. The Appellant's attempt to do its calculations of what could have been the yield per hectare and come up with perceived correct figures and gross damages as he refers to is a nullity and disallowed. Further, this Court must clarify that despite earlier intentions to amend the plaint, the lower court record shows that the plaint was not amended and the trial court made no reference to the same even in this judgment. Any attempt by the Appellant to refer to it in its submissions must be disregarded.
15. Perhaps this Court should at this juncture consider the impact of failure by a Defendant to call any witness for its case. Courts have variously held that the failure leaves the Plaintiff unchallenged. For example, in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR, Lesit J (as she then was) stated:-

“The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was uncontroverted and therefore unchallenged.”

16. The Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR dealt with the issue of failure by defence to call witnesses and while citing several



cases on this issue including the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR , and clarified that :-

“First and foremost, there can be no quarrel with the statements in the above judgments that averments by the parties do not constitute evidence. The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant’s failure to testify when he had filed a defence and a counterclaim. While the defendant’s failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities... We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim.”

17. This therefore means that the trial court had to be satisfied that despite finding that the Respondent’s evidence was unchallenged go ahead and determine that the Respondent adduced evidence which in absence of rebuttal evidence by the Appellant proved her claim on a balance of probabilities.
18. In this case, there is no dispute that there was a contract between the parties as stated by the Respondent. This therefore leads to the second issue as to whether the Appellant was in breach of the contract. The Appellant faulted the trial court for not appreciating the fact that the Respondent was also in breach of the contract. It was also the Appellant’s contention that the evidence relied upon by the Respondent was at variance with the pleadings before court.
19. It is not in doubt that the Appellant was in breach of the contract by failing to harvest the 1<sup>st</sup> and 2<sup>nd</sup> ratoon crops. From the plaint, the Respondent had pleaded that the plot was capable of producing 135 tonnes per hectare at the rate of Kshs 1,730/= . Rebuttal by the Appellant in its defence that the Respondent’s plot was only capable of producing a maximum of 65 tonnes per hectare is not support by evidence. Further , the averments in the Appellant’s statement of defence justifying tribal clashes as the reason for the breach remain a mere statement which was not even put to the Respondent during cross examination. In his judgment, the trial magistrate observed that failure of the defendant to harvest the ratoon crops after they were harvested amounted to breach of contract. I find no fault in that finding.
20. The Appellant termed the estimate in the award as unjust because the amount realized in the first crop could not be the same quantity as the 1<sup>st</sup> and 2<sup>nd</sup> ratoon. In coming up with his assessment, the trial magistrate relied on the cane productivity report for Kakmasia area produced by the Appellant . The Appellant did not produce evidence to show that the cane ought to be assessed at the estimate of 60



- tonnes . Indeed, the Respondent produced documentary evidence in support of her case and which were not challenged by any other evidence to the contrary. In this regard, I find fault in that assessment.
21. Further, the sum of KShs. 186,840/= was arrived at as a result of calculating the plot estimate and the price per ton for the two ratoons. I find that the damages were specifically pleaded and ascertained. The issue of damages is the discretion of the court . This award is not so high or low to warrant interference by this Court .
  22. On the issue as to whether interest should have been awarded from date of filing the suit or date of judgment, the Respondent had prayed in her plaint that that same be calculated from the 23<sup>rd</sup> August 1996 until payment in full. In holding that the interest would be from date of filing the suit, the trial magistrate relied on the High Court case of *Speed building Technologies Ltd v County Government of Migori* [2016] eKLR where H.A. Omondi J awarded interest from date of filing for breach of contract.
  23. While some Superior Courts award from date of filing of the suit others have awarded interest from the date of judgment for cases which have been pending in court without prosecution. Taking advantage of this prevailing situation, both parties have cited case law that support their rival position on which date interest should be calculated.
  24. The Appellant urges the Court to award interest from the date of judgment while citing various authorities including *South Nyanza Sugar Co. Ltd v John Chora Omolo* [2019] eKLR where Majanja J awarded interest from the date of judgment as the lower court case filed in 2010 remained in limbo until September 2016 when it first came for hearing and found that the Appellant should not be penalised for the Respondent's failure to prosecute the suit with diligence.
  25. On the other hand, the Respondent relies on the case of *Mathews O. Ogot v South Nyanza Sugar Co. Ltd* [2020]eKLR where the court A.C. Mrima J held that it is now settled in law and has been held over time, that interest on special damages starts running from the time of filing the suit. In that case , the Judge cited the Court of Appeal case of *John Richard Okuku v South Nyanza Sugar Co. Ltd* [2013] eKLR where the suit was filed in 1998 and judgment rendered in 2013 but the Court held that interest must run from the date of filing the suit.
  26. The issue of when interest should run therefore is basically discretionally and the Court would not normally interfere with such discretion unless the exercise of that discretion has caused miscarriage of justice. From the conduct in this matter, I find no reason to interfere with the trial magistrate's discretion.
  27. In conclusion, I find no merit in this appeal and as a consequence, the appeal is dismissed with costs.

**DATED, SIGNED AND DELIVERED BOTH OPEN COURT & VIRTUALLY AT KISII THIS 6<sup>TH</sup> DAY OF JULY 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

N/A for Appellant

Ms Theuri for Respondent

Kevin Isindu, Court Assistant

