REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 124 OF 2018

SOUTH NYANZA SUGAR COMPANY LIMITED.............................APPELLANT

VERSUS

JAMES AYUGI ADAGI..RESPONDENT

(An appeal from the Judgment and decree of Hon. Nathan S. Lutta - CM dated and delivered on the 30th October, 2018 in Kisii

CMCC No. 589 of 2010)

JUDGEMENT

1. According to the plaint filed before the Kisii Chief Magistrate's Court Civil Suit No. 589 of 2010 (hereinafter referred to as the *'suit'*), the respondent was contracted by the appellant vide an agreement dated 1st September 1995 to grow sugarcane on his land parcel; Plot 28A in field number 357 in Oloontare Sub location measuring 4Ha. He was assigned number 714511. The agreement would remain in force for a period of 5 years or until one plant crops and 2 ratoon crops of sugarcane were harvested, whichever period would be less. The respondent claimed that the appellant failed to harvest the sugarcane when it was ready for harvesting and the cane started deteriorating.

2. The Respondent posited that he suffered loss of the plant crop, 2 ratoon crops and thus claimed damages for breach of contract.

3. The Appellant entered appearance and filed a Statement of Defence dated 4th May 2011. The Appellant denied both the existence of a contract to purchase sugar and any breach thereof. It put the Respondent into strict proof thereof. The appellant further pleaded that the respondent failed to develop sugar cane and there was no crop available to the appellant to harvest. It was advanced that in any case, the average yield in the area is 65 tons of sugar cane per hectare and not 135 tonnes as alleged by the respondent. The amount paid up to growers also attracts cane harvesting and transport charges, cess and milling charges which would have been deducted by the appellant from whatever payments would have been due to the respondent. The appellant pleaded without prejudice that no blanket damages can be awarded for breach of contract.

4. The suit was finally set down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted his statement as part of his testimony. He also produced the documents in his List of Documents as exhibits. The Respondent called its Senior Field Supervisor, George Ochieng' (DW 1), as its sole witness who adopted his statement as his evidence in chief and produced the documents as exhibits.

5. In its judgment delivered on 30th October 2018, the trial court allowed the suit by awarding the respondent Kshs 801,653.20 with interest and costs.

6. It is this judgment that has now precipitated this appeal. In summary, the appeal set out in the memorandum of appeal dated 29th November 2018, is based on the following grounds summarized as follows; that the trial magistrate failed to consider the evidence in its entirety in reaching his decision, that the trial court awarded damages not pleaded and that the interest was not awarded as from the date of judgment.

7. The 1st respondent has also cross-appealed against the judgment and decree based on the memorandum of appeal dated 16th July 2019 in which he set out the following grounds;

1. *The learned trial magistrate erred in failing to take into account relevant factors and thereby made an award that was*

inordinately low in the circumstances.

2. The learned magistrate erred in law in failing to consider making an award for the respondent's lost ratoon crops as arose from the damage and loss of the plant crops.

8. Directions were taken and the appeal was disposed of by way of written submissions.

9. The appellant advanced that the respondent did not prove that the sugar cane got burnt and cited the case of **Jael A. Omolo v South Nyanza Sugar Co. Ltd (2019)** in support of its case. It was explained that the respondent having failed to prove breach of contract then the award of nominal damages for the ratoons crops would similarly fall. They submitted that the suit was filed in December 2010, dismissed twice and reinstated for hearing on 11th October, 2017 and judgment delivered on 30th October 2018. The suit was concluded nearly 9 years after filing and it would be unjust to require the appellant to pay interest on the principal award from the date of filing the suit. In support of their position they cited the case of **South Nyanza Sugar Company Ltd v Joash Otieno Ogada (2020) eKLR**.

10. The respondent submitted that the plaintiff specifically pleaded breach and particularized the loss. It argued that the fact that the respondents land was 4 hectares was not in dispute. He submitted that he was entitled to compensation for all 3 crops not nominal damages and relied on the case of **Jusinta A. Odero vs South Nyanza Sugar Co. Ltd HCCA No. 12 of 2019**. They supported the trial's court finding that since the crops were not harvested then it was not to be subjected to any deductions. It was further submitted that interest for special damages as a matter of principle is computed from the date of filing of suit and cited the decision of Mrima J in **Consolata Ogutu vs South Nyanza Sugar Co. Ltd HCCA No. 160 of 2018.**

11. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see **Selle and Another v Associated Motor Boat Company Ltd [1968] EA 123**).

12. The issues for determination are as follows;

1) Whether there was breach of contract.

2) Whether the respondent was entitled to damages.

13. It is not in dispute that the plant crop was developed by the respondent. The appellant assisted the respondent to develop the plant crop by supplying him with seed cane, DAP and urea. On 30th October 2005 the appellant then issued the respondent with a job completion certificate for planting. Clause 6.3 of the contract provided that the grower was required to notify the miller in the event the cane was burnt. DW1 testified that he had the grower's/respondent's file and that there was a letter by the respondent to the appellant informing them that the cane was not harvested and thus got burnt. The respondent testified that the sugar cane was left un-harvested by the appellant and caught fire when it was 55 months old.

14. It is clear that the appellant was in breach of its contractual obligation when it failed to harvest the plant crop when it became mature at 24 months. Dw1 in his statement which he adopted as his evidence in chief testified that the appellant was not bound to buy burnt cane. While the appellant had discretion of buying burnt cane from the respondent, I find that the appellant fell into breach on 30th October 2007 when it failed to harvest the mature plant crop.

15. I now turn to damages. The appellant contend in its memorandum of appeal that the respondent was awarded damages for breach of contract, yet he neither pleaded nor proved that he was entitled to the award of Kshs 801,653.20. In **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR** the court stated as follows:

"The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi& 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".

16. In this case, the respondent at paragraph 7 of his plaint pleaded as follows;

"7. In breach of the agreement, the defendant failed to harvest the plant crop when the same was mature and ready for harvesting 22-24 months of age and the cane started deteriorating

PARTICULARS OF LOSS AND DAMAGE*:*

The plaintiff's plot was capable of producing an average of 135 tonnes per hectare for the plant crop and 135 tonnes per hectare for the ratoon crop and the rate payable then applicable per tonne was Kshs 2,015 and the plaintiff claims damages

for three (3) crop cycle as particularized;

a) Expected yield for plant crop 135 tonnes x 4 ha x 2,015

1,088,100

b) Expected yield for 1st ratoon 135 tonnes x 4 ha x 2,015

1,007,500

c) Expected yield for 2nd ratoon 135 tonnes x 4 ha x 2,015

<u>886,600</u>

TOTAL <u>2,982,200"</u>

17. The court in ***Siree vs Lake Turkana El Molo Lodges (2002) 2EA 521*** held that *"when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages"*. The Court of Appeal in **John Richard Okuku Oloo v South Nyanza Sugar Co Ltd Civil Appeal No. 278 of 2010 [2013] eKLR** held that;

> *"In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of land which was 0.2 hectare (paragraph 3 of Plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=……………………*
>
> *We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof."*

18. Chesoni, J (as he then was) in the case of **Ouma v Nairobi City Council (1976) KLR 304** observed as follows:-

> *"Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533;-*
>
> *The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. <u>As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry</u>."*

19. Guided by the principles enunciated from the above cases, I find that the respondent pleaded special damages with certainty and particularity and it was clear to the trial court that he sought the award for special damages.

20. I now turn to whether the respondent was entitled to damages sought. Having found that the appellant was in breach when it failed to harvest the plant crop 24 months after it became mature, the respondent was thus entitled to payment for the 3 cycles comprising of the plant crop, 1st and 2nd ratoon. I therefore find that the trial court erred by concluding that the respondent was not entitled to special damages for the 1st and 2nd ratoons for reasons that the ratoon crops were never developed.

21. The survey certificate indicates that the respondent's field measured 3.1 Ha. It was the respondent's case that the price per tonne at the time was Kshs 2,015. On the expected yields, the appellant's Senior Field Supervisor, DW 1, gave testimony that the plant crop would yield 98.22 tons while the ratoons would yield 78.47 tons. DW 1 also testified that all cane proceeds are subject to statutory deductions which includes harvesting charge at Kshs 210/- per ton, transport charges at Kshs 399 per ton and cess calculated at 1% of the total cane value. I find that the respondent was entitled to the plant and two ratoon crops less the cost of contractual services made up as follows:

KSHS

a) Plant crop 649,365.91(98.22x3.1x 2,015 *less 193,861.59*)

b) 1st ratoon crop 327,117.72(78.47x3.1x2,015 *less 153,045.14*)

c) 2nd ratoon crop <u>327,117.72</u>(78.47x3.1x2,015 *less 153,045.14*)

TOTAL <u>1,303,601.35</u>

22. I now turn to the issue of interest on special damages. It is now well established that interest on special damages run from date of filing suit, unless it is shown that the plaintiff caused unreasonably delays before the trial court. In **Peter M. Kariuki v Attorney General [2014] eKLR** the court of Appeal observed that;

> "*Award of interest is in the discretion of the Court, which discretion must be exercised judiciously. See KENINDIA ASSURANCE CO LTD V ALPHA KNITS LTD & ANOTHER, (2003) 2 EA 512 and OMEGA ENTERPRISES KENYA LTD V ELDORET SIRIKWA HOTEL LTD & OTHERS, CA NO. 235 OF 2001,*
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> *(Unreported). It is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim for interest denied. See METAL BOX CO LTD V CURRYS LTD, (1988) 1 ALL ER 341 and the decision of this Court in MUMIAS SUGAR CO LTD V NALINKUMAR M SHAH, CA NO. 21 OF 2011, (MSA), (unreported). Due to the appellant's own delay in filing his petition, we shall only award interest from the date of decree of the High Court till payment in full."*

23. The respondent filed the suit on 17th December 2010. The appellant shortly thereafter raised a preliminary objection challenging the jurisdiction of court and his application was set for hearing on 15th October 2012. The trial court dismissed the suit on 7.5.2013 and the respondent moved to this court in Kisii HCJR 6 of 2013 which resulted in the reinstatement of the suit. The suit was again dismissed on 17.6.2013 by the trial court for want of requisite filing fees pursuant to Order made in Civil Case No. 469 of 2010 that same be paid within 7 days.

24. From the above, it is clear that the respondent is not entirely blameless for the delay in the disposal of this matter. A party who disobeys an express order on payment of court fees misconducts himself regarding the proceedings before court and should not expect to be rewarded for their infraction. I find this a good ground to deny award of interest from the date of filing suit.

25. In conclusion, I now enter judgment for the respondent against the appellant on the following terms:

> **(a) Kshs. 1,303,601.35**
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> **(b) Interest on (a) above at court rates from the date of judgement of the trial court.**
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> **(c) Costs of the aluppeal and the cross appeal as well as costs at the trial court.**

Dated, Signed and **Delivered** at **KISII** this **22nd July** day of **2020.**

A. K. NDUNG'U

JUDGE