REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 263 OF 2006

PHOEBE ACHIENG ALUOCH.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate A.A. Ingutia (SRM) dated 16th August 2006 in Civil Suit No. 958 of 2004)

JUDGMENT

1. Being dissatisfied with the decision of the trial court in Civil Suit No. 958 of 2004, the appellant has filed this appeal based on the following grounds:

a. The learned trial magistrate erred in law and in fact in failing to make a finding on the merits of the case after hearing the suit on merits;

b. The learned trial magistrate erred in law in dismissing the suit by wrongly invoking the arbitration clause in the parties agreement when it was not proper to do so, and when reference to arbitration was not an issue at the trial; and

c. The learned trial magistrate erred in law in failing to make a finding on damages payable, had the plaintiff succeeded in the suit.

2. The parties canvassed the appeal by way of written submissions and highlighted them before this court. Counsel for the appellant submitted that the trial court erred in its decision to refer the matter to arbitration yet that issue had not been raised. It was his submissions that once the defence was filed, the respondent lost the right to invoke the arbitration clause. Counsel urged the court to assess damages as submitted by the appellant before the lower court.

3. The respondent's counsel aligned herself with the trial court's decision. She submitted that the appellant had produced a contract which had a provision for arbitration at clause 12. She also submitted that general damages were not awardable for breach of contract. Counsel further pointed out the appellant's delay in prosecuting the matter. The appeal had been filed on 11th October 2006 and the record of appeal in 2014. She urged the court to give interest from the date of judgment in case the appellant succeeded.

4. Being a first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify *(see **Selle v Associated Motor Boat Co. [1968] EA 123**)*.

5. The appellant sued the respondent in her capacity as the legal representative for the estate of her deceased husband John Linus Aluoch. She produced a copy of the letters of grant and also produced a copy of the agreement and survey report showing that her late husband had been contracted by the respondent to grow sugarcane on plot 158 field number 169 account number 430711.

6. She told the court that the agreement was to last for 5 years. She expected 3 harvests, the first one after 24 months and the ratoon crops after 18 months. The plant crop and 1st ratoon crop were harvested as agreed. As for the 2nd ratoon crop, it over matured on the farm and when she reported the matter to the respondent's field manager, harvesters were sent to her fieldbut they only cut 202 stalks which were not transported and dried up on the field together with the rest of the cane. The plant cane yielded 599.580 tonnes and the gross income for it was 931,147.70/=. She could not recall how much tonnage the 1st ratoon crop produced. She stated that at the time a tonne was going for Kshs. 1,730/=. She told the court that she had maintained the farm well and the yield for the 2nd ratoon crop was good as she had utilized manure.

7. On cross examination, the appellant was shown a statement for the 1st ratoon crop which indicated that its total yield was 257.170 tonnes. She admitted that if cane was not properly husbanded, it would not yield well. She testified that for the plant crop and the 1st ratoon crop, she was supplied with fertilizers but for the 2nd ratoon crop the respondent did not give them any services and she paid for all inputs. She stated

that the farm was capable of yielding 135 tonnes.

8. On re-examination the appellant told the court that the contract was signed on 27th April, 1995 after planting the cane which was harvested on 19th December 1996. The 1st ratoon crop was to be harvested in June 1998 but was harvested in June 1999 hence the yield.

9. Francis Abogo (DW1) told the court that he was working for the respondent as a senior agricultural supervisor. He knew the appellant and her late husband who was a farmer with the respondent. He admitted that the plant crop and the 1st ratoon were harvested but stated that the 2nd ratoon crop was not maintained. He had visited the field himself and made a report to the senior manager. During cross examination, DW1 affirmed that the plant crop was harvested on 19th December 1996 and the 1st ratoon crop was harvested on 27th June 1999. He told the court that he did not know how long the ratoon crop took to mature and on re-examination stated that there was no stipulated date of harvesting in the agreement.

10. Otieno Nganyi (DW2) a senior accountant for the respondent told the court that the plant crop was harvested in 1996. It produced 599 tonnes and the gross income was Kshs. 931,147.70/=. The crop attracted deductions of Kshs. 826,818.30/= and the net amount payable was Kshs. 50,302.10/=. The 1st ratoon crop was harvested in June 1999. The tonnage was 257.17 tonnes. The gross amount was Kshs. 444,904.10/= and the total deductions were Kshs. 145,969.70/=. The farmeralso asked for advance payments and requested the respondent to make direct payments at various intervals which they did. The 2nd ratoon crop was not delivered. When cross examined, DW2 told the court that most deductions were done at the plant crop stage. He confirmed that the price of cane in 1999 was Kshs. 1,730/= per tonne.

11. After hearing the witnesses, the trial court dismissed the suit. the trial court's decision reads as follows:

> *"I find that the agreement provides in simple terms in clause 12 thereof that any dispute between the parties relating thereto must be referred to arbitration. There is no reason as to why this dispute cannot go to arbitration. Consequently, the plaintiff's suit is premature and I hereby dismiss it with costs."*

12. The appellant argues that the above decision was erroneous as neither party had invoked or sought to enforce the arbitration clause. The respondent had opted to defend the suit and did not apply to stay the suit pending arbitration.

13. It is trite that a court of law is required to impartially adjudicate matters that are brought before it by parties. The court risks its objectivity when it goes beyond the scope of what has been raised. This position of law was rendered by the Court of Appeal in the case of ***Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others Civil Appeal No. 219 Of 2013 [2014] Eklr*** which held:

> *"Lord Denning was of course alluding to the essential difference between an adversarial system of justice such as we have in which the judge is or ought to be more of an impartial umpire and the inquisitorial system where the judge is an active investigator after evidence and truth. The good law Lord had proceeded to quote Lord Green MR who had explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations for, by descending into the arena the judge is liable to have his vision clouded by the dust of conflict.*
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> ...
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> *The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."*

14. Having considered the pleadings filed by the parties, it is evident that none of the parties sought to apply the arbitration clause. Hence, the finding by the trial court that the matter ought to have been referred to arbitration was erroneous.

15. Clause 12 of the contract provided that any dispute arising between the parties was to be referred to the decision of a single arbitrator to be agreed between the parties. The clause was to apply subject to the provisions of the Arbitration Act Cap 49.

16. In interpreting the application of arbitration clauses, the Court Of Appeal in ***Kisumuwalla Oil Industries vs PAN Asiatic Commodities 1995-1998 IEA 153***distinguished the application of arbitration clauses, also known as Scott v Avery clauses, in the English context and their application in Kenyan legal context. In England, a party had no cause of action in respect of a claim falling within the ambit of an arbitration clause whereas in the Kenyan legal regime, such arbitration clauses were to be applied subject to statutory provisions, particularly the Arbitration Act.

17. When the appellant filed his suit, **section 6** of the **Arbitration Act No. 4 of 1995** provided as follows:

> ***6(1)*** *A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters an appearance or files any pleading or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration, unless it finds-*
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> *(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
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> *(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*

18. As none of the parties moved the court to have the matter stayed and referred to arbitration, they were taken to have submitted to the court's jurisdiction. The parties having conceded to the trial court's jurisdiction the court should have proceeded to determine the matter on merit.

19. In her suit, the appellant claimed the loss of one crop cycle. The respondent contends that the claim as drawn was incapable of being awarded as the appellant was seeking general damages yet general damages cannot be awarded for a claim anchored on a breach of contract. The respondent cited the following cases in support of its argument: ***Provincial Insurance Company of East Africa Ltd. vs. Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289; Phoebe Achieng Alouch v South Nyanza Sugar Co. Ltd Civil Appeal No. 245 of 2006; Margaret Muga Oduk v South Nyanza Sugar Co. Ltd HCCC No. 2007 of 2001 and South Nyanza Sugar Co. Ltd v Heziron Narera Monwasi HCCC No. 103 of 2006.***

20. The court of appeal in dealing with a similar issue in the case of ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010*** 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 properly pleaded his case by specifying 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. The appellant in this case set out the acreage of the plot, the expected yield, the price for each tonne and the crop cycle lost in paragraphs 3, 7, 8 and 9 of her plaint. She then prayed for *interalia*:

> "*a. Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of the one (1) ratoon crops on 7.604 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/= per tonne for the expected (1) ratoon crop."*

22. I find and hold that the appellant properly pleaded her claim as special damages and having done that was required to prove the same.

23. The respondent's witnesses did not contest the existence of a contract between the respondent and the appellant for the development and cultivation of cane on the deceased's parcel of land. The issue in contention was whether the appellant was entitled to an award of damages for the loss of the 2nd ratoon crop.

24. The respondent's witnesses argued that respondent did not harvest the 2nd ratoon crop because the field was not properly maintained. DW1 testified that he had inspected the field and had prepared a report for the 2nd ratoon crop but he did not produce it in evidence to support this claim. On the other hand, the appellant's assertion that the plant crop was to be harvested at the ages of 22 to 24 months and ratoon crops at 16 to 18 months was not refuted. It was admitted that the 1st ratoon crop was harvested on 27th June 1999, more than 30 months after the harvest of the plant crop on 19th December 1996. From this it is apparent that the respondent was in breach of contract when it harvested the 1st ratoon crop outside the stipulated period and was also in breach when it failed to harvest the 2nd ratoon crop. The appellant is therefore entitled to an award of damages.

25. The purpose of damages for breach of contract is to put the claimant as far as possible in the same position he would have been if the breach complained of had not occurred. *(see **Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR** and **Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR***).

26. The acreage of the appellant's plot was proved to be 7.6hectares. This was supported by the survey report and other documents adduced by both parties. The witnesses were all in agreement that the price of cane at that time was Kshs. 1,730/=. It was also not contested that the respondent did not harvest the 2ndratoon crop.

27. The appellant pleaded and testified that she expected 135 tonnes of cane from the 2nd ratoon crop. She stated that she had maintained the crop well and had gone ahead to use her own inputs when the respondent did not provide them. The respondent's argument is that the appellant simply failed to maintain the 2nd ratoon crop and implied that she could not have achieved her expected yield. Reading the terms of the contract between the parties, it is clear that the duty to maintain the crop for the best yield fell on both parties. Therefore the estimate given by the appellant is found to be a fair approximation of the yield she expected.

28. For the reasons set out above, the appellant's loss can be computed as follows: *Kshs. 1,730 x 135 tonnes x 7.6 hectares x 1 crop cycle = Kshs. 1,774,980/=*.However at the trial court, the appellant asked the trial court to award her a sum of Kshs. 800,000/=. The appellant's counsel urged this court to assess damages as submitted by the appellant before the trial court. Therefore, the judgment of the trial court is hereby set aside and substituted with a judgment for Kshs. 800,000/=.

29. I concur with the respondent's submission that the appellant was indolent in prosecuting this appeal. As such, I award interest at court rates from the date of filing suit that is 10th August 2004 to the date the memorandum of appeal was filed that is 11th October 2006. Interest shall then accrue from the date of this judgment until payment in full.

30. The appellant shall have costs for this appeal assessed at Kshs. 20,000/= only.

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

R.E.OUGO

JUDGE

In the presence;

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

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

Rael Court clerk