REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 253 OF 2006

BANABA O. OYUGI.....APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree of the Senior Resident Magistrate A.A. Ingutia in CMCC No. 1521 of 2004 Kisii dated 16th August 2006 and delivered on 19th September 2006)

JUDGMENT

1. Being aggrieved by the decision of the trial court in CMCC No. 1521 of 2004 the appellant preferred this appeal which is based on the following grounds:

i. The learned trial magistrate erred in law and in fact when he failed to find that on the evidence before suit there was on a balance of probabilities, proof that the plaintiff had developed his second ratoon crop as scheduled;

ii. The learned trial magistrate erred in law in dismissing the suit on the erroneous finding that the claim was not specifically pleaded and/or that there were no particulars provided in the plaint, while the pleadings disclosed sufficiently the particulars, and the evidence adduced proved the claim on damages to the required standard;

Alternatively, and without prejudice to the aforestated the learned trial magistrate erred in law in treating the suit as special damage claim and further fell into error when he failed to find that in as much as the evidence disclosed that the breach of the contract caused damage and injury to the appellant, damages were awardable and on the material before it, the court was entitled to assess the same; and

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

2. At the hearing of this appeal the appellant's counsel relied on written submissions dated 15th January, 2018 and supplementary submissions dated on 28th August 2018 in support of the appeal. Counsel further submitted that the trial court had erred in finding that the appellant had failed to plead and prove his case as a special damage claim as the pleadings were sufficiently particularized. He relied on the cases of ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010*** and ***Silvan Ketch vs South Nyanza Co. Ltd HCCA No. 210 of 2001*** in support of this. On quantum, the appellant's counsel submitted that the court did not state the amount it would have awarded had the appellant been successful. Counsel submitted that there was sufficient evidence in the statement of accounts and the evidence arising from the appellant's and respondent's evidence to determine the award payable. He also argued that the appellant had filed his suit on time and urged the court to allow the appeal and assess the quantum of damages payable.

3. The respondent's counsel supported the decision of the trial court and relied on submissions dated 5th July 2018. Regarding pleadings, counsel argued that damages for breach of contract are in the nature of special damages. The appellant was therefore required to state how much he lost as a result of the alleged breach of contract. It was the counsel's submissions that the appellant had not pleaded and proved his claim to the required standard. It was also the respondent's submissions that the time of limitation began to run when the breach occurred and the appellant should not have waited for the contract to lapse before filing his claim. He urged the court to dismiss the appeal and award costs to the respondent.

4. Being a first appellate Court, the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter, bearing in mind that it did not see or hear the witnesses. (See ***Selle & Another. vs. Associated Motor Boat Co. Ltd (1968) EA 123***).

5. The appellant told the trial court that he had entered into a contract in the year 1995 to plant sugarcane on his Plot No. 172 Field No. 3 Account Number xxxxxx measuring 1.2 hectares. The contract was to last for 5 years within which time the cane would be harvested thrice. The first crop was to be harvested after 24 months and the ratoons at 18 months each. He testified that two crop cycles had been harvested

but the 2nd ratoon crop was not harvested and it ended up drying in the field. He further testified that he had been paid Kshs. 200,000/= for the plant crop and Kshs. 87,500 for the 1st ratoon crop. He stated that the price per tonne was Kshs. 2,015/= but that the price had reduced to Kshs. 1,730/=. He produced a copy of the statement for the 1st ratoon crop but testified that he had lost his contract book.

6. The respondent's witness, **Francis Abongo** (DW1), a senior agricultural supervisor for the respondent stated that the farmer had two contracts with the respondent. He stated that the contract in question was in respect of Account Number 430739 and that this contract was dated 7th December 1994 and had been signed in January 1995. According to the respondent's statements, the plant crop's yield was 228 tonnes to 1.2 hectares and the yield for ratoon 1 was 45 tonnes. He stated that there had been a sharp decrease in the crop yield hence the 2nd ratoon crop was neglected. He testified that the price of the cane between 2000 and 2003 was Kshs. 1,730/= per tonne. The maximum ratoon 2 would have yielded was a maximum of 70 tonnes.

7. Having duly considered the record of appeal and the parties' submissions, the main issues arising for determination are:

i. Whether the respondent breached the contract;

ii. Whether the appellant's claim was properly pleaded; and

iii. Whether there was sufficient evidence in support of his claim for the loss of the second ratoon crop.

8. Before addressing the substantive issues set out above, I will first dispense with preliminary question raised by the respondent which is whether the appellant's claim should fail for being time barred.

9. The **Limitation of Actions Act** at **section 4 (1) (a)** provides that actions based on contract are to be brought within six years from the date the cause of action accrued. The cause of action in claims based on contracts will normally arise at that date of the alleged breach of the contract by a party to the contract and not at the end of the contract period. *(See **Joseph Odira Ombok v South Nyanza Sugar Company Ltd Civil Appeal No. 83 of 2018 [2018] eKLR*** and ***South Nyanza Sugar Company Limited v Diskson Aoro Owuor MGR HCCA No. 85 of 2015 [2017] eKLR**)*

10. It was the appellant's case that he entered into a contract with the respondent on 8th September 1995 which was to remain in force for a period of 5 years, during which time the plant crop would be harvested at the ages of 22 to 24 months and the ratoon crops at 16 to 18 months after planting and subsequent harvest. The appellant's cause of action arose by failure of the respondent to harvest the 2nd ratoon crop which should have been harvested on 8th August 2000 if the parties had strictly adhered to their agreement. The appellant's suit was filed on 22nd November 2004 and was therefore well within time.

11. As for whether there was a breach of contract by the respondent, DW 1 testified that the respondent had entered into two contracts with the appellant and the contract in question was dated 7th December 1994. He also claimed that there was a significant drop in yield which led to the abandonment of the 2nd ratoon. He conceded in cross examination that the respondent was supposed to cut the cane 3 times.

12. From these admissions by the respondent's witness, I find that the appellant established that the respondent had acted in breach of the contract when it failed to harvest the 2nd ratoon crop as agreed. Despite being in his possession, DW 1 failed to produce documents to support his claim that the 2nd ratoon crop had deteriorated to a yield that would be uneconomical to harvest. In such circumstances, a court may be entitled to draw an adverse inference from the failure of a party to produce crucial evidence in his possession which I hereby draw and conclude that the documents would probably have had a negative import on the respondent's case.

13. The appellant was also aggrieved by the trial court's findings that he had not properly pleaded his claim. In his plaint the appellant sought judgment against the respondent for

> *"Damages for breach of contract and order that the defendant do compensate the plaintiff for loss off the 2nd ratoon crop on 1.2 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/= per tonne."*

14. In paragraphs 3, 7 and 9 of his plaint, the appellant pleaded the acreage of her plot as 1.2 hectares, he indicated the average produce he expected from the lost crop cycle was 135 tonnes per hectare and also stated that the price at which the cane was selling at the time was Kshs. 1,730/= per tonne. Considering the nature of the acts from which the cause of action arose, I find that the appellant sufficiently pleaded his claim for special damages and the trial court erred in holding otherwise. I rely on the binding decision of the Court of Appeal in ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010***in support of this finding. The court of appeal in the above case found that the appellant, having specified the acreage of the land, the cane proceeds per acre and the price per tonne in his pleadings, the claim for special damages suffered was clear and sufficient enough to be awarded.

15. The respondent relied on the case of ***Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited Civil Appeal No. 189 of 2014 [2016]eKLR*** in support of its argument that special damages arising from breach of contract must not only be specifically pleaded but must also be strictly proved. In ***Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited (supra)*** the relevant issue was whether the appellant had proved its claim for special damages for the cost of damaged electric equipments and losses incurred in the business due to a breach of contract by the respondent. This is distinguishable from present case where the main issue is whether the appellant properly pleaded his case.

16. In proof of his claim, the appellant testified that his plot measured 1.2 hectares and that the price of cane was Kshs. 2,015/= and that it then dropped to Kshs. 1,730/=. DW1 did not dispute the acreage of the appellant's field and also testified that the price of cane between 2000

and 2003 was Kshs. 1,730/=. The appellant testified that the 1st ratoon produced 50 tonnes but did not testify on the yield he expected from the lost crop. DW 1 stated that the 2nd ratoon could have yielded a maximum of 70 tonnes and as such I find that the expected yield for the lost crop was 70 tonnes per hectare.

17. From the foregoing, I find that the appellant proved his claim against the respondent and is entitled to an award of **Kshs. 145,320/=** made up as follows:

1.2 hectares x Kshs. 1,730/= x 1 crop cycle x 70 tonnes

18. This appeal succeeds and the judgment and decree of the trial court is substituted with an award of Kshs. 145,320/=. I award interest on the above sum at court rates from the date of filing suit being 22nd November 2004 to the date the memorandum of appeal was filed that is 20th November 2017. Interest shall then accrue from the date of this judgment until payment in full. The appellant shall have costs for this appeal which I assess at Kshs. 20,000/=.

Dated, **signed** and **delivered** at **Kisii** this **8th day of March 2019.**

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyangacha h/b for Mr. Oduk For the Appellant

Respondent Absent

Rael Court clerk