



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 241 OF 2011

PENINA ATIENO AYOMA.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTDRESPONDENT

(Being an appeal from the judgment and decree of the Resident Magistrate P.L. Shinyada (RM)

dated 26th October 2011 in CMCC No. 510 of 2004 in Kisii)

JUDGMENT

1. The appellant's claim against the respondent was for loss of three crop yields of sugarcane on her parcel of land being plot number 26B in field number 11 in Kanyamamba sub-location measuring 1 hectare. It was her case that the respondent acted in breach of the contract dated 1994 and had led to the loss of the cane. The trial court in found that the appellant had failed to plead her loss as special damages and proceeded to dismiss the suit with costs.
2. The appellant has preferred an appeal against that decision on the following grounds;
 - a. The Learned Trial Magistrate erred in holding that the pleadings in the plaintiff's suit was not in the nature of a special damage claim yet the cause of action sufficiently disclosed the nature of the plaintiff's claim in contract;
 - b. The Learned Trial Magistrate failed to appreciate that from the nature and circumstances of the case, the pleadings were sufficient and properly served the purpose and requirement in law of putting the defendant on notice as to what it was expected to meet at the trial;
 - c. The Learned Trial Magistrate erred in law in holding that damages were not awardable in the suit, yet she had enough material and proof to enable her make the award and indeed did make an assessment as was required in law;
 - d. The Learned Trial Magistrate erred in law in failing to find that the plaintiff's claim was a liquidated claim and / or was for services rendered upon a contract duly proved;
 - e. The Learned Trial Magistrate erred in law in relying and putting emphasis on style and form rather than substance in the pleadings and thereby arrived at a wrong decision; and
 - f. In all circumstances of the case, the defendant did not suffer any prejudice and the Learned Trial Magistrate ought to have awarded the plaintiff the assessed amount, costs and interest.
3. In highlighting the appellant's written submissions, Mr. Oduk, argued that the trial magistrate erred in finding that the appellant's claim was for special damages. He relied on the case of ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010*** where for similar pleadings the Court of Appeal stated that it was clear that the claim was for special damages.
4. Ms. Anyango, counsel for the respondent, submitted that the appellant had claimed general damages which are not awarded in a breach of contract. She stated that the contract was not produced in evidence and that though 3 crops were claimed, the appellant admitted that the crop got burnt hence the respondent was not under any obligation to buy burnt cane and that the appellant had not proved that she developed the 2nd ratoon crop.

5. In response, Mr. Oduk submitted that the allegation that the appellant had not produced the contract was not canvassed in the lower court and could not be raised during appeal. He contended that the respondent can only do so with the court's leave and urged this court to disregard the said submissions. He further submitted that documents such as harvesting receipts were produced and the respondent could not then deny the existence of the agreement.

6. The role of a first appellate court is well settled. This court is required to re-evaluate the evidence on record and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**).

7. From the grounds and record of appeal, the only issue arising for determination is whether the appellant pleaded and proved her claim as special damages.

8. The respondent had argued that the appellant did not produce the contract between her and the respondent and that there was in fact no such agreement between the parties. It is also the respondent's contention that it was not obligated to purchase the burnt plant crop and that the proceeds from the 1st ratoon crop had been used to offset the expenses of developing the cane. The respondent also argued that the appellant did not produce any evidence to prove the development of the 2nd ratoon crop.

9. The appellant produced copies of outgrowers' delivery notes and a harvesting advice note from the respondent which the respondent's witness admitted were headed and serialized in the respondent's name. The trial court found that on a balance of probabilities, there had existed a contract between the appellant and the respondent. The respondent did not cross appeal against this finding of the trial court and the same is upheld.

10. The trial court having determined that the respondent was in breach of contract, it found that the appellant had not pleaded her loss as a special damage hence her claim could not succeed.

11. A court will not ordinarily interfere with the findings of a trial court on an award of damages. Law, JA in **Butt v Khan [1981] KLR 349** stated:

"... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."

12. The principles applicable in this case were set out by the Court of Appeal in **John Richard Okuku Oloo (Supra)**. The Court restated the well settled principle that a claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity. The Court did however note that the degree of certainty and particularity with which the damage done ought to be stated and proved, depended on the circumstances and the nature of the act complained of. In that case the Court found that the appellant having specified the acreage of the land, the cane proceeds per acre and the price per tonne in his pleadings, the pleading on the special damages suffered was clear and sufficient enough to be awarded.

13. In the present case the appellant framed her claim for damages in her plaint as follows:

"9. The plaintiff's plot was capable of producing an average of 135 tonnes per hectare and the rate of payment then applicable per tonne was Kshs. 1,730/= . And the plaintiff claims damages."

She then prayed for;

"a. An inquiry as to damages for breach of contract and compensation of the plaintiff for loss of sugarcane on 1.0 hectares for the three lost crop yields;

b. Cost of this suit;

c. Interest thereon at court rates until payment in full;

d. Any other relief this Honourable Court deems just and expedient to grant"

14. From the above, the area on which the crop was to be grown, the expected yield of harvest for that area, the number of crop yields lost and the amount payable for each tonne of cane were set out in the pleadings as required. The trial court therefore erred when it held that the claim had not been properly pleaded.

15. The appellant then needed to prove her claim. The oral evidence of the appellant was that her land measured 1 hectare. The contract was to last for 5 years during which time, the first crop was to mature after 24 months and the ratoons after 18 months. She testified that the crop overstay on the field and after 28 months it got burnt. She removed the burnt cane and developed the 1st ratoon crop, which the respondent harvested but did not pay for. In her estimation, she ought to have harvested about 150 tonnes of cane which would be worth Kshs. 280,000/= as at the time, the respondent was a paying Kshs. 1,730/= for a tonne. The appellant produced a harvesting advice note for the 1st ratoon crop which indicates that her estimated yield for that crop was 78 tonnes.

16. DW1, a field supervisor for the respondent denied the existence of a contract between the parties. On cross examination, he admitted that the delivery notes produced by the appellant bore the respondent's heading and the same identified the appellant's field and plot number as

