REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL CASE NO. 24 OF 2015

NGINA GITIBA.....PLAINTIFF

-VERSUS-

SOUTH NYANZA SUGAR COMPANY LIMITED.....DEFENDANT

JUDGMENT

Introduction:

1. **Ngina Gitiba,** the Plaintiff herein, sued S**outh Nyanza Sugar Company Limited,** the Defendant herein, over alleged breach of three contracts on sugar cane growing entered in respect to the Plaintiff's parcel of land known as **Bugumbe/Masaba/402** (hereinafter referred to as **'the land'**) measuring approximately 83.75 acres.

2. Upon denial of liability the case was settled for hearing after the parties undertook the pre-trial preliminaries which included the production of all the documents in the Plaintiff's List of Documents dated 10/12/2015 as the Plaintiff's Exhibits. The Plaintiff testified as **PW1** and called three witnesses; **Zachary Wangwi Gitiba (PW2), Dickson Onyango Otieno (PW3)** and **Gisabo Chacha Mwita (PW4).** The Defendant was represented by its Senior Field Supervisor one **Richard Muok** who testified as **DW3**. The Defendant called two witnesses being **Gordon Onyango Abayo (DW1)** and **Joseph Omondi Mc Ochollah (DW2)**.

The Plaintiff's Case:

3. The Plaintiff's claim is anchored in the 36-paragraph Plaint dated 10/12/2015 and filed on 17/12/2015. It is for the recovery of Kshs. 90,292,038/= with interest, General Damages and costs.

4. It is the Plaintiff's position that, as a sugar cane farmer and the owner of the land, she entered into three contracts with the Defendant on sugar growing on the land. That, the first contract was on 16/09/2011. It was a Growers Cane Farming and Supply Contract for Company Developed Cane over a portion of the land measuring 17.2 Hectares (43 Acres). That contract shall be referred to as **Contract A** hereinafter and the area subject of that contract shall henceforth be referred to as **Plot A**. The second contract was executed on 05/03/2012. It was also a Growers Cane Farming and Supply Contract for Company Developed Cane. The contract covered an area of 11.06 Hectares (28 acres) being part of the land. That contract shall be referred to as **Contract B** hereinafter and the area subject of that contract shall henceforth be referred to as **Plot B**. The third contract was entered into on 03/09/2012. It was for the remainder of the land being 5.24 Hectares (13.1 acres). This was however a different type of a contract. It was a Growers Cane Farming and Supply Contract for Self-Developed Cane. That contract shall be referred to as **Contract C** hereinafter and the area subject of that contract shall hereinafter referred to as **Plot C**.

5. The Plaintiff pleaded that since contracts A and B were under the category of Company-Developed Cane, then the Defendant was obliged to ensure that it inspected Plots A and B and advised on their suitability, supplied the cane seed to her for planting, harvested the cane after inspection and determined its maturity before it was delivered to the Defendant's weigh bridge, caused the cane to be delivered and weighed the cane on arrival at the buying point which the Defendant ought to have designated and to pay the Plaintiff, net of all deductions, the value of the cane delivered to the Defendant.

6. The Plaintiff further pleaded that she was the one who carried out all the preparatory activities on Plot A and Plot B including bush clearing, ploughing, harrowing, furrowing, planting of the seed cane which was nevertheless delivered so late and undertook all actions and directions pursuant to the Defendant's recommendations. It was contended that the Plaintiff undertook not without permission and written consent from the Defendant to sell, assign, lease or part with possession of the plots and/or the cane.

7. The Plaintiff averred that she requested the Defendant to harvest the mature Plant Crop cane on the Plot A and Plot B, but in breach of the contracts A and B the Defendant failed and/or refused to harvest the cane on maturity and as provided for in the respective contracts.

8. Further breaches on Contract A and Contract B were pleaded as failure by Defendant to supply cane seed in time thereby causing the Plaintiff to re-plough at her own additional cost, that the Defendant wrongfully surcharged the Plaintiff with the cost of re-ploughing, the

Defendant's unilateral decision to burn the cane on Plot A and Plot B and failing to harvest the burnt cane within 24 hours of burning, the Defendant failed to furrow Plot B in good time thereby causing the Plaintiff to furrow at her own additional cost, failure to transport the cane to the weigh bridge leading to drastic reduction in weight of the cane due to loss of sucrose, piece meal harvest of the over mature cane, harvesting the cane but refusing to collect it hence rendering the harvest to waste, misrepresenting that the harvested cane was green cane whereas it was brown/burnt cane and failing to pay the dues arising from the proceeds of Plot A and Plot B.

9. It was further pleaded that despite the Plaintiff preparing Plot C and making it ready for planting the Defendant failed to supply the cane seed despite repeated requests.

10. The Plaintiff testified and adopted her Statement as part of her evidence. She narrated how she had to secure credit facilities to the tune of Kshs. 10,556,000/= as to sufficiently perform the contracts. She contended that as a result of the breach of the contracts she was not able to service the credit facilities which continue to accrue interests at commercial rates to date. The Plaintiff also stated that she incurred an amount of 10,028,550/= in bush clearing, ploughing, harrowing, ridging, planting, weeding, gapping and payment of workers.

11. It was the Plaintiff's contention that the Defendant delayed to supply seed cane for Plot A from the execution of the Contract A on 16/09/2011 until 02/04/2012 when the Defendant supplied the seed cane for Plot A and Plot B *albeit* late even under Contract B. Although the seed cane supplied was type N14 which was highly yielding, the delay cost her more expenses. On harvesting, the Plaintiff testified that the Defendant failed to harvest the already over mature cane on Plot A and Plot B. That, Plot A was to be harvested in April 2014 but that did not happen until 06/09/2014 and extended up to 25/03/2015 as the harvesting was piecemeal. That even at the late harvest time the Defendant's workers burnt the already over mature cane without her consent. The Plaintiff explained that over mature cane was deficient of sucrose content and rich in fibre and that led to weight loss and consequently to loss of cane tonnage. Further, that the harvesting was so poorly done as the cane was cut at 20 inches above the ground instead of the standard practice of two inches from the ground and as such no ratoons could regenerate. The Plaintiff also stated that to date over 10 acres of dried cane is still on the land.

12. On transportation of the cane, the Plaintiff stated that the cane was transported as from 23/01/2014 to 10/10/2014 and that only part thereof was transported leaving heaps of dried cane on the land to date. The Plaintiff further took issue with the Weigh Bridge Tickets which indicated that the cane delivered thereat was green cane whereas it was burnt or brown. Plaintiff contended that she applied the highest possible agricultural standards as to improve the yields as she hoped to harvest six ratoon cycles with liberty to sell the additional ratoon yields to the Defendant or any other Miller.

13. The Plaintiff recounted her disappointment on the outcome of her enormous investment. That, only two batches of the harvested cane were weighed at 896.26 metric tonnes and 275 metric tonnes totaling to Kshs. 4,497,714/= which sum is yet to be paid to her. The Plaintiff clarified that no seed cane was ever supplied under Contract C. She prayed for a total sum of Kshs. 105,340,711/= and not Kshs. 90,292,038/= as prayed in the Plaint.

14. **PW2** was the Farm Steward for the Plaintiff's project. He essentially reiterated and corroborated the evidence of the Plaintiff. He also adopted his Statement as apart of his evidence. He stated that all happened on the land under his watch and supervision.

15. On harvesting, PW1 stated that the Defendant, *albeit* late, dispatched a contingent of over 60 cane cutters to the land on 06/09/2014. That, since the already overmatured cane was very well built, had big stalks and had formed a canopy the cutters had a very difficult time to harvest. The harvesting was at a snail's speed and the workers complained of hunger and that the land was too big. The exercise went on the following day. As PW2 was around Plot B he saw heavy smoke from Plot A and rushed there only to be confronted by a very huge fire which quickly spread to Plot B and totally burnt the cane. That only small portions on the Plots remained and the land was heavily devastated by the fire. That, all the trees on the land were burnt and that the fire even spread to the neighbourhood and destroyed more trees resulting to strained relations with the neighbours. PW2 reported the fire incident to the Forest and Agricultural Officers.

16. **PW3** was the Agricultural Officer In-charge of Kuria East Sub-County. He was a holder of B.Sc. in Agricultural Economics and a M. Sc in Agricultural Policy Analysis. He visited the land on receipt of a complaint from the Area Chief who was accompanied by PW2. He inspected the land, prepared and produced in evidence an Advisory Report on **Burning of Crops and Plant Debris**.

17. On the visit, PW3 confirmed that the seed cane variety used was N14 which was a medium yielding variety and that with good husbandry one was guaranteed of good returns of up to 40 MT per acre. That, one half of the cane on Plot A and Plot B had not been harvested and the other half was selectively harvested as the cutters avoided the areas where the cane had been badly burnt. He noted that the cane had overmatured by 5 months. He took photographs which he also produced in evidence. He further gave a price of Kshs. 3,200/= per tonne as the then prevailing price but confirmed that the sugar sector has a regulator who is vested with the mandate to come up with the prices.

18. **PW4** was the Divisional Forest Extension Officer for Masaba Division in Kuria West District. He received a complaint from PW2 on the fire on the land and he visited, inspected and prepared a Report which he produced in evidence.

19. With the foregone evidence, the Plaintiff closed her case.

The Defendant's Case:

20. The Plaintiff's claim was strenuously resisted. The Defendant filed a Statement of Defence dated 02/02/2016 on 03/02/2016. It admitted entering into Contract A and Contract B with the Plaintiff but denied any allegation of breach of any of the contracts and put the Plaintiff into strict proof. It equally denied the proposed yields and contended that it was the Plaintiff who instead failed to discharge her part of the contracts by failing to maintain the cane properly so as to produce the desired yields. That, as a result the yields were so poor and its value very low that the Defendant did not even recoup its expenses on the land and that to-date a balance of Kshs. 703,124/02 remain outstanding.

21. Through the evidence of the Defendant's representative, DW3, the Defendant admitted entering into the three contracts with the Plaintiff.

DW3 stated that Plot A was poorly maintained that it yielded only 331.36 tonnes which amounted to Kshs. 1,060, 358/40 at the then rate of Kshs. 3,200/= per tonne against the Defendant's input of services and supplies amounting to Kshs. 2,399,530/63. That, the Defendant then relied on **Clause 15.1** of Contract A and suspended any further supply of services on Plot A since even the Plaintiff abandoned the Plot and did not cultivate the ratoon crops. He contended that the average yields in Moheto area for the plant crop was around 63.82 tonnes per hectare and around 40.36 tonnes per hectare for the ratoon crops. DW3 also contended that the Plaintiff prematurely filed the suit since the Plant crop was harvested on 28/09/2014 and the first ratoon crop was expected to be ready for harvest by 27/09/2016 but the suit was filed on 10/12/2015.

22. On Contract B, DW3 stated that Plot B yielded 845.94 tonnes which amounted to Kshs. 2,707, 014/40 at the then rate of Kshs. 3,200/= per tonne against the Defendant's input of services and supplies amounting to Kshs. 2,070,966/19. That, the Plaintiff had not collected the balance of Kshs. 636,048/21 as she is yet to sign a Job Completion Certificate. It was further contended that the Plaintiff as well abandoned this Plot and did not cultivate the ratoon crops. DW3 further contended that the Plaintiff prematurely filed the suit relating to Plot B since the Plant crop was harvested on 25/09/2014 and the first ratoon crop was expected to be ready for harvest by 25/07/2016 but the suit was filed on 10/12/2015. By the time of filing the suit DW3 stated that the first ratoon crop would, if developed, have been 13 months old.

23. DW3 contended that since Contract C was Self-Developed then the Plaintiff was to undertake all the land development operations by herself, but failed to do so and did not even plant the seed cane. That, Contract C was treated as withdrawn/suspended. DW3 then prayed that the suit be dismissed with costs.

24. The Defendant called two witnesses in buttressing its case. **DW1** was a Research Scientist at the Sugar Research Institute in Kisumu. The mandate of the Institute is to conduct research on sugarcane and its derivatives. He was a holder of B.Sc. in Botany and Zoology and a M.Sc. in Agriculture and Agronomy. He prepared a Report on **Major Sugar Cane Varieties and their Yields in South Nyanza Sugar Company Zones for the period 2010-2014**. The Report was produced as an exhibit.

25. **DW2** was a Technical Officer at the Sugar Directorate, which is the Sugar Sector Regulator, having previously worked at the Defendant as an Area Manager for Kuria, Trans Mara and Kanyamkago Zones during the currency of the contracts in issue in this suit. He was a holder of B.Sc. in Agricultural Economics, a M.Sc. in Strategic Management and a Diploma in Farm Management. He prepared a Report on comparative analysis on Sugar Yields and Cane Prices in Kenya from 2012 to 2016 which he produced as an exhibit.

26. The Defendant then closed its case.

The Plaintiff's submissions:

27. The Plaintiff filed her final submissions on 19/10/2017 and additional submissions on 31/05/2018. The Plaintiff reiterated her claim and proposed four issues for determination. The issues were whether the Plaintiff discharged her obligations under the contracts, whether the Defendant breached the contracts, whether any damages are payable to the Plaintiff by the Defendant in the event the Defendant was in breach of the contracts and whether the Plaintiff was entitled to the reliefs sought.

28. The Plaintiff submitted that she fully discharged all her obligations under the contracts but the default which caused her to suffer colossal losses was on the part of the Defendant. She relied on the evidence and exhibits on record in support of the submission. In contending that the Defendant was in breach of the contracts, the Plaintiff relied on the persuasive case of **Hassan Zubedi vs. Patrick Mwangangi Kibaiya & Another (2014) eKLR** and the Court of Appeal case in **National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Ltd and Another (2002) EA 503**.

29. In submitting that the loss she suffered was a direct result of the breach of the contracts by the Defendant, the Plaintiff relied on **South Nyanza Sugar Co. Ltd vs. Peter Odera Ambaro (2017) eKLR**, **Jackie Distributors vs. Co-operative Bank of Kenya Ltd (2013) eKLR** and **Rono Limited vs. Caltex Oil (Kenya) Limited (2014) eKLR**. The Plaintiff finally tabulated her claim as Kshs. 404,107,014/= being inclusive of penalty interest and prayed for judgement in her favour.

The Defendant's submissions:

30. The Defendant mooted for the dismissal of the suit. It argued that the contracts were statutorily guided under the **repealed Sugar Act** (hereinafter referred to as '**the Act'**) and that it was not open to any of the parties to seek remedies not specifically provided for in the contracts and the **Act**.

31. The Defendant vehemently denied breaching any of the contracts and submitted that the onus was first on the Plaintiff to prove that she had discharged all her obligations under each of the contracts. That, the Plaintiff instead failed to do so since she did not avail any evidence that she developed the cane as expected under the contracts, but purely relied on bare allegations. The Defendant submitted that the Plaintiff was to demonstrate to the Court what she did until the cane was mature, if at all any.

32. The Defendant further submitted that the Defendant harvested the poorly managed cane and could not even redeem its costs for inputs and services supplied. Further, it was submitted that the Plaintiff was estopped from claiming any proceeds from the undeveloped ratoon crops as she rushed and filed this suit before the expiry of the contract periods. It was further submitted that the claim by the Plaintiff was not proved as she kept on changing the amounts of money she was allegedly entitled to. The Defendant relied on the Court of Appeal **Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited (2016) eKLR** on the submission.

33. It was further submitted that the claim by the Plaintiff was on consequential loss as opposed to actual loss hence the claim has no room under the contracts. The English case of **Hadley vs. Bradley (1854) 9 Exch 341** and the Court of Appeal in **Aineah Liluyani Njirah vs. Aga Khan Health Services (2013) eKLR** were cited in support of the submission. The Defendant took issue with the claim by the Plaintiff for payment of interest on loans the Plaintiff privately procured without the Defendant's involvement. That, the Defendant was not privy to

the loans the Plaintiff entered into with third parties and that the loans did not benefit the Defendant and that the claim is further smacked with malice since the Plaintiff did not seek the Defendant to repay the entire loans, but only the interest on the loans. The Defendant clarified that the letters it wrote to various institutions on the Plaintiff and the contracts were only meant to confirm that the Plaintiff existed in her books as one of the contracted farmers and not otherwise. The Defendant contended that it was only obligated to pay for the value of the yields delivered to it under the contract and not any extraneous and consequential claims.

34. The Defendant submitted that the contracts were specific on the number of cycles which were only three on successful discharge of obligations. That, the claim for 6 ratoon cycles can only be speculative and out of the contracts. That, the claim is outrageous and has no legal basis and unveils the Plaintiff's greed and attempt to extort money more so in view of her changing claims from the initial Kshs. 90,292,038/= to the final one of Kshs. 404,107,014/50 without even amending the Plaint.

35. It was the Defendant's further submission that the Plaintiff failed to mitigate the loss even after breaching the contracts. That, she gave no reason why she failed to develop the ratoon crops and comfortably sat back to claim for the loss she personally occasioned.

36. On contract C, the Defendant submitted that no attempt in demonstrating breach on its part was tendered in evidence and the claim must fail. The Defendant also took issue with the expected yields and contended that the issue was not legally settled in evidence. It was further submitted that the Plaintiff brought many issues during the trial which had no basis in the pleadings and urged this Court to disregard them. Relying on the **Civil Procedure Rules** and a plethora of decisions the Defendant contended that apart from the claim of Kshs. 90,292,038/= which is subject to proof all the other monetary claims including the Kshs. 12,835,200/= as damages together with an additional Kshs. 3,599,750/= to be multiplied by 6 ratoons, Kshs. 1,368,250/= on loss of burnt trees, Kshs. 40,000,000/= on damage to soil fertility and Kshs. 30,833,950/= introduced through the submissions must out rightly fail.

37. The Defendant also vehemently opposed the attempt to claim any interest other than what is provided under **Section 26** of the **Civil Procedure Rules** and submitted that any other interest awarded will be unconscionable and unreasonable. Several decisions were also referred to on this issue and the Defendant clarified that the penalty interest was not pegged on a claim for late payment of sugar cane proceeds but a claim where a farmer delivers cane to the miller and the cane having been accepted and received remains unpaid for beyond 30 days. The Defendant in closing urged this Court to dismiss the suit.

Analysis and Determinations:

38. This Court has given this matter a careful and keen consideration. To that end it has perused and understood the pleadings, the proceedings, the exhibits, the written submissions, the highlights to the written submissions and to all the decisions tendered. Since there was no concurrence on the issues for determination I have framed the following two main issues: -

a) Whether there was a breach of any of the contracts;

b) If the answer to (a) above is in the affirmative, whether the Plaintiff is entitled to any redress;

39. Each of the issues shall be dealt with separately.

Whether there was breach of any of the contracts:

39. There is no doubt that the parties herein entered into the three contracts being Contract A, Contract B and Contract C. The contracts were produced as exhibits by consent of the parties.

40. The Plaintiff's claim is majorly that the contracts were breached by the Defendant in not discharging its obligations. The claim was clearly captured in the Plaint and buttressed in the Witness Statements and the *viva-voce* evidence adduced before Court. Since the contracts were independently executed, I will consider each of them separately in settling the first issue.

Contract A:

41. This contract was a **Growers Cane Farming and Supply Contract for Company Development Cane**. According to DW3 all activities on Plot A were to be undertaken by the Defendant with an exception of those which were specifically designated to be undertaken by the Plaintiff under that contract. According to the Contract, the Defendant had several obligations including those listed in Clauses 3.1.1 to 3.1.12 inclusive. They included the inspection of the Plot and advice on its suitability for cane development, preparation of the Plot for planting, planting of the seed cane, application of all chemicals, maintenance and inspection of the cane up to maturity, preparation of the harvesting programme, harvesting, carrying to and weighing of the cane on arrival at the Weigh Bridge, promptly paying the Plaintiff the net income from the cane proceeds among many others.

42. The Plaintiff on its part was under an obligation to offer access to the Defendant into the Plot A, to employ a full time Manager or Agent on the Plot A, to generally take all directions and advice from the Defendant on the cane development, to at all times guard against hazards and to report any invasion of the land by pests or any event which would affect the development and yield of the cane, not to sell, assign, lease or part with possession of the Plot A and the cane during the currency of the contract without written consent of the Defendant, to comply with the provisions of the **Act** and to reimburse the Defendant all its expenses incurred on the Plot A.

44. It is uncontroverted that the Plaintiff was the owner of the land and that she employed PW2 as a Full-Time Farm Manager of the land. There is also no controversy to the fact that the Defendant inspected the land and found it suitable for cane development.

45. I will now look into whether the parties discharged their respective obligations as required under the contract. On the **preparation of**

Plot A, the Defendant was to prepare it by initially clearing the bush and undertake all other activities that naturally followed. However, the evidence by PW1 and PW2 is to the effect that the preparation was instead undertaken by the Plaintiff. That, it was the Plaintiff who at her sole cost undertook *inter alia* bush clearing, ploughing, harrowing and ridging between the period of 01/07/2011 and 30/12/2011. The Plaintiff produced respective invoices and corresponding official payment receipts in proof thereof as exhibits.

46. On its part the Defendant contended that it indeed undertook those preparatory activities which included Surveying of the Plot A at a cost of Kshs. 6,804/=, the first plough at Kshs. 143,955/25, the second plough at Kshs. 106,683/75, the first harrowing at Kshs. 73,650/75, the second harrowing at Kshs. 65,087/90 and furrowing at Kshs. 37,546/10.

47. With the two opposite positions on the same issue, it is for this Court to determine who amongst the Plaintiff and the Defendant undertook which activity. It is not in doubt that the Defendant surveyed Plot A. There is a Survey Certificate issued by the Defendant which was produced as an exhibit. There is as well no doubt that the bush clearing was undertaken by the Plaintiff since the Defendant did not lay any claim on that activity. There is however serious contention on who undertook the ploughing, the harrowing and the furrowing on Plot A.

48. To aid the Court in determining who undertook the activities, the evidence of DW3 comes in handy. DW3 had the following to say during cross-examination: -

> ***The Defendant did the ploughing and the Job Completion Certificates and Debit Notes are in Court. In any such Certificates the farmer or Agent must sign them and in this case the Plaintiff's Agent one Zachary did so. Job Completion Certificates are signed in the field/farm. <u>The Certificates confirm genuine expenses incurred by the Defendant</u>. It is not true that the Certificates were not signed by the Plaintiff's Agent…..***
>
> ***Kennedy Matiko was a company employee and was terminated. He was the one who signed for the farmer in Job Completion Certificate on Page 27…*** (emphasis added).

49. As well put by DW3, a duly signed Job Completion Certificate is proof of the expenses incurred by the Defendant on a specific activity which expenses the Plaintiff must reimburse. That being the position, for a Job Completion Certificate to be holding and to be a basis of refund there must be proof that the same was signed either by the farmer or the authorized Agent. In this case, DW3 admitted that Job Certificate No. 367454 dated 30/06/2012 which was on Page 27 of the Bundle of the Documents filed by the Defendant was not signed by the Plaintiff or PW2 but by one **Kennedy Matiko Masubo** who was an employee of the Defendant and whose services had been terminated. That Certificate was on the planting of the cane seed.

50. Job Completion Certificate No. 315561 dated 24/10/2011 was for the first plough on Plot A. Job Completion Certificate No. 355012 dated 18/02/2012 was on the second plough on Plot A. Job Completion Certificate No. 355014 dated 18/02/2012 was on the second plough on Plot A. Job Completion Certificate No. 355014 dated 18/02/20912 was for harrowing of Plot A. These three Certificates were signed by PW2. Job Completion Certificate No. 372512 dated 20/03/2012 was allegedly for furrowing with remarks **"<u>Replace missing JCCs 9/8/2012</u>".** That Certificate was as well not signed at all. Job Completion Certificate No. 386093 dated 6/12/12 was alleged signed by **Peter Masoke** and not by the Plaintiff or PW2.

51. The foregone six Job Completion Certificates were produced as exhibits. With an exception of Job Completion Certificates No.355012, 345361 and 355014 which were signed by PW2 as an Agent of the Plaintiff, the rest of the three Job Completion Certificates Nos. 367454, 372512 and 386093 are of very little probative value if at all any since they were not signed by the Plaintiff or PW2. They are hence not proof of the activities allegedly undertaken and expenses incurred by the Defendant. The Defendant therefore failed to prove that it undertook the planting of the cane seed and furrowed Plot A. There is however cogent evidence that the Defendant ploughed and harrowed Plot A.

52. From the foregone analysis, this Court finds and hold that the Defendant only ploughed and harrowed Plot A whereas the Plaintiff furrowed and planted the said Plot A.

53. On **supply of the seed cane**, **Clause 3.1.4** of Contract A provided as follows on the part of the Defendant: -

> ***With the consent of the Grower, establish seed cane "B" nurseries on the Grower's plot for purposes of developing seed cane which cane the Miller will buy at the same rates as of mill cane and will not be charge the cost of transportation of the seed to the recipient plot PROVIDED that in the event the said seed cane is not certified by the Miller's Agronomist as being suitable for seed cane, then the said crop will be developed as mill cane.***

54. From the record, there is no evidence that the Defendant established any seed cane "B" nurseries on Plot A for purpose of developing the seed cane. There is equally no evidence that the Plaintiff withheld her consent to the Defendant.

55. Further, whereas the Defendant contended that it supplied the seed cane which was planted on 30/06/2012 the Plaintiff and PW2 contended that the seed cane was supplied and planted between 02/04/2012 and 19/04/2012. The Defendant's position was supported by the Job Completion Certificates Nos. 367454 and 386093 which Certificates this Court has already dealt with and held that their contents are of very little probative value if at all any. Therefore, the Defendant's contention that the planting was on 30/06/2012 has no legal leg to stand on and is hereby rejected. This Court now finds and holds that the cane seed was supplied and planted on Plot A between 02/04/2012 and 19/04/2012 and further finds that the Defendant delayed in supplying the cane seed for planting on Plot A.

56. As to **whether the delay in supplying the cane seed necessitated that Plot A be re-ploughed before planting**, there is no doubt that the Defendant had initially ploughed Plot A. The Plaintiff testified that she cleared the bush between 01/07/2011 and 29/08/2011. That was a period of 2 months. The Defendant undertook the first plough on 24/10/2011 and the second plough on 18/02/2012. The Defendant also harrowed Plot A on 18/02/2012. Given that the cane seed was planted as from 02/04/2012 then it means that there was no activity on Plot A

for a period of around 45 days. That explains the unsuccessful attempt by the Defendant to introduce Job Completion Certificate No. 372512 dated 20/03/2012 for furrowing. The lack of any action on Plot A for the said period adds credence to the position that Plot A had to be re-ploughed before planting and that the Plaintiff undertook that activity. Ideally, once land is cleared, ploughed and harrowed, then it is almost immediately furrowed and planted. It is therefore the delay in the supply of the cane seed that necessitated the re-ploughing of Plot A. As the Plaintiff even produced invoices and payment receipts on the re-ploughing I find and hold that it was the Plaintiff who re-ploughed Plot A before planting was done.

57. On **whether the cane on Plot A was properly maintained** to the required agricultural husbandry, the Plaintiff on one hand contended that she fully discharged all her obligations under Contract A and blamed the Defendant for failure to discharge its part of the contract. On the other hand, the Defendant contended that it was instead the Plaintiff who failed to maintain the cane to the required agricultural standards thereby resulted to pour yields out of which the Defendant could not even recoup its expenses.

58. It is beneficial to remember that Contract A was a Growers Cane Farming and Supply Contract for Company Development Cane. Under that contract, in case of default on the part of the Plaintiff over any of her duties the Defendant was obliged under **Clause 6.2** (which ought to have been Clause 6.1 instead) to issue a Notice to the Plaintiff on the default and remained at liberty to remedy the default without relieving the Plaintiff that duty under the contract. **'Clause 6.2'** of the Contract was tailored as follows: -

> **The miller shall be entitled to upon expiry of fourteen-day notice and at its own discretion and without relieving the Growers of the obligations under this agreement, in the event that the Grower does not prepare plant and maintain the plot and the cane in accordance with his obligations under this agreement and/or instructions and advise issued which the Miller shall in its sole discretion deem necessary to ensure satisfactory yield and quality**

59. The above contemplated Notice was to be served upon the Plaintiff in terms of **Clause 9** of the Contract which provided that: -

> **Any notice or demand by the Miller under this agreement shall be deemed to have been properly served upon the Grower if delivered to the Provincial Administration for onward transmission to the Grower or delivered by hand or sent by registered post or facsimile at the address of the Grower shown in this agreement. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by registered post at 10 a.m. seven (7) days following the date of posting (notwithstanding that it is returned undelivered) or if sent by facsimile on the completion of transmission. Where the notice or demand is sent by registered post it will be sufficient to prove that the notice or demand was properly addressed**

60. In the unlikely event of failure to remedy any default on the part of the Plaintiff even after service of the Notice, **Clause 15.2** of the Contract provided for termination of contract. The said Clause provided as follows: -

> **If the grower shall be in default or in breach of any of its obligation hereunder and fails or is unable to remedy such default within 14 days of receiving notice thereof from the Miller; or shall have a composition with creditors; or go into liquidation whether voluntary or compulsory (otherwise than for the purposes of amalgamation or reconstruction), then the Miller may by notice (to take effect on a date specified in the notice) to the Grower terminate this agreement**

61. The import of **Clauses 6.2.9** and **15.2** of Contract A among others is that the Defendant must take every step to formally inform the Plaintiff of any default on the part of the Plaintiff and to require specific remedial action within a specific time frame before the Defendant can exercise its right to terminate the contract. Therefore, for the Defendant to successful contend that the Plaintiff failed to discharge any of her obligations under the contract the Defendant must at least adduce evidence that it notified the Plaintiff of the breaches. The Defendant ought to have adduced at least a copy of its Notice or any like correspondence to the Plaintiff and to further demonstrate that it served the Notice or any like correspondence in compliance with **Clause 9** of the contract.

62. The allegation by the Defendant that the Plaintiff defaulted in discharging her obligations under the contract was not supported by evidence. The Defendant failed to produce any Notice or like correspondence to that effect. Therefore, the effect of the Defendant's allegation that the Plaintiff failed to maintain the cane can only be hearsay at most. The contention is devoid of any merit and is hereby rejected.

63. On **harvesting of the cane**, according to **Clause 1(f)** of the contract the **Plant Crop** was to be mature for harvesting not later than 24 months from planting. As the planting was done in the month of April 2012 then the Plant Crop was expected to be ready for harvesting by April 2014. DW3 contended in his filed Statement that the cane was harvested on 28/09/2014 which was within the contractual period of 24 months from planting. DW3 then changed his position during cross-examination and stated that the Defendant harvested the cane in one week instead. A Bundle of the Defendant's Weigh Bridge Tickets was produced as exhibits. The tickets are the Defendant's official records of how cane harvested from a farm is transported to a Weigh Bridge and weighed thereby generating the tickets. The tickets contain several details including the farmer's name and the Contract Account Number, the number of the plot/farm, the amount of the cane weighed on a particular date and time among others details. This Court has carefully perused the bundle of the tickets and found that there are tickets for Contract A showing that cane was transported from Plot A and weighed between 28/09/2014 and 07/10/2014.

64. According to the Plaintiff the Defendant delayed the harvesting of the cane on Plot A until 06/09/2014 when it sent a contingent of about 60 cane cutters to Plot A. That by then the cane had formed a heavy canopy and the harvesting went on so slowly. That, the cane cutters then unlawfully set the cane on fire on 07/09/2014 which fire uncontrollably burnt and devastated the cane. That, the harvesting then proceeded on and the Defendant transported and delivered the burnt cane to the Weigh Bridge between 23/09/2014 and 10/10/2014. The Plaintiff also produced her letter dated 27/03/2014 to the Defendant requesting for harvesting of the mature cane.

65. PW1 reported the fire incident to the Area Chief and PW3. A site visit was made by PW3 on 19/09/2014 and on 13/10/2014 respectively. PW3 then prepared a Report which he produced as an exhibit. According to PW3 he visited the land two days after receipt of the complaint. On the first visit of 19/09/2014 PW3 confirmed that the cane on Plot A had been burnt and that harvesting had been selectively done as the

portions which had been badly burnt were not harvested. Therefore, if PW3 visited Plot A on 19/09/2014 and found that the cane was already burnt and partially harvested then the position taken by the Defendant that harvesting on Plot A began on 28/09/2014 cannot be true.

66. **Clause 3.1.12** of Contract A provided for the harvesting of the cane. The Clause required the Defendant to prepare a harvesting programme in the following manner: -

> ***Prepare the harvesting program setting out the approximate expected time of harvesting which program will be subject to changes necessitated by factors beyond the control of the Miller***

67**.** In answer to whether the Defendant complied with the above **Clause 3.1.12** DW3 responded in cross-examination as follows: -

> ***.....Harvesting started in time. There are documents to confirm the harvesting. They include a Job Completion Certificate, a Program on the harvesting, Delivery Notes and Weigh Bridge Tickets. All these documents were prepared but I do not have them here as the Plaintiff has already produced them.....***

68. Having gone through the bundles of documents filed by both parties and which were all produced as exhibits, I have not come across any Job Completion Certificate on the harvesting neither did I see the alleged harvesting program nor any delivery notes. I have however come across some Weigh Bridge Tickets. In that case therefore the assertion by DW3 that the Defendant prepared a harvesting program and eventually prepared a Job Completion Certificate is not proved. This Court therefore finds that the Defendant failed to prepare a harvesting program for Plot A as required under the contract.

69. From the foregoing analysis and by placing the evidence of PW1, PW2 and PW3 on the issue of when the cane on Plot A was harvested on one hand and the evidence of DW3 on the other hand, this Court finds that harvesting of the cane on Plot A commenced on 06/09/2014 and not on 28/09/2014 and that as at the harvesting time the cane was around 29 months old having outgrown by about 5 months.

70. Having carefully analysed various aspects of the Contract A against the evidence on record, this Court hereby finds and hold that the Defendant variously breached Contract A on land preparation, seed cane supply, planting of the seed cane and on the harvesting of the cane. The upshot being that Contract A was breached by the Defendant.

Contract B:

71. This Contract was similar to Contract A being a **Growers Cane Farming and Supply Contract for Company Development Cane** as well save for the acreage and the date of its execution. The Contract was executed on 05/03/2012 about 6 months after the execution of Contract A.

72. There is uncontroverted evidence that the survey on Plot B was undertaken by the Defendant. A Survey Certificate was produced as an exhibit. As to who undertook the **land preparation**, the Plaintiff contended that she solely and at her own cost did the bush clearing, ploughing, harrowing, furrowing and the planting of the seed cane. Despite DW3 rightly stating that the only way of confirming that the Defendant provided any service to a farmer was through a Job Completion Certificate none was produced in respect to any activity on Contract B. On her part, the Plaintiff produced Schedules of the activities she undertook on Plot B, the Invoices and payment receipts thereof. This Court therefore finds and hold that all the land preparation activities on Plot B were carried out by the Plaintiff.

73. On **seed cane supply** and **planting**, the Plaintiff contended that she completed all the preliminary preparations on Plot B on time but the Defendant delayed in supplying the cane seed. According to the contents of Paragraph 16 of the Plaint and the evidence of PW1 and PW2, land preparation on Plot B was completed by 01/01/2012 such that by the time contract B was executed on 05/03/2012 Plot B was ready for planting. That further buttresses the Plaintiff's position that she undertook all the preparatory activities by herself.

74. DW3 stated in examination-in-chef that the Defendant supplied the cane seed and that the planting was done on 11/06/2012. The Plaintiff however stated that the cane seed for Plot A and Plot B were supplied at the same time on 02/04/2012. As this suit was instituted by the Plaintiff and who clearly stated when the cane seed was supplied to her and whose evidence was duly corroborated by PW2 as opposed to the uncorroborated evidence of DW3, this Court hereby finds that the cane seed for Plot B was supplied on 02/04/2015. That was around one month from the execution of Contract B.

75. Given that Plot B had been fully prepared by January 2012 and that Contract B was entered in March 2012, this Court finds that the period of 30 days taken by the Defendant to organize for and supply the cane seed after the execution of the Contract was not inordinate since the Defendant required reasonable time to organize for the supply.

76. On **whether Plot B was well maintained**, DW3 on cross-examination stated that he visited Plot B in February 2013 and on September 2014 and found that the cane was fairly maintained. As the Defendant did not raise any concern over the cane development and maintenance on Plot B as appertains the Plaintiff’s obligations under Contract B, this Court finds that the cane on Plot B was well maintained.

77. On **harvesting of the cane**, DW3 is his written and filed Statement stated that the Plant Crop on Plot B was harvested on 25/09/2014 when the cane had attained the desired age of 24 months from planting. PW1 and PW2 on the other hand contended that the harvesting of the cane on Plot A and Plot B was piecemeal and although the harvesting began in September 2014 it proceeded to March 2015. There are also the Defendant's Weigh Bridge Tickets on the cane transported from Plot B to the Weigh Bridge ranging from 23/09/2014 to 25/03/2015 which were produced as exhibits. The Defendant's position that it harvested the cane on Plot B on 25/09/2014 cannot therefore be correct since the evidence on record miliates against such.

79. The Plaintiff further formally wrote to the Defendant vide her letters dated 06/12/2014 and 27/03/2014, requesting the Defendant to

harvest the cane as it had matured. The said letters are part of the evidential record. The Defendant did not produce any harvesting program for Plot B.

80. As the cane seed was planted in April 2012 then under **Clause 1(f)** of Contract B the Plant Crop which was to be ready for harvesting not later than 24 months was to be harvested by March 2014. That was the time the Plaintiff began visiting the Defendant requesting for the harvesting of the cane. From the evidence of the Weigh Bridge Tickets, the harvesting went on until March 2015 meaning that the cane was harvested for a whole year. Once again that adds credence to the position by the Plaintiff that the harvesting was piecemeal and went on until March 2015. The period of one year in harvesting can only be described as unreasonable and inordinately long.

81. The foregone analysis therefore leads this Court to find and hold, which I hereby do, that the Defendant only breached Contract B to the extent of failing to prepare the Plot B and failing to harvest the cane on Plot B when it matured.

Contract C: -

82**.** This contract was different from the other two contracts as it was for **Self-Developed Cane.** That means the Plaintiff was the one to undertake the preparatory works among many other activities as the Defendant's role mainly was supply of seed cane and supervisory.

83. The Plaintiff contended that it prepared Plot C but the Defendant failed to supply the seed cane and everything stalled thereat. On its part the Defendant contended that the Plaintiff did not carry out her obligations in preparing Plot C so as to enable the Defendant survey it and supply the seed cane.

84. PW1 and PW2 testified that they undertook bush clearing on Plot C between August and September 2011, ploughed Plot C on three occasions, harrowed the plot and furrowed it accordingly. The Plaintiff produced Invoices and corresponding Receipts as exhibits in confirming that she indeed undertook the said preparatory activities on Plot C. The Plaintiff formally wrote to the Defendant on 25/09/2012 complaining that the supply of seed cane was getting inordinately late which correspondence was also produced as an exhibit by the consent of the parties.

85. The Defendant contended that it terminated and/or suspended Contract C in line with **Clause 15**. The Defendant however did not avail any evidence of the steps it took up to the termination of the contract. No notice or any such correspondence was produced as required under the Contract C prior to the suspension or termination of the contract. Unlike the Plaintiff, the Defendant averments are devoid of any proof and can only be regarded as unproved. The only credible evidence on this aspect confirms that the Plaintiff undertook all the preparatory works on Plot C in line with Contract C, but it was the Defendant who failed to supply the seed cane even after formal request.

86. This Court hereby finds and hold that the Defendant was in breach of Contract C in not supplying the said cane as requested and/or at all.

87. Based on the foregone considerations, the first issue is answered in the affirmative in respect to all the three contracts. In other words, the Defendant variously breached Contract A, Contract B and Contract C.

Whether the Plaintiff is entitled to any redress:

88. Having found that the Defendant breached all the three contracts the question which now begs an answer is whether the Plaintiff is entitled to any redress. I previously dealt with this question in **Migori High Court Civil Appeal No. 138 of 2015 South Nyanza Sugar Co. Ltd vs. Hilary M. Marwa (2017) eKLR** where I expressed myself as follows: -

> *15. I recall having dealt with this issue at length in **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited**. In that case I found that there can be no award of general damages for a claim on breach of contract. However, the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (restitution in integrum'). The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. I substantiated those findings with various case law. I must say that I am still of that position.'*

89. The foregone finding was reiterated by the Court of Appeal in **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)**, **Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR)** among others.

90. As the remedy in breach of contract cases lies in special damages, the general legal position is that such damages must be pleaded and strictly proved. The Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd** while dealing with how the special damages may be pleaded and proved in breach of contract cases in sugar matters like in this case partly stated thus: -

> ***…….the degree and certainty must necessarily depend on the circumstances and the nature of the act complained of. In the Jivanji case (supra) a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of.***
>
> ***……..The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. 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 damages is done.***

91. Much earlier, the Court of Appeal in the case of **J. Friedman v. Njoro Industries (1954) 21 EACA 172** observed that: -

> ...***there is no obligation on a trial judge who is in possession of all material facts to enable him to make a fair assessment of the damages to order an enquiry in regard thereto.....***

92. Indeed, the Court in **John Richard Okuku Oloo** (supra) dealt with instances where it was almost impossible to assess the special damages and held that:

> ***Vaughan Williams, LJ goes on to state, and we fully agree, that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.***

93. From the foregone it is clear that once a Court makes a finding that a contract was breached then it has a duty to carefully consider that contract and ensure that the defaulting party makes good the loss incurred by the innocent party to that contract. A Court must endeavor based on the terms of the contract and the evidence to ensure that the innocent party is practically put as far as possible in the same position that party would have been if the breach complained of had not occurred, subject to mitigation of losses in appropriate cases.

94. While endeavoring to deal with this issue, it is imperative to also look at the question of whether damages for consequential loss are payable. The Plaintiff submitted in the affirmative whereas the Defendant submitted in the negative. I have taken refuge in the Contracts. **Clause 16** of the contracts state as follows: -

> ***The miller shall have no liability to the Grower for any indirect, special or consequential loss of Grower arising out of or in connection with the provision of any goods and services pursuant to this agreement***

95. I believe the Contracts spoke clearly on the issue. I have gone through the various decisions on the subject of consequential loss as presented by the parties' Counsels and I highly appreciate that effort, but since the Contracts have a Clause on the issue I will not attempt to reinvent the wheel in such clearest of cases.

96. Therefore, the liability on the part of the Defendant arising out of the breach of contracts can only be to the extent that was directly contemplated and arose from the breach. Given the nature of the contracts, I will consider the remedies arising from Contract A and Contract B together and Contract C separately.

On Contract A and Contract B: -

97. These contract were for a period of 5 years from execution or until the Plant Crops and two ratoons Crops were harvested. The period could however be extended in terms of **Clauses 2(b) (iii)** of the respective Contracts. Resulting from the breach of these contracts that led to loss of the yields from the plant crops, the development of the ratoon crops was compromised. The Plaintiff is hence entitled to compensation arising from the three crop cycles under both contracts. In computing the loss, three items must be ascertained namely the acreages, the expected yields and the then prevailing prices.

98. The respective **acreages** for Plot A and Plot B were well settled by the Survey Certificates which were produced as exhibit. Plot A measured 17.2 Hectares whereas Plot B measured 11.06 Hectares. As to the **expected yields**, several witnesses testified on the matter. According to the Plaintiff the expected yield was 70 metric tonnes per acre. PW3 testified that on practicing good crop husbandry the cane variety that was planted on Plot A and Plot B being N14 would yield 40 metric tonnes per acre thereby translating to 100 metric tonnes per hectare. PW3 also stated that the yield was historical having undergone several national trials. PW3 further stated that Plot A and Plot B were uniquely situated between two external streams and had the advantage of having alkaline soils which were more fertile than other soil types.

99. DW1 testified and produced a Report on the major sugar cane varieties and their expected yields in the Defendant's zones for the period 2010 - 2014. He stated that on average the yields on Plot A and Plot B would be between 70 to 80 metric tonnes per hectare but on application of good crop husbandry the minimum yields can be 100 metric tonnes per hectare with possible maximum yields of over 120 metric tonnes per hectare. DW2 also testified and produced a Report on the possible yields as well. To him, the maximum yields the N14 cane variety could possible yield on good crop husbandry in Kuria Sub-location would be 100 metric tonnes per hectare but generally the average maximum is about 80 tonnes per hectare.

100. I have carefully studied the Reports by the three experts PW3, DW1 and DW2. PW3 was the Kuria East Sub -County Agricultural Officer whereas DW1 was a Researcher Scientist working at the Sugar Research Institute under the KALRO. DW2 was a Technical Officer at the Sugar Directorate under AFFA and had previously worked at the Defendant among others sugar millers. While working at the Defendant's he was the Area Manager for Kuria, Trans-Mara and Kanyamkago Sub- Zones and actually supervised the Plaintiff's land during his tenure.

101. The contents of the three reports appear to be in agreement on the possible yields on the Plot A and Plot B. According to PW3 the expected yields were 100 tonnes per hectares while according to DW1 the expected yields would be between 100-120 tonnes per hectares on good crop husbandry whereas according to DW2 the maximum possible yields would have been 100 tonnes per hectares on application on good crop husbandry.

102. The Plaintiff testified that she had heavily invested in the project and employed PW2 as a full-time Farm Manager on the land. The Plaintiff described all the steps she took to ensure that she would get the best returns out of her heavy investment and contended that she took every required step and practiced the best crop husbandry under the close supervision and guidance of the Defendant. PW2 corroborated that evidence. PW3 who also visited the land confirmed that indeed the Plaintiff had applied good crop husbandry and expected good returns. PW3 took photographs of some portions of the land with burnt cane and were part of his Report.

103. The Defendant through DW3 contended that the Plaintiff did not maintain Plot A and Plot B which yielded less than what was reasonably expected. As already found above, the Defendant failed to demonstrate that the Plaintiff was guilty of discharging her part of the contracts.

104. I observed the demeanors of all the witnesses who testified before me. The three experts (PW3, DW1 and DW2) were quite professional in their testimonies and I believed the basis of their Reports. They also shielded all questions quite well. I also believed the testimonies of the Plaintiff and PW2 that the Plaintiff applied the best possible crop husbandry on the land. It is on that basis that I will settle for an average yield of 100 metric tonnes per hectare for Plot A and Plot B.

105. On the **prices** of the cane, the Plaintiff settled for a figure of Kshs, 3,900/= per metric tonne. PW3 stated that the cane prices were usually set by the sector players on the guidance of the Sugar Directorate under AFFA. To him at the time of writing his Report the cane prices were Kshs. 3,200/=, that was in April 2014, and that the prices had dropped from Kshs. 3,800/= in August 2013. DW1 also confirmed that the cane prices were not static.

106. It was DW2 who worked at the Sugar Directorate under AFFA whose mandate was to develop, promote and regulate the Sugar Industry including dealing with cane prices. In his Report DW2 gave the prices from 2012 through to 2017 within the Defendant's zones.

107. There is therefore consensus that the cane prices were not and static and were regulated by the Sugar Directorate under AFFA. I hence find that the prices given by DW2 on Page 2 of his Report had a sound basis and I hereby adopt them as the then prevailing prices in this matter.

108. Having settled the three issues on the sizes of the plots, the expected cane yields and their respective prices, I will now calculate the expected returns on Plot A and Plot B. **Plot A** was 17.2 hectares in size. The yields were settled at 100 tonnes per hectare and the price in April 2014 was Kshs. 3,200/=. The expected returns on the Plant Crop was Kshs. 5,504,000/=. The first ratoon crop was expected to be mature in February 2016 when the prices were Kshs. 4,200/=. The expected returns on the first ratoon crop was Kshs. 7,224,000/=. The second ratoon crop was expected to be mature in January 2018 when the prices were Kshs. 4,700/=. The expected returns on the second ratoon crop was Kshs. 8,084,000/=. The total expected returns on Plot A under Contract A were hence **Kshs. 20,812,000/=.**

109. The Plaintiff was also entitled to the costs of the preparatory works she undertook on Plot A since that was to be undertaken by the Defendant. The activities undertaken by the Plaintiff on Plot A on behalf of the Defendant, as found here above, include the bush clearing, furrowing and planting. From the exhibits on record, the Plaintiff expended the sum of Kshs. 473,000/= on bush clearing. A further sum of Kshs. 107,500/= was expended on furrowing. Kshs. 301,000/= was the cost of planting. The sums were correctly pleaded and proved.

110. The Plaintiff also prayed for the cost of re-ploughing of Plot A which resulted from the delay in supply of the seed cane. The claim was for Kshs. 426,000/= and was duly proved. Having found that the Defendant was guilty of late supply of the seed cane the sum is payable to the Plaintiff. There is also the cost of weeding. The Plaintiff testified that she undertook seven cycles in weeding Plot A. The various sums were pleaded and proved as well. Contract A having been a Company Development Cane Agreement then it was the Defendant who had the responsibility of weeding the cane and given that it failed then the Plaintiff is entitled to the refund of such costs which were tabulated to the sum of Kshs. 2,257,500/=. On the claim for the cost of undertaking chemical weeding, the Plaintiff did not adduce any evidence of applying the said chemical called Wibsate. There is no evidence that the chemical was even procured and if so how and/or its quantity. The sum therefore having not been proved to have been incurred is hereby declined.

111. There was also the claim for the cost of employing the workers who included four Guards and PW2. While the sums were pleaded they were not proved. There were no employment contracts adduced in evidence and none of the guards testified. Even when PW2 testified he did not state how much he used to be paid by the Plaintiff. The claim is therefore declined. The claim for gapping at Kshs. 225,000/= is allowed having been pleaded and rightly proved.

112. As for **Plot B**, its size was 11.06 hectares and the expected yields remain at 100 metric tonnes per hectare. Since the seed cane was planted at the same time on Plot A and Plot B, the expected maturity periods for the plant crop, the first ratoon crop and the second ratoon crop were April 2014, February 2016 and January 2018 respectively. As the cane price in April 2014 was Kshs. 3,200/= then the expected income from the plant crop was Kshs. 3,539,200/=. The expected returns from the first ratoon crop in February 2016 when the cane prices were at Kshs. 4,200/= was Kshs. 4,645,200/= and the returns from the second ratoon crop in January 2018 when the cane prices were Kshs. 4,700/= would have been Kshs. 5,198,200/=. The total expected returns on the yields on Plot B under Contract B were hence **Kshs. 13,382,600/=.**

113. The Plaintiff was also entitled to the sum of Kshs. 305,250/= on bush clearing, Kshs. 69,375 on furrowing, Kshs. 196,000/= on cane seed planting, Kshs. 1,470,000/= on weeding and Kshs. 143,750/= on gapping which sums were pleaded and sufficiently proved. Having found that the Defendant did not delay in supplying the seed cane for Plot B the claim for the cost of re-ploughing is hereby denied. The claim on chemical weeding also fails for want of proof.

114. I must however clarify that despite finding that the Plaintiff was entitled to the cost of the sums she expended on the bush clearing, furrowing, cane seed planting, weeding and gapping, **Clause 3.3** of Contract A and Contract B provided for the refund of any sum expended by the Defendant on the development of the cane. Such sums would ordinarily be deducted from the proceeds realized on the sale of the cane. That position was echoed by DW3 and the Plaintiff. However, since the sums were instead incurred by the Plaintiff the same are recoverable from the Defendant.

115. The Plaintiff admitted having been supplied with fertilizer by the Defendant and that she applied it as required. That was during her examination-in-chief. However, since the Defendant did not adduce any evidence on the cost of the fertilizer it supplied to the Plaintiff, that unknown amount is not recoverable from the Plaintiff's dues.

116. The other costs which the Defendant would have been entitled to be reimbursed by the Plaintiff were on the transport and harvesting.

DW3 orally testified on the said charges. Surprisingly, no evidence was adduced in such support and as such the said costs are not deductible from the Plaintiff's income from the cane yields.

117. At this point in time it is imperative that I deal with the prayer by the Plaintiff for the proceeds from seven cane cycles. From the foregone analysis, I instead settled for only 3 cane cycles, that is the plant crop and two ratoon crops. The reason being that Contract A and Contract B expressly provided in **Clauses 2** that the contracts shall be for 5 years or until one plant crop and two ratoon crops of sugar cane were harvested from Plots A and Plot B whichever came first. Under the contracts the Defendant was at liberty to extend the duration of the agreement at its sole discretion. There is no evidence that the Defendant extended the contracts past the 5 years' period or the 3 crop cycles. As the parties were firmly bound by the contracts any demand for further crop cycles than those expressly provided for would be tantamount to entertaining a claim on consequential loss which **Clauses 16** of the contracts barred.

118. To me, even if the further 3 ratoon crop cycles were properly provided for in the contracts or the contracts' periods were extended by Defendant under **Clause 2** of the contracts still the claims for the proceeds for the three more yields would fail since the Plaintiff did not adduce any evidence of the possible expected yields past the second ratoon crops and also no price estimates were availed. Without the expected yields and their prices there is no way the proceeds from those cycles could be calculated.

119. This Court further takes note of the evidence of DW1 who testified that the N14 cane variety in the Defendant's zones could not possibly produce seven yields even on good crop husbandry. Given that DW1 was a Technical expert in the sugar sector the contention by the Plaintiff that the cane would have yielded up to seven crops must give way to DW1's position. The claim for the other three ratoon crop yields therefore fails.

On Contract C: -

120. Based on the failure by the Defendant to supply the seed cane under Contract C the Plaintiff also claimed for proceeds in respect of seven crop cycles. This Contract was different from the other contracts in that the cane seed was not availed at all despite the Plaintiff undertaking all the preparatory work on Plot C. Most importantly, Contract C was a Self-Development Cane Agreement where the Plaintiff was to undertake all the activities.

121. A look at the general cane development is also of essence under this sub-heading. When the plant crop is successfully maintained up to maturity and harvested then that gives room to the development of the first ratoon crop which also paves way to the second ratoon crop development on maturity and harvesting. Once the mature plant crop is interfered with, say for instance by non or poor harvesting or by not properly applying the expected crop husbandry, then the development of the ratoon crop is equally interfered with. On proof that the party who was charged with the harvesting of the plant crop failed to discharge such a duty then the farmer automatically becomes entitled to the value of the expected yields for not only the plant crop but also the ratoon crops. That is because at harvest time the process is irreversible and nothing can be reasonably done to rescue the development of the first ratoon crop if the plant crop is not properly and timeously harvested. On the other hand, if it is proved that the farmer failed to exercise good care of the cane under a self-development contract arrangement then a claim for breach of contract against the miller cannot succeed.

122. The position is however different in respect to Contract C. The irreversible process in this case was not started since there was no planting of the seed cane or at all. There was ample opportunity for the Plaintiff to squarely mitigate any perceived loss. Contract C was executed on 03/09/2012. The Plaintiff pleaded under paragraph 16(i)(f) of the Plaint that bush clearing was done between 05/08/2011 and 04/09/2011 hence by the time the contract was executed Plot C had been idle for over one year. Upon execution of Contract C, the Plaintiff ploughed, harrowed and furrowed the plot. Furrowing was done by 05/04/2013. As the Defendant delayed to supply the seed cane, the Plaintiff again waited for close to two and a half years before filing the instant suit.

123. The Plaintiff had ample opportunity to mitigate any possible loss by terminating the contract within a reasonable time and contracting another miller since the Defendant had not incurred any cost on Plot C. Waiting for the Defendant to supply cane seed for a period of two and a half years amounts to an act of indolence. **Article 10(2)(b)** of the **Constitution** elevates equity as a national value and a principle of governance. As equity aids the vigilant and not the indolent, the Plaintiff cannot expect to benefit having glaringly breached the **Constitution** by her conduct. Therefore, although the Defendant was in breach of Contract C in failing to supply the cane seed, the Plaintiff on her part did not take reasonable steps to mitigate the loss, if at all any, and as such she is not entitled to any redress.

Other claims by the Plaintiff: -

124. The Plaintiff submitted for the sum of Kshs. 1,368,250/= being the **costs of damaged trees.** Although PW4 produced a Report on the effects of the fire on the land, that claim was not pleaded in the Plaint. The claim hence fails.

125. There was a further claim of Kshs. 40,000,000/= on account of **damages**. The Plaintiff claimed for general damages in the Plaint. As already considered elsewhere above, a claim based on a breach of contract does not attract any general damages. (Further see the Court of Appeal in **Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR).** The Plaintiff's submission that the sum of Kshs. 40,000,000/= was on damages caused to the soil on the land by the fire which was set up by Defendant's servants does not either way save the claim. Had the Plaintiff wanted to recover from such she would have pleaded it as special damage claim and proved it. As it stands the claim borders on a consequential loss which the contracts expressly opposed. The claim also fails.

126. The claim for **interest on the loans** taken by the Plaintiff which amounted to Kshs. 15,926,652/= was a special damage claim which ought to have been pleaded in the Plaint so that the Defendant would have been accorded an opportunity to respond thereto. The claim having been brought out by way of final submissions cannot hold and it is for rejection. However, interest on the sums expended by the Plaintiff on behalf of the Defendant in the implementation of contract A and contract B shall accrue interest at court rates from the date of filing of the suit.

127. There was also a **claim on penalty interest on late payment** for the proceeds of the plant crop and the two ratoon crops amounting to

Kshs. 201,615,962/50. The basis of the claim is in **Guideline No. 6(d)** of the **Guidelines for Agreements between Parties in the Sugar Industry** under the Second Schedule of the **Act**. The Schedule had its basis in **Section 29** of the **Act**.

128. The said **Guideline 6(d)** provided that one of the roles of a Miller is to: -

> ***Pay the sugar cane farmer within 30 days of accepting delivery or otherwise pay interest on the sum due or market rates, plus a penalty of 3 per cut per month on late payment.***

129. For the Plaintiff to benefit from the said provision she must have proved that indeed some cane was received by the Defendant and that the Defendant unjustifiably refused or failed to pay for the same. In the case of Contract A and Contract B there is evidence that some cane was harvested and delivered to the Defendant's weigh bridge and tickets issued. According to the Plaintiff a total of 896.26 metric tonnes was delivered to the Defendant. That tonnage realized Kshs. 3,495,414/=. The Defendant contended that the total tonnage realized was 331.36 tonnes which realized Kshs. 1,060,355/40 which amount was less than the sum of Kshs. 1,339,172/23 which the Defendant invested in terms of provision of services and inputs.

130. I have perused the Weigh Bridge Tickets on the cane from Plot A and they reveal a tonnage of around 350 metric tonnes. The said tonnage would, be the rate of Kshs. 3900 per tonne, realize Kshs. 1,365,000/=. According to DW3, the Defendant surveyed Plot A, ploughed, harrowed and supplied cane seed at the total sum of Kshs. 1,498,688/=. There was hence a negative pay of Kshs. 133,688/=. There was hence no penalty interest payable on Contract A under Guideline 6(d).

131. On **Plot B**, according to the Weigh Bridge Tickets a total of around 840 tonnes were delivered to the Defendant by March 2015. The value therefore was Kshs. **3,276,000/=.** According to DW3 the total input costs by the Defendant was Kshs. 2,070,966/= hence leaving a balance of Kshs. 1,205,034/=. The Defendant contended that it had not released the balance to the Plaintiff since the Plaintiff had not signed a Job Completion Certificate.

132. I have already held elsewhere above that the Defendant did not undertake any works on Plot B save surveying and supplying cane seed which services amounted to Kshs. 472, 268/= according to DW3's statement. As also held the Defendant failed to prove the harvesting and transporting charges. The net amount then payable to the Plaintiff on Plot B was **Kshs. 2,803,730/=.** I will deduct the sum of Kshs. 133,688/= being the balance from Contract A thereby bringing the total unpaid sum to **Kshs. 2,670,042/=**.

133. The Defendant's contention that the release of the money to the Plaintiff was as a result of failure by the Plaintiff to execute a Job Completion Certificate does not hold. The Defendant did not state which Certificate the Plaintiff was yet to sign neither was the said Certificate produced before Court. I therefore find that the Defendant had no justification in withholding the sum of Kshs**. 2,670,042/=** due to the Plaintiff and that the said sum shall attract the penalty interest under Guideline 6(d). For avoidance of doubt the penalty interest on the said amount shall be at 3% over and above the normal Court interest and shall run from the date of filing the suit.

134. Having dealt with the four further issues raised by the Plaintiff I must now come to the conclusion of this matter.

Conclusion:

135. As I come to the end of this matter I must apologize for the delay in delivery of this judgment which was caused by factors beyond my control and my involvement in a Multi-Judge bench in Mombasa.

136. Having said so and based on the foregone analysis, judgment for the Plaintiff against the Defendant is hereby entered as follows: -

(a) On Contract A:

i. Value of proceeds of Plant Crop - Kshs. 5,504,000/=

ii. Value of proceeds of 1st Ratoon crop - Kshs. 7,224,000/=

iii. Value of proceed of 2nd Ratoon crop - Kshs. 8,084,000/=

iv. Cost of clearing Plot A - Kshs. 473,000/=

v. Cost of furrowing Plot A - Kshs. 107,500/=

vi. Cost of planting Plot A - Kshs. 301,000/=

vii. Cost of weeding Plot A - Kshs. 2,257,500/=

viii. Cost of gapping Plot A - Kshs. 225,000/=

Sub Total Kshs. 24,176,000/=

(b) On Contract B:

i. Value of proceeds of Plant Crop - Kshs. 3,539,200/=

ii. Value of proceed of 1st Ratoon Crop - Kshs. 4,645,200/=

iii. Value of proceed of 2nd Ratoon Crop - Kshs. 5,198,200/=

iv. Cost of clearing Plot B - Kshs. 305,250/=

v. Cost of Furrowing Plot B - Kshs. 69,375/=

vi. Cost of planting Plot B - Kshs. 196,000/=

vii. Cost of weeding Plot B - Kshs. 1,470,000/=

viii. Cost of gapping Plot B - Kshs. 143,750/=

Sub-Total - **Kshs. 5,423,225/=**

Total (A and B) Kshs. 39,599,225/=

(c) The sums in (a) and (b) above shall attract interest at Court rates from the date of filing of the suit;

(d) The sum of Kshs. 2,670,042/= being the net proceeds of the Plant Crop cane under Contract B delivered to the Defendant and not paid for as required shall attract a further penalty interest at the rate of 3% (three percent) per month from the date of filing of the suit.

(e) Costs of the suit to the Plaintiff.

These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mugoye Counsel instructed by Messrs. Mugoye & Company Advocates for the Plaintiff.

Mr. Marvin Odero Counsel instructed by Messrs. Okong'o Wandago & Company Advocates for the Defendant.

Evelyne Nyauke – Court Assistant.