REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 246 OF 2011

PATROBA ODHIAMBO OGOLA..........................APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree of the Resident Magistrate P.L. Shinyada dated 26th October 2011 in CMCC No. 667 of 2005 Kisii)

JUDGMENT

1. The appellant filed suit against the respondent for failure to harvest one crop cycle of sugar cane in breach of a contract between the parties to grow and sell sugarcane on the appellant's plot number 5B in field number 174 within Kongeso sub location. The trial court found that the appellant had proved his case on a balance of probabilities but dismissed the suit on the grounds that the plaintiff's claim had not been properly pleaded as required by law.

2. This appeal is based on the following grounds :

i. The Learned Trial Magistrate erred in holding that the pleadings in the plaintiff's suit was not in the nature of a special damage claim yet the cause of action sufficiently disclosed the nature of the plaintiff's claim in contract;

ii. The Learned Trial Magistrate failed to appreciate that from the nature and circumstances of the case, the pleadings were sufficient and properly served the purpose and requirement in law of putting the defendant on notice as to what it was expected to meet at the trial;

iii. The Learned Trial Magistrate erred in law in holding that damages were not awardable in the suit, yet she had enough material and proof to enable her make the award and indeed did make an assessment as was required in law;

iv. The Learned Trial Magistrate erred in law in failing to find that the plaintiff's claim was a liquidated claim and / or was for services rendered upon a contract duly proved;

v. The Learned Trial Magistrate erred in law in relying and putting emphasis on style and form rather than substance in the pleadings and thereby arrived at a wrong decision; and

vi. In all circumstances of the case, the defendant did not suffer any prejudice and the Learned Trial Magistrate ought to have awarded the plaintiff the assessed amount, costs and interest.

3. The parties canvassed the appeal by way of written submissions. I have considered them alongside the memorandum of appeal and the record of appeal.

4. It is trite that an appellate court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the trial court proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.*(See**Butt v Khan [1981]KLR 349**)*

5. In ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010***the Court of Appeal restated the principle that a claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity. The court then pointed out that the degree of certainty and particularity with which the damage done ought to be stated and proved, depended on the circumstances and the nature of the act complained of. In that case the Court found that the appellant, having specified the acreage of the land, the cane proceeds per acre and the price per tonne in his pleadings, the claim of special damages suffered was clear and sufficient enough to be awarded. The court found that the fact that damages cannot be assessed with certainty did not relieve the wrongdoer of the necessity of

paying damages for his breach of contract.

6. 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 case is distinguishable from the present one where the main issue is whether the appellant properly pleaded his case.

7. Applying the principle in ***John Richard Okuku Oloo*** *(supra)* I am convinced that the trial court erred in finding that the appellant had not properly pleaded his case. In his plaint at paragraph 3, the appellant set out the particulars of his field and pleaded his claim in paragraphs 8 and 9 as follows:

> *3. By a written agreement dated 28th April, 1995, the defendant contracted the plaintiff to grow and to sell to it sugarcane on his land parcel being plot number 5 B in field number 174, in Kongeso Sublocation measuring 0.6. hectares.*
>
> *8. By reason of the said neglect and breach, the plaintiff lost one (1) crop cycle and suffered loss and damages.*
>
> *9. The plaintiffs plot was capable of producing an average 135 tonnes per hectare and the rate of payment then applicable per tonne was Kshs. 1,730/= and the plaintiff claims as damages.*

8. The appellant then prayed for the following award *inter alia*:

> *(a) Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of one (1) crop on 0.6 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/- per tonne.*

9. From the above pleadings the acreage of the land, the cane proceeds expected per hectare and the price of cane per tonne were clear. The question then is whether the appellant proved his claim against the respondent.

10. At the hearing of this matter, the appellant told the trial court that his agreement with the respondent was to last 5 years during which time the respondent was to harvest the cane thrice. He stated that the 1st harvest was to be done after 2 years and the 1st and 2nd ratoon harvests after 1 year and 4 months. He testified that the plant crop was harvested after 3 years, ratoon 1 after 1 year and 4 months but the last crop was never harvested despite his informing the respondents. He stated that he was to be paid Kshs. 1,730/= per tonne and testified that he was not certain of the average yield in his area.

11. The respondent's field supervisor, **Richard Muok** (DW1) acknowledged that the respondent had contracted the appellant to plant and sell sugarcane on his land for 5 years or until the plant crop and 2 ratoons were harvested whichever period was less. The plant crop was planted and harvested and the farmer realized 62.2 tonnes against 0.6 hectares. He was paid Kshs. 11,477.20/=after deductions. The 1st ratoon realized 14.752 tonnes, this was harvested on the 11/6/2000 and the appellant was paid Kshs. 3,201.45/=. DW1 stated that the ratoon crops would yield 60 tonnes per hectare if they had been well maintained. That the 2nd ratoon was abandoned by the farmers and that Sony invoked clause 5 of the agreement book. Sony did not breach the contract.

12. During cross examination, DW1 told the court that in spite the delay in harvesting the plant crop, the appellant's field had realized 100.37 tonnes hence the average expected yield was 100 tonnes per hectare. He also stated that the price of cane per tonne at the time was Kshs. 1,730/=.

13. The acreage of the appellant's field and price of cane per tonne were not contested. The respondent did not cross appeal on the trial court's finding that it was in breach of the contract by failing to harvest the 2nd ratoon crop. From DW1's evidence the average expected yield for the appellant's field was 100 tonnes per hectare thus I find that the appellant is entitled to an award of **Kshs. 103,800/=** made up as follows:

0.6 hectares x Kshs. 1,730/= x 1 crop cycle x 100 tonnes

14. The judgment and decree of the trial court is therefore set aside and substituted with an award for Kshs. 103,800/=. On interest, this court finds that there was inexcusable delay in prosecuting the appeal which was filed on 22nd November 2011. The respondent should not be made to suffer the appellant's indolence. I award interest at court rates from the date of filing suit being 14 July 2005 to the date the memorandum of appeal was filed that is 22nd November 2011. Interest shall then accrue from the date of this judgment until payment in full.The appellant shall have costs for this appeal at Kshs. 20,000/=.

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

R.E.OUGO

JUDGE

In the presence;

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

Respondent Absent

Rael Court clerk