REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 99 OF 2018

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

JOHN JOWI AYUKA suing as the personal representative

of PASCAL SONYE AYULA (deceased) .....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon.N. S. Lutta, PM dated 19th September 2018 at the Magistrates Court in Kisii in Civil Case No. 55 of 2004*)

JUDGMENT

1. According to the plaint filed in the subordinate court, the respondent filed the claim on behalf of the deceased who had entered into an agreement dated 11th January 1993 with the appellant in which he agreed to grow and sell sugarcane to the appellant on his land parcel being Plot 352A in field No. 68B Kakmasia Sub location measuring 0.529 Ha. He was given account No. 260632. The agreement was to remain in force for a period of 5 years or until one plant crop and two ratoon crops of sugarcane were harvested whichever period would be less. The respondent claimed that in breach of the agreement the appellant failed to harvest the 1st ratoon crop when it was ready and mature. On 6th October 1998, when the 1st ratoon crop was about 43 months old, it caught fire and burnt. The respondent therefore prayed for damages for the 2 ratoon crops at a yield of 135 tonnes per Ha. at a rate of Kshs. 1730 per tonne.

2. In its defence, the appellant denied the claim but it also stated the deceased failed to develop the cane or avail her cane for milling. In the alternative, it stated that the deceased's plot could only have produced a maximum yield of 60 tonnes per Ha. and that the deceased abandoned the cane and left the plot unattended.

3. At the hearing, the plaintiff called two witnesses; John Jowi Ayuka (PW 1) and Kong'o Wagaya (PW 2). The testimony of the two witnesses was not challenged on cross-examination. The appellant called its senior field supervisor, Richard Muok (DW 1). He admitted the contract between the parties and stated that the plant crop was harvested on 17th January 1995 and that the 1st ratoon got burnt at 13 months. He contended that under clause 10(i) of the agreement, the appellant was not bound to purchase burnt cane. He stated that the farmer never developed the 2nd ratoon.

4. The trial magistrate found as a fact that the plant crop was developed and harvested and while the 2nd ratoon was developed it was never harvested. He was of the view that the appellant did not show that the cane got burnt at 13 months. The trial magistrate held that the respondent had proved its case on the balance of probabilities and awarded the respondent damages for the 1st ratoon and exemplary damages for the 2nd ratoon.

5. The appellant filed a rather prolix memorandum of appeal dated 18th October 2018, the appellant complains that the respondent failed to prove its case and that there was no evidence that it developed that cane. He also complained that the trial magistrate wrongly awarded exemplary damages when no damages were even due to the respondent who never developed both ratoon crops. The respondent cross-appealed against the judgment on the basis that the trial magistrate erred in not awarding the damages for the 2nd ratoon when he was entitled to it.

6. The issues raised by the appellant are factual and this court, as the first appellate court, has a duty to re-evaluate and re-assess the evidence adduced before the trial court, keeping in mind that the trial court saw and heard the parties and giving allowance for that, and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

7. The main issue is whether that appellant breached the agreement by failing to harvest the 1st ratoon when it was ready. The respondent produced a report by the Awendo Field Extension Officer dated 10th October 1998 in which he found that, *"Cane was planted on 1996 to be ready for harvest by 1998 January but overstayed for 5 years."* It is noteworthy that the respondent pleaded that the sugarcane got burnt on 2nd October 1998 yet the agricultural officer did not allude to this in his report. This report was not challenged by the appellant. On the part of the appellant, the cane got burnt on 10th March 1996 but its defence was not that the cane got burnt to the extent that it could not harvest it but that it was deceased who failed to develop and or avail cane for milling hence its evidence is inconsistent with its pleading.

8. So the question is, did the respondent prove that the appellant failed to harvest the 1st ratoon within the period of 16 – 18 months after the plant crop? It is admitted that the plant crop was harvested on 17th January 1995 hence the 1st ratoon was due for harvest latest June 1996. By June 1996 there was already breach as such the respondent was entitled to damages for the 1st and 2nd ratoon as this was the consequence of the breach of the contract which contemplated that there would be three harvests.

9. As to whether the trial court could take into account mitigation of damages, I hold that this not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the appellant to show how that respondent could have mitigated the loss (see ***African Highland Produce Limited v Kisorio*** **[1999] LLR 1461 (CAK)**). The appellant did not discharge this burden.

10. The trial magistrate awarded exemplary damages, *"arising out of the opportunity to realise ratoon 2."* This was a misdirection for two reasons. First, the respondent did not pray for exemplary damages. Second, the principles for the award of exemplary damages are well settled and the facts in this case did not fall within those principles. These principles were summarized as follows in ***Godfrey Julius Ndumba Mbogori & Another v Nairobi City County*** **NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR** as follows:

> *[32] The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of* ***Rookes v Barnard [1964] AC 1129*** *where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.*

11. The crop yield per hectare is a question of fact. The trial magistrate held that the respondent's proposal of 135 tons per hectare was unchallenged. This was not a correct appreciation of the facts as there were two contending proposals for consideration. The respondent produced a report titled, *"Cane Productivity Sub-locationwise."* It showed the yield 1995/96 and 1996/97. The appellant produced its own report titled, *"Cane Yield in Outgrowers."* Having looked at the both reports, I would prefer the one produced by the appellant as part of its business as a sugar manufacturer. It is not apparent from the report produced by the respondent who the author was and under what circumstances it was prepared. I therefore accept the appellant's proposal that the yield per Ha. for Kakmasia Sub-location was 48.97 tons.

12. I also hold that damages for breach of contract are calculated on the basis of the principle of *restitution in integrum* which means that the claimant must be put as far as possible in the same position had the breach complained of not occurred. In this case, had the contract been performed in full then the appellant would have made statutory deductions, cost of inputs and services like transport which would be deducted before making payment. The net amount would constitute the actual loss made by the respondent. DW 1 gave evidence to support the harvest charge would be Kshs. 210 per ton, transport would be Kshs. 590 per ton and cess and sugar levy at 1% of the price per ton. He also stated that the cost of inputs would be Kshs. 12, 886.10 for the ratoon.

13. The amount for deductions for both ratoons works out as follows: Kshs. 609 X 0.529Ha X 48.76 X 2 = Kshs. 31,417.14. The total award for the two ratoons less contractual charges and inputs for two ratoons would be as follows: 48.76 tons X 1.529 ha X Kshs. 1730/- X 2 – Kshs. 31,417.15 – Kshs. 25,772.20 = **Kshs. 200,767.64/-**.

14. I allow the appeal to the extent that I set aside the judgment for exemplary damages and allow the cross-appeal and set aside the judgment and substitute it with judgment for the respondent against the appellant for Kshs. 200,767.64. The sum shall accrue interest from 6th October 2010 until payment in full. The respondent shall have costs of the suit in the subordinate court and costs of this appeal assessed at Kshs. 30,000/- exclusive of court fees.

DATED and **DELIVERED** at **KISII** this **20th day of MAY 2019.**

D.S. MAJANJA

JUDGE

Mr Odero instructed by Okong'o Wandago and Company Advocates for the appellant.

Mr Oduk instructed by Oduk and Company Advocates for the respondent.