REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 4 OF 2017

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

VERSUS

JANE A. ONDONDI.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. J. Njoroge (SPM) dated and delivered on 15th December 2016 in Kisii CMCC No. 584 of 2010)

JUDGMENT

1. This appeal arises from the trial court's judgment entered for the respondent who was the plaintiff before the court. Her claim against the respondent, as set out in her plaint,was that she and the appellant had entered into a written agreement dated 14th July 2005 in which she was contracted to grow and sell sugarcane to the appellant from her parcel of land measuring 0.9 hectares within Kakmasia Sub location. The contract was to remain in force for a period of five years within which time, one plant crop and two ratoon crops of sugarcane would be harvested from theland.

2. The respondent claimed that in breach of that agreement, the appellant failed to harvest the plant crop when it was mature and ready for harvesting and the cane began deteriorating. She also averred that her parcel of land was capable of producing an average of 135 tonnes per hectare for both the plant crop and ratoon crops which would have been sold for Kshs. 2,500/= per tonne. She therefore claimed compensation for all three crop cycles.

3. The appellant filed a statement of defence denying the existence of the agreement as pleaded by the respondent. It was averred that despite being assisted and provided with inputs and other services, the respondent failed to develop the cane and none was available to the appellant for harvest. The appellant also pleaded that the yield within the respondent's vicinity was 65 tonnes of sugarcane per hectare which would have been subject to contractual or statutory deductions such as harvesting, transport, cess and milling charges.

4. As this is a first appeal, I will proceed to analyze and re-assess the evidence afresh bearing in mind that I did not have the benefit of seeing the witnesses testify. (See ***Selle v Associated Motor Boat Company Ltd. [1968] EA 123***).

5. The respondent Jane Atieno Odondi (PW1) gave evidence in support of her claim. She relied on her statement and list of documents as her evidence and reiterated that her claim was for 3 cycles of sugarcane which were never harvested by the appellant and were left to dry.

6. Patrick Oduok (DW 1), who testified for the appellant, similarly relied on his statement and list of documents as his evidence. On cross examination, he stated that the respondent had been supplied with inputs but no cane was harvested and the crop was left to jaggery and that no written complaint had been made.

7. The parties canvassed the appeal by way of written submissions which I have considered alongside the record of appeal. I find that the issues for determination are as follows;

a. Whether the respondent specifically pleaded and proved her claim before the trial court;

b. Whether the trial court erred by failing to find that the respondent was obliged to apply the principle of mitigation of losses;

c. Whether the trial court erred in its assessment of damages awardable to the respondent

8. The appellant's counsel argued all the grounds of appeal collectively as they were all intertwined. On the first issue, he submitted that the respondent's pleadings were at variance with her evidence and thus fatal to the suit. During the hearing of the matter, the respondent had

testified that she developed the 1st and 2nd ratoon crops by removing all preceding cycles which were not harvested by the appellant. This evidence, counsel argued, had not been pleaded and went beyond the scope of the case set out in the plaint. At paragraph 7 of her plaint the respondent had pleaded that only the plant crop was not harvested at maturity but did not mention the ratoon crops. Counsel argued that such evidence must be disregarded and no sum awarded on the basis of the evidence.

9. This first issue was challenged by counsel for the respondent who argued that the respondent had specifically pleaded breach and particularized her losses such that the appellant was able to specifically deny the claim in its defence. Counsel relied on the case of ***South Nyanza Sugar Co. Ltd v Masiga Mikwanga HCCA No. 72 of 2019*** where the court held that the purpose of a pleading is to enable the opposing party to understand the nature of the claim and answer it and in this case that had been done.

10. Although the respondent did not expressly plead that she had developed the ratoon crops it is clear from the plaint, when read as a whole, that hers was a claim for three crop cycles. Paragraph 7 of the plaint cannot be read in isolation. At paragraph 5, the respondent stated that contract was to remain in force until one plant crop and two ratoon crops had been harvested within a period of 5 years. Paragraph 6 of the plaint indicated that within that period of 5 years, the plant crop would be harvested first and the ratoon crops would be harvested subsequently. The appellant further averred that the appellant had failed to harvest the plant crop when it was ready for harvest and the cane started to deteriorate hence the claim for the 3 cycles of crop. I am not convinced that the respondent's case was fundamentally different from what had been pleaded as to take the appellant by surprise at trial.

11. I am guided by the case of ***Simon Muchemi Atako & Another v Gordon Osore NRB CA No. 180 of 2005 [2013]eKLR*** where the Court of Appeal held;

> In our view, the appellants had pleaded their claim with sufficient particularity to enable the respondent understand the case he was to meet. In **Esso Petroleum Company Limited v Southport Corporation [1956] AC 218**, Lord Normand expressed himself as follows on the object of pleadings:
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> > "The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them."
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> In **Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634**, the respondent's evidence concerning the occurrence of an accident was a departure from its pleadings in the statement of defence and counterclaim. The Supreme Court of Uganda held that the departure from pleadings did not cause a failure of justice to the appellant as the appellant had a fair notice of the case it had to meet and the departure was a mere irregularity not fatal to the case of the respondent whose evidence departed from its pleadings.

12. The appellant also submitted that the respondent did not act to mitigate her losses. That she unwisely exposed herself to risk by cultivating the first ratoon crop after the plant crop was not harvested and went on to develop the second ratoon after the first ratoon had not been harvested; all the while hoping that the appellant would harvest every subsequent crop yet she had the option of terminating the contract. According to the appellant's counsel, this showed that the respondent opted to aggravate her losses instead of mitigate them.

13. Counsel for the respondent submitted that mitigation must be proved and in this case the appellant had not discharged its burden of proof. He relied on the case of ***Michael S. Odongo v South Nyanza Sugar Company Ltd HCCA No. 53 of 2018 [2018]eKLR***where the court held;

> Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (see African Highland Produce Limited v Kisorio **[1999] LLR 1461 (CAK)**). Although the respondent contended that the appellant could have mitigated his loss and suggested in the submissions that the wasted crop could be sold, this was not brought out in evidence to show that it was in fact a practical and realistic possibility.

14. The position in the above cited case was stated in the case of ***Abdalla Hussein Kilo v Kombo Kassim Omar & another Civil Appeal No 49 of 1984 [1986] eKLR*** where the Court of Appeal observed;

> It will be recalled that the burden of proof of damages is upon the plaintiff, as the person alleging loss. But if a defendant seeks to show that the plaintiff ought to have mitigated his loss, the burden may pass to the defendant, and the normal measure of damages will not be cut down unless the defendant succeeds in showing that the plaintiff out reasonably to have taken mitigating steps. (see Mayne & MacGregor on Damages 17th Ed p 825.)

15. In the present case, no evidence was led by the appellant to show the steps that could reasonably be taken by the respondent to mitigate her losses without acting in breach of the contract. The second issue is therefore answered in the negative.

16. On the assessment of damages by the trial court, counsel for the appellant contended that there was no indication from the judgment why the court opted to assess damages based on an estimate of 100 tonnes per hectare. He argued that the document dubbed *"South Nyanza Sugarcane Productivity Sub-Locationwise,"*which had been relied upon by the respondent as a basis for her estimated loss of 135 tonnes per hectare, had no probative value, as it had not been produced as an exhibit during trial. It would therefore be irregular and disproportionate to apply it in assessing quantum.

17. Counsel relied on the case of **Monica A. Miranda v South Nyanza Sugar Company Limited [2018]eKLR** where the court held as follows;

> ... On the expected yield, the Appellant relied on a document he claimed to be the Respondent's Sugarcane Productivity Schedule. The Respondent, although it did not file and produce any documents on this issue, submitted that an average of 65 tonnes per hectare

was reasonable. I have considered the document relied upon by the Appellant and I cannot agree to be guided by it. I say so because the document does not disclose its source; it contains some schedules on a plain paper. As such, its source cannot be verified as well as its contents. In this matter I will be guided by the proposal by the Respondent.

18. The court was urged to apply an estimate of 67.5 tonnes per hectare based on the foregoing case in place of the trial court's unproven choice.

19. Conversely, counsel for the respondent submitted that as opposed to the appellant who had not given evidence of its pleaded estimate of 65 tonnes per hectare, the appellant had provided a statement in support of her claim for 135 tonnes per hectare.

20. The general principle for a party seeking special damages need not only specifically plead but must also strictly prove the claim to succeed. The degree of proof required will often depend on the circumstances of the case.

21. Turning to the respondent's pleadings, in her plaint, the respondent averred that she expected 135 tonnes per hectare for the plant crop and 135 tonnes per hectare for the ratoon crop at a rate of Kshs. 2,500/= per tonne. Her testimony before the trial court tallied with her pleadings.

22. In its statement of defence, the appellant rejected the respondent's claim that she expected an average yield of 135 tons per hectare for each crop cycle. Instead, the appellant averred that the average yield in the vicinity of the respondent's parcel of land was 65 tonnes of sugar cane per hectare. DW1 who testified for the appellant made no mention of this in his testimony. In his evidence. DW1 referred to a statement and list of documents but having perused the record and the trial court file, I found that there was no statement or list of documents on record.

23. Section 109 of the Evidence Act places the burden of proof on the party who wishes the court to believe in the existence of a certain fact. The appellant did not support its assertions with any proof. Further and with due respect, submissions can never take the place of evidence. (See. **Daniel Toroitich ArapMoi vs. Mwangi Stephen Muriithi& Another Civil Appeal No. 240 of 2011 [2014] eKLR**).

24. Whereas I agree with the appellant's contention that the trial court did not provide a basis for assessing damages on a yield of 100 tonnes per hectare, I am not convinced that I should interfere with the trial court's assessment for the reasons already given. First, the appellant tendered no evidence to prove its claim that the respondent's field could only produce 65 tonnes per hectare, Second, civil matters, are decided on a balance of probabilities and in this case the only evidence availed on the expected yield was the respondent's testimony that her field could produce 135 tonnes per hectare. This would have been the appropriate estimate to compute damages but there was no cross appeal by the respondent who was satisfied with the trial courts assessment.

25. Lastly, the appellant urged this court to make definite orders on interest as this had not been done by the trial court. It was argued that as much as interest accrued from the date of filing suit in claims for special damages, the respondent had been indolent in prosecuting the matter and it would be unjust to order the appellant to pay interest from the date of filing suit.

26. I concur with the appellant's submission that the respondent took a long time to prosecute her suit. The respondent filed her plaint on 17th December 2010 and was only able to have the matter heard on 22nd August 2016. As such, I award interest on the award made by the trial court at court rates from 22nd August 2016 until payment in full. The judgment sum remains but the trial court order on interest is substituted with interest at court rates from 22nd August 2016. The parties shall each bear their costs as the appeal has only been partly successful. It is so ordered.

Dated, **signed** and **delivered** at Kisii this **6th** day of February **2020.**

R.E.OUGO

JUDGE

In the presence of;

Appellant Absent

Mr. Wesonga h/b Mr. Oduk for the Respondent

Ms. Rael Court clerk