REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 121 OF 2011

DOMINIC O. KASARA..APPELLANT

VERSUS

SOUTH NYANZA SUGAR COMPANY LTD................RESPONDENT

(Being an appeal from the judgment and decree of the Resident Magistrate Mr. Kimutai dated 25th May 2011 in Kisii CMCC No. 296 of 2006)

JUDGMENT

1. By a plaint dated 6th April, 2005, the appellant herein commenced CMCC 296 of 2006 against the respondent for breach of the terms of a contract for the cultivation and sale of sugarcane on the appellant's land.

2. At the hearing of the matter, the appellant testified that he had entered into a contract dated 1/12/2000 with the respondent for cultivation of cane on his plot number 42, field number 12. The account number assigned to his plot was 261085. The agreement dated 1st December 2000 was to run for a period of 5 years during which time the cane was to be harvested thrice. The appellant was paid Kshs. 42,000/= for his 1st main harvest. The 1st ratoon crop was also harvested and he was paid for it. It was his case that he maintained the 2nd ratoon crop well but it was not harvested by the respondent and it ended up drying in his shamba. On cross examination, the appellant stated that the main crop produced 29 tonnes and the 1st ratoon crop 12 tonnes, average yield was 32 tons per the statement.

3. Richard Muok (DW1), a field supervisor for the respondent company, admitted the existence of the contract. He testified that the land was developed, the cane planted and the first crop harvested on 1st April, 2002. It produced 29.31 tonnes. He told the court that a good harvest would have produced 40 tonnes and this harvest was below par. The 1stratoon crop was also developed and harvested on 22nd August 2003. It produced 12.94 tonnes which was no better than the first harvest. The appellant was paid for both harvests but the 2nd ratoon crop was abandoned by the respondent in accordance with clause No. 5 of the agreement which provided that if the company was of the view that developing of the next crop would be counter-productive, it was entitled to abandon it without notice. He testified that the 2nd ratoon crop would have attracted deductions of Kshs. 10,413.35/= yet they expected a lower income from it due to the plot's history.

4. When cross examined DW 1 stated that the best yield they had gotten from a field was 100 tonnes and it was wrong for the appellant to claim he would have realized 135 tonnes for his. He admitted that the respondent had conducted a census for the appellant's plot which gave an estimate of his expected yield. He denied that his failure to produce the census report was deliberate.

5. The trial court heard both parties and concluded that the appellant had neither properly pleaded nor proved his claim and dismissed his suit. Being aggrieved by that decision, the appellant has filed this appeal which is based on the following grounds:

a.The Learned Trial Magistrate erred in law in stating that the appellant was not entitled to an award of damages and or that damages were in the circumstances not awardable;

b.The Learned Trial Magistrate erred in law in failing to assess the damages payable had the appellant succeeded in the suit; and

c.The Trial Magistrate erred in the award of costs and failed to consider the extent of the appellant's successes in the suit.

6. The appellant's counsel Mr. Oduk submitted on the 3 grounds of appeal. First, he emphasized that the appellant's claim was one for special damages. He argued that the trial court had based its decision on the wrong principles of settled law. On this he relied entirely on the Court of Appeal's decision in ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010***.

7. Counsel also submitted that the trial magistrate having found for the plaintiff on liability, it should have assessed the amount of damages payable. Since the magistrate was no longer in the station, he urged this court to award the appellant a sum of Kshs. 92,420/=.

8. Ms. Anyango, for the respondent aligned herself with the findings of the trial court and submitted that the appellant's claim was framed as one for general damages which could not be awarded in a claim for breach of contract. On this, she relied on the case of ***Phoebe Achieng Aluoch v South Nyanza Sugar Co. Ltd Civil Appeal No. 245 of 2006.***

9. It was also her contention that the appellant had not proved his claim. He had based his computation on a yield of 135 tonnes per hectare yet according to the evidence adduced; the plant crop and the 1st ratoon crop had produced yields far below what was expected. She submitted that the respondent was justified in suspending its harvesting services in accordance with clause 5 of the contract in a situation such as this, to minimize its losses. She reiterated that the appellant's claim was untenable as he had not proved his case on a balance of probabilities. She relied on the case of ***Dalmas Ojwang v South Nyanza Sugar Co. Ltd Kisii Civil Appeal No. 48 of 2007*** in support of this argument.

10. In response, Mr. Oduk submitted that liability was not in issue as the trial court had found the respondent wholly liable. On yield, counsel stated that the low yields of the 1st and 2nd harvests had been caused by the respondent's delay. He urged this court to disregard the respondent's submissions and make an award for the appellant.

11. I have carefully considered the grounds of appeal, the record and the submissions made by the parties and will proceed to determine the main issue which is whether the trial court erred in finding that the appellant had not properly pleaded or proved his claim and was therefore not entitled to an award of damages.

12. As a first appellate court, this court is required to, *"reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect." (See **Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126**)*

13. It is not in dispute that there existed an Outgrowers' Cane Agreement between the appellant and respondent. The same commenced on 1st December 2000 and was to run for a period of 5 years or until one plant crop and two ratoon crops of sugar cane had been harvested on the plot whichever period was less. Both parties agree that the plant crop was harvested on 1st April 2002 and the 1st ratoon crop on 22nd August 2003. It is also not in dispute that the respondent failed to harvest the 2nd ratoon crop.

14. It was the respondent case that the 2ndratoon crop would have attracted deductions that would have surpassed its income and since the appellant's yield was dwindling by the harvest, it would have been unsustainable to develop it. DW1 testified that the respondent was entitled to abandon the crop by virtue of clause 5 of the contract which provides;

> *"5. If at any time the Company is of the opinion that the sale proceeds of the next cane harvest of the Outgrower will be insufficient to reimburse the Company with the monies then due to the Company from the Outgrowers then and in that case the company may immediately and without notice to the Outgrower suspend the supply of services and materials to the Outgrower until it is satisfied as the reimbursement of the monies aforesaid."*

15. That clause only envisioned a temporary suspension of the respondent's services and not a complete abandonment of the crop. The respondent was only entitled not to purchase the cane subject to clause 10 (i). That is where the cane got burnt; where the respondent found that the first expressed juice was of a quality below 83 %; where the cane had been harvested by persons other than the respondent or its agents; where the variety of seed cultivated had not been approved by the respondent or where the cane had not been made available to the respondent by the due date. The respondent did not show that any of these conditions had been met and was in breach of contract when it completely abandoned the 2nd ratoon crop yet the contract was to remain in force until all three crop cycles were harvested.

16. The failure by the respondent's witness to produce the cane census report was also inferred by the trial court to mean that the report would have had an adverse effect on the respondent's case. I find no reason to depart from that conclusion and hold that the respondent was in breach of contract when it failed to harvest the 2nd ratoon crop as it was required to.

17. The question then is whether the appellant was entitled to an award of damages. The respondent supports the trial court's contention that the appellant's prayers as framed were incapable of being awarded. The respondent argues that the appellant sought general damages as opposed to special damages which is the appropriate remedy for a breach of contract.

18. The appellant particularized the claim in his plaint as follows:

> "**3**. *By a written agreement dated 1st day of December 2000, the defendant contracted the plaintiff to grow and to sell to it sugarcane on his land parcel being plot number 42 in field number 12, in Kakmasia Sub location measuring 0.40 hectares.*
>
> ***9***. *The plaintiff's plot was capable of producing an average of 135 tonnes per acre and the rate of payment then applicable per tonne was Kshs. 1,730/= and the plaintiff claims damages."*

19. The appellant went on to seek the following order;

> *"a.) Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of one (1) crop hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/= per tonne or the expected one (1) crop."*

20. In ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd (supra)*** the Court of Appeal held that the character of the acts which produce the damage regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. The Court

found that the appellant in that case had specified the acreage of land, the cane proceeds per acre and the price per tonne in his pleadings. It cited with approval the decision in ***J. Friedman & others v Njoro Industries [1954] 21 EACA 172*** where it was held that *"there is no obligation on a trial judge who is in possession of all the material facts to enable him to make a fair assessment of the damages to order an inquiry in regard thereto."*

21. From the appellant's pleadings reproduced above, it is evident that he set out the measurements of his plot, the expected yield and the price for each tonne. The respondent's position that the appellant did not properly plead his claim is therefore rejected. Having pleaded his claim for special damages, it was incumbent upon the appellant to prove it.

22. Both parties agree that the proportion of the appellant's plot was 0.4 hectares. The appellant did not testify on the price of cane per tonne but the respondent's witness acknowledged that at the time the price per tonne was Kshs. 1,800/=. As for the expected yield of the 2nd ratoon crop, the appellant provided no proof nor testified on this. This was especially important given that the respondent refuted the appellant's estimate of 135 tonnes per hectare. There was no way for this Court to quantify the claim and as such this appeal stands dismissed.

23. If the appellant had proved his claim, I would have awarded the appellant a sum of **Kshs. 83,006.65**/= made up as follows :

Kshs. 1,730/= per tonne x 0.4 ha x 135 tonnes x 1 crop cycle = Kshs. 93,420/= less Kshs.10,413. 35 = Kshs. 83,006.65/=

24. The respondent shall have costs for this appeal. Costs are assessed at 15000/-

Dated, signed and delivered at Kisii this 17th day of January 2019.

R.E.OUGO

JUDGE

In the presence;

Mr. Wesonga h/b Mr. Oduk For the Appellant

Mr. Bosire h/b Mr. Yogo For the Respondent

Rael Court clerk