REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 34 OF 2016

BETWEEN

JENIPHER AUMA ODERA .....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. J. Njoroge, SPM dated 24th May 2016 at the Chief Magistrates Court at Kisii in Civil Case No. 487 of 2010*)

JUDGMENT

1. The trail magistrate dismissed the appellant's case on the ground that she had been paid for the three crop cycles under the agreement dated 2nd February 2000. The appellant was contracted by the respondent to grow and sell sugarcane on Plot No. 652 field number 133 measuring 0.8 hectares in Kanyamgony A Sub-location. It was a term of the agreement that it would commence on 2nd February 2000 and remain in force for a period of 5 years or until one plant and two ratoon crops of sugarcane are harvested on the appellant's land whichever period is less.

2. In his submission in support of the appeal, Mr Oduk, counsel for the appellant, relied on and reiterated the grounds of appeal set out in the memorandum of appeal dated 16th May 2016 as follows:

> *1. The learned trial magistrate erred in law in totally disregarding the credible and trustworthy evidence of the appellant that not a single sugar cane cycle was ever harvested to that of the defendant/respondent impugned evidence that all three crops were harvested.*
>
> *2. The learned trial magistrate erred in law when he failed to properly and sufficiently analyse the so-called transaction document (D Exh. 1) and expressly find that it was a generated document meant to hoodwink the court that harvests were indeed made and payments made, yet the said document was false, unusual and not in itself evidence of payment or evidence of that it sought to prove.*
>
> *3. The trial magistrate erred in law in treating the evidence on record casually and with little or no examination of proof, of due harvest dates/period so as to arrive at a correct decision.*
>
> *4. The learned trial magistrate erred in law in failing to assess the damages that may have been awarded had the appellant been granted judgment (sic).*

3. Counsel for the respondent, Mr Bosire, supported the conclusions of the trial magistrate. He submitted that the appellant did not object or raise any issues regarding the statement that the respondent relied upon to establish that the appellant had been paid in accordance with the contract.

4. This appeal turns on the meaning and purport of the document produced on behalf of the defendant by Richard Muok (DW 1) titled, *"Transaction Report for Jenifer Aoko Odera"* which was produced as D-Exhibit No. 1. It runs from 24th November 2001 to 24th March 2011. The trial magistrate accepted the document and held that the appellant had been paid in full. As this is the first appellate court, I am entitled to review that entire evidence and come to an independent conclusion bearing in mind that I neither saw nor heard the witnesses testify (see ***Selle and Another v Associated Motor Boat Company Ltd*** **[1968]EA 123**).

5. I would like to dispose of the issue of admissibility of the document. The document was produced without any objection by the respondent. The only question is what weight would the court attach to it in light of all the other evidence.

6. While referring to the statement, DW 1, in order to demonstrate that the appellant stated that:

- The plant crop was harvested between 24th and 26th November 2001 as illustrated in the transaction list for the period 1st July 2001 to 30th June 2014.
- Ratoon I was harvested on 7th March 2003 and the appellant paid Kshs. 73,353.25.
- Ratoon II was harvested on 7th June 2004 and the appellant paid on Kshs. 53,141.75.

7. As against this evidence was the appellant's case that the respondent never harvested the cane. Counsel for the appellant contended that given that the contract started running from 2nd February 2000, the plant crop would have been harvested at the age of 22 – 24 months and the ratoon crop 16 – 18 months after planting and subsequent harvest hence the document was false and could not support the respondent's case.

8. From the judgment, it is clear that the trial magistrate did not analyse the statement in order to come to the conclusion that the appellant had been paid in full for the three crop cycles. Having re-evaluated the evidence and in particular D-Ex 1 and I am not convinced that the respondent established the appellant had been paid. DW 1 did not explain how the entries on the account were inconsistent with the provisions of the contract. Since the contract was entered into in 2000, it would be impossible for the plant crop to be planted within the same year. Counsel for the appellant also pointed out that the statement does not show payment for the plant crop. He submitted that since the 1st ratoon was allegedly delivered on 18th March 2003, it was impossible for the appellant to be paid within a period of 3 days and lastly the 2nd ratoon was paid on 18th February 2004 when delivered were done on 7th June 2004.

9. From his evidence, DW 1 did not make any effort to explain the statement. It is not enough for the respondent to throw at statement at the court and say look, payment has been made. The payment must be consistent with the provisions of the contract and if not, the party must provide an explanation as to the variations and inconsistencies so that the court may make an informed decision.

10. I have looked at the *"Transaction Report for Jenifer Aoko Odera."* It shows that the plant crop was harvested in November 2001 yet the contract was entered into in February 2000. This is inconsistent with the plant crop being harvested 22-24 months after planting. In light of the issues raised by the appellant, I too come to the conclusion that the statement cannot be relied on to confirm payment to the appellant.

11. At the end of the day, I find that the appellant proved on the balance of probabilities that she planted the cane which was not harvested. She also redeveloped the ratoon crops but they went to waste. This was clearly a breach of the agreement. The question is whether, in light of the breach, the appellant was entitled to be compensated for the 1st and 2nd ratoon. In ***Joseph Akech Nundu v South Nyanza Sugar Company Limited*** **MGR CA Civil Appeal No. 36 of 2016 [2017]eKLR** the court expressed the view with which I agree as follows:

> *[17] Having found that the Appellant was entitled to judgment, the remedy available to him from the breach of contract is what the Appellant would have reasonably received as the proceeds under the contract crystallized as special damages and not damages at large or general damages. (See the Court of Appeal case of* ***Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR).*** *In this case the contract provided a period of 5 years or until one plant crop and two ratoons of sugar cane were harvested from the subject land whichever event occured first. Further the contract under Clause 1(f) indicated that the plant crop was expected not later than 24 months from planting whereas the first ratoon crop was expected not later than 22 months after harvesting the first crop and the second ratoon crop was expected not later than 22 months after harvesting the first ratoon crop.*

12. I therefore find and hold that the appellant was entitled to the three crop cycles in light of the breach by the appellant. I now turn to calculate the amount due to the appellant for the plant crop, 1st and 2nd ratoons.

13. Although the appellant had pleaded that the yield per hectare was 135 tonnes, she did not support this conclusion with any evidence. The only evidence available was the *Cane Yield in Outgrowers* produced by DW 1 which showed that the yield for Kanyamgony A was 62.04 for the plant crop and 56.68 for the ratoons. The total expected yield was therefore as follows:

> Plant crop 62.04 tonnes per Ha. X 0.8Ha X Kshs. 1730 per tonne = Kshs. 85,863.36
>
> 1st ratoon 56.68 tonnes per Ha. X 0.8 Ha X Kshs. 1730 per tonne= Kshs. 78,445.12
>
> 2nd ratoon 56.68 tonnes per Ha. X 0.8 Ha.X Kshs. 1730 per tonne = Kshs 78,445.12
>
> **TOTAL Kshs. 242,753.60**

14. Damages for breach of contract are calculated on the basis of the principle of *restitution in integrum* which means that the claimant must be put as far as possible in the same position had the breach complained of not occurred. I take the position that had the contract been performed in full then the respondent would have made statutory deductions, cost of inputs and services like transport which would be deducted before making payment. The net amount would constitute the actual loss made by the claimant. The defendant produced several schedules showing Land Development rates, Seed Cane rates, Fertilizer rates, cane harvesting rates and cane transport rates. Unfortunately, DW 1 did not explain how these rates applied to the appellant. Doing the best I can would give the respondent credit of 15% (Kshs. 35,413.04) to cater for those deductions.

15. I conclusion, I set aside the judgment and substitute it with the judgment for the appellant against the respondent for **Kshs. 206, 340.56/-**.

16. The court has discretion to award interest but such discretion is to be exercised judiciously bearing in mind established principles. In this

case the principle to be applied is that interest on special damages is from the date of filing suit. The suit before the subordinate court was filed in 2010 but the first step to prosecute the same was taken in 2014. The respondent should not be penalised for the appellant's failure to prosecute the suit with diligence. I therefore award interest to the appellant at court rates from 16th May 2015 the until payment in full.

17. The appellant shall have the costs of the suit before the trial court and costs of this appeal which I assess at Kshs. 20,000/- exclusive of court fees.

DATED and **DELIVERED** at **KISII** this **13th day of FEBRUARY 2019.**

D.S. MAJANJA

JUDGE

Mr Oduk instructed by Oduk and Company for the appellant.

Mr Bosire instructed by Moronge and Company Advocates for the respondent.