REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 70 OF 2016

SOUTH NYANZA SUGAR COMPANY LIMITED.... APPELLANT

VERSUS

WILLIAM KENGERE MANDERE............................RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate Hon. J.M. Njoroge dated the 1st day of September, 2016 in Kisii CMCC No. 1310 of 2004)

JUDGMENT

1. The appellant being dissatisfied with the trial court's decision in Civil Case No. 1310 of 2004 has lodged this appeal against that decision based on grounds, which are set out in the memorandum of appeal dated 29th September 2016 as follows;

> a. The learned trial magistrate erred in both law and in fact when he awarded damages for breach of contract in the sum of Kshs. 22,420/= which was an amount well beyond the scope of what had been claimed in the plaint, and which had neither been pleaded nor proved at the trial as is required by law;
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> b. The learned trial magistrate erred in both law and in fact when he awarded compensation based on several crop circles when only one crop circle had been pleaded as having been lost;
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> c. The learned trial magistrate erred in both law and in facts when without evidence and without finding he held that the respondent's lost sugarcane in respect of each circle of crop as he had awarded, on the average yield of 100 tons per hectare, when in actual fact the respondent had pleaded for and claimed less in the plaint;
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> d. The learned trial magistrate erred in both law and in fact when he awarded global compensation to the respondent in respect of crop circles which were never developed by the respondent and therefore never existed at all, thereby failing to take into account a relevant fact and circumstance that the respondent was under a duty to mitigate his/her losses and in failing to apply the principle of mitigation of losses; and
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> e. The learned trial magistrate in the circumstances therefore, and on the main decided the case against the weight of evidence, awarded compensation beyond the scope of the pleadings and contrary to law and known legal principles, thereby exercised his discretion wrongly when he failed to dismiss the respondent's suit in the court below with costs.

2. The appellant's counsel filed written submissions arguing that the trial court should have dismissed the respondent's claim due to the respondent's departure from his pleadings. Counsel contended that the character of the contract which the suit was based on was never proven. He referred to the respondent's testimony where he had testified that the appellant had failed to harvest all three crop cycles yet these issues had not been pleaded in his claim. Further, the respondent had pleaded that he expected 17 tonnes of sugar but led evidence that he expected a yield of 20 tonnes from each crop cycle. Counsel argued that based on the variance of the evidence tendered by the respondent and his pleadings, there was no proof of loss.

3. The appellant also complained that the trial court had computed the amount due to the respondent using an expected yield of 100 tonnes which was not supported by evidence. Counsel urged the court to make a finding that the respondent had not proved his case and in the alternative take into account the respondent's submissions in assessing the award in case the court came to the finding that the claim had been proved.

4. As this is a first appeal, I am mindful of the duty of this court which is to analyse and re-assess the evidence afresh and reach its own conclusion, bearing in that it did not have the benefit of seeing the witnesses testify. *(See **Selle v Associated Motor Boat Company Ltd.***

[1968] EA 123)

5. At the trial court, the respondent and the appellant's witness Richard Muok both adopted their statements as evidence and relied on their lists of documents in support of their claim.

6. The respondent, William Kengere (PW 1) further testified that the acreage of his land was 0.2 hectares and that he was claiming 3 crop cycles for which he expected a yield of 20 tonnes. He testified that in 2004, the plant crop was cut but was never transported by the defendant which led to the loss of the other crop cycles.

7. In his written statement, Richard Muok (DW 2) agreed that the defendant had entered into a contract with the respondent but stated that the agreement was only temporary and was to cover one harvest. He testified that the cane had been harvested and the respondent paid for his cane.

8. The issues arising from the record, the memorandum of appeal as well as the appellant's submissions are;

> a. Whether the respondent proved his case;
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> b. Whether the variance in the respondent's pleadings and his evidence was fatal to his case; and
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> c. Whether the trial court erred in its assessment of the award due to the respondent.

9. The respondent's claim against the appellant was that in the year 2002, he entered into an agreement with the appellant where he was to cultivate sugar cane on his plot number 43, field no. 350 vide account no. 805859. The respondent was required to harvest and transport the cane to the factory upon its maturity but failed to do so occasioning loss to the respondent.

10. The appellant admitted the respondent's assertion that there was an out grower's contract between the parties but claimed that it had duly paid the respondent for the crop. The burden of proving this fact lay on the appellant in line with the principle of law that *one who seeks to assert a fact must prove its existence*. The appellant did not furnish any proof to tilt the balance of probabilities in its favour thereby leading to the trial court to the inevitable conclusion that the appellant did not pay for the crop as claimed by the respondent in breach of contract.

11. In his plaint the respondent pleaded the appellant's breach of contract as follows;

> 4. Pursuant to the said contract/ agreement the plaintiff grew sugarcane on a plot measuring 0.2 Ha and on its maturity asked the defendant to harvest /purchase the said sugarcane as per the agreement but the defendant unreasonably, negligently and or recklessly and in total breach of contract refused to harvest the sugarcane which later got abandoned, damaged and dried up on the farm thereby causing loss to the plaintiff.

12. The appellant contends that the respondent's evidence did not tally with his pleadings and that this departure from his pleadings was fatal to the respondent's case. When he testified the respondent sought compensation for three crop cycles yet his plaint made no mention of the three cycles. The appellant argues that the trial court should have dismissed the claim when it found in favour of its version that the outgrower's contract between the parties was temporary. The appellant relied on the case of **John Ogola Nyanjwa v South Nyanza Sugar Company Ltd [2017] eKLR** in support of this.

13. The question this court is asked to determine is whether the inconsistency between the respondent's pleadings and his evidence was fatal to his case. **Order 2 Rule 6** of the **Civil Procedure Rules** bars a party from departing from what he pleads as follows:-

> "No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit"

14. In **Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others (2014)e KLR** the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) Ltd v. Nigeria Breweries PLC SC 91/2000 on this as follows;

> "…it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded…in fact parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

15. As for whether such a departure was fatal to the claim, the Court of Appeal in ***Simon Muchemi Atako & Another v Gordon Osore NRB CA No. 180 of 2005 [2013]eKLR***, observed thus;

> In our view, the appellants had pleaded their claim with sufficient particularity to enable the respondent understand the case he was to meet. In **Esso Petroleum Company Limited v Southport Corporation [1956] AC 218**, Lord Normand expressed himself as follows on the object of pleadings:
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>> "The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his

evidence to the issue disclosed by them."

> *In* ***Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634***, the respondent's evidence concerning the occurrence of an accident was a departure from its pleadings in the statement of defence and counterclaim. The Supreme Court of Uganda held that the departure from pleadings did not cause a failure of justice to the appellant as the appellant had a fair notice of the case it had to meet and the departure was a mere irregularity not fatal to the case of the respondent whose evidence departed from its pleadings.

16. The guideline to be derived from the above authorities in my view is that a court will not automatically dismiss a claim when the evidence led departs from the pleadings, if the opposing party had fair notice of the case it had to meet. Applying this principle to the current case, it is my considered view that appellant was well informed of the respondent's claim for one crop cycle of cane and went ahead to put up a comprehensive defence to that claim. The trial court was therefore right in finding that the respondent was entitled to one crop cycle.

17. On the question of whether the trial court erred in its assessment of damages, the respondent argued that the court erred in adopting an expected yield of 100 tonnes per hectare as there was no basis for such an estimate.

18. In his pleadings, the respondent stated that he expected 17 tonnes from his plot measuring 0.2 Ha. He testified that he expected 20 tonnes from each crop cycle and that the price per ton at the time was between Kshs. 1,730/= and Kshs. 2,000/=. The appellant on its part denied that the respondent's plot could produce 17 tonnes and pleaded that the price of cane at the time was Kshs. 1,553/= per tonne which amount was subject to deductions. The appellant did not however tender any evidence in support of these figures.

19. The trial court used an estimated yield of 100 tonnes per hectare which was erroneous as there was no proof led to support this finding. The court also erred in making the deductions as no proof had been tendered by the parties on these. I would therefore assess the respondent's award at Kshs.29,410/=made up as follows;

Kshs. 1,730/= per tonne x 17 tonnes x 1 crop cycles = Kshs. 29,410 /=

20. The respondent did not cross-appeal on this point hence the award is left as had been assessed by the trial court.

21. In the end this appeal is dismissed for the reasons given above with costs to the respondent.

Dated, **signed** and **delivered** at Kisii this**7th**day of **June 2019**.

R.E.OUGO

JUDGE

In the presence of;

Appellant Absent

Respondent Absent

Ms. Rael Court clerk