



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 62 OF 2016**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT**

**VERSUS**

**JOASH OTIENO OGADA.....RESPONDENT**

**(Being an appeal from the judgment and decree of Hon. J. Njoroge, SPM dated and delivered on the 1<sup>st</sup> day of September 2016 in Kisii CMCC No. 1138 of 2004)**

**JUDGMENT**

1. The respondent, Joash Otieno Ogada, instituted CMCC No. 1138 of 2004 claiming that the appellant had breached an agreement to grow and sell sugar on his parcel of land measuring 0.3 hectares. The trial court found in favour of the respondent and awarded him a sum of KShs. 56,640/=, plus costs and interest.
2. Being aggrieved by that decision, the appellant lodged this appeal vide a memorandum of appeal dated 29<sup>th</sup> September 2016. The grounds of appeal were argued by his counsel Mr. Odero who took directions to dispose of the appeal by way of oral submissions. Despite being served with the hearing notice, the respondent did not appear when the matter was scheduled for hearing or file submissions in response to the appeal.
3. Mr. Odero stated that the appeal related to the quantum and interest awarded by the trial court in favour of the respondent. Regarding quantum, counsel contended that the trial court had awarded damages for two crop cycles according to the respondent's oral testimony which contradicted his pleadings and the evidence. In his pleadings, the respondent had claimed that the appellant had failed to harvest the 2<sup>nd</sup> ratoon crop but testified that he was seeking compensation for the 1<sup>st</sup> and 2<sup>nd</sup> ratoon.
4. Counsel also faulted the trial court for awarding the respondent 30 tons for two crop cycles notwithstanding the respondent's pleadings and his testimony that his farm would have realised 28 tons of sugarcane. He argued that the trial court had not explained why it had opted to use 100 tons per hectare in the absence of proof of the estimated yield. He relied on the cases of *South Nyanza Sugar Company vs. Mary A. Mwita and another [2018] eKLR* and the case of *South Nyanza Sugar Company vs. Phoebe Atieno [2018] eKLR* in support of his submissions.
5. On interest, counsel contended that the trial court had not specified when the interest would begin accruing. Since the claim was for special damages, he argued that it was proper for the trial court to specify the time from when interest was to start running. He argued that in this case, it would be just and proportionate that interest begin to run from the date of judgment as the respondent had taken 12 years to prosecute the suit.
6. As the first appellate court, this court is duty bound to re-evaluate and re-assess the evidence adduced before the trial court and reach its own conclusion, keeping in mind that the trial court saw and heard the parties and giving due allowance for that. (see *Selle v Associated Motor Boat Co. [1968] E.A. 123*)
7. The respondent adopted his statement and testified that the appellant had only harvested the plant crop but failed to harvest the 1<sup>st</sup> and 2<sup>nd</sup> ratoon crop. The appellant's witness, Richard Muok (DW1), a senior field supervisor under the agriculture department also adopted his statement as his evidence.
8. It is not in dispute that the parties herein entered into an agreement which was to remain in force for five years or until the plant crop and two ratoon crops were harvested whichever period was less. The appellant does not dispute the trial court's finding that there was breach of the contract on its part. What is contested is the trial court's award of quantum.
9. A breach of contract is compensated by way of special damages which must not be specifically pleaded but must also be proved with a degree of certainty and particularity. (See *Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010 [2013]*)

eKLR )

10. This principle was aptly put by the court in *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd Civil Appeal No. 53 of 2015 [2015] Eklr* as follows;

a. 15. *The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see 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). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)).*

11. At paragraph 5 of his amended plaint, the respondent pleaded his loss as follows;

5. *Pursuant to the said contract/agreement the Plaintiff grew sugarcane on a plot measuring 0.3 Ha and on its maturity asked the Defendant to harvest/purchase the said sugarcane as per the agreement but the defendant but unreasonably, negligently and or recklessly and in total breach of the contract refused to harvest, the 2<sup>nd</sup> ratoon which later got abandoned, damaged and dried up on the farm thereby causing loss to the plaintiff.*

12. From the above, it is evident that trial court erred in awarding the respondent compensation for two crop cycles yet he had only claimed compensation for the 2<sup>nd</sup> ratoon crop.

13. The respondent was also required to prove the yield expected from the cane that had been abandoned. In this case, the trial court did not indicate what had influenced its decision to elect a yield of 100 tonnes per hectare. The appellant had pleaded that he expected 28 tonnes of cane from his plot and adopted his statement which claimed the same quantity. He relied on a report made by the Kenya Sugar Research Foundation setting out the appellant's yields within its zone between the years 1993 and 2001 but failed to specify which period was applicable for his expected yield.

14. The appellant's witness on the other hand stated that the cane yields for ratoon crop cycle in Kakmasia sub-location, which is where the appellant's plot was located, was 48.76 tonnes per hectare. Since DW 1 was more knowledgeable in matters concerning cane produce, I am persuaded by his estimate of 48.76 tonnes per hectare for the ratoon crop cycle.

15. The respondent was entitled to compensation for the loss of the 2<sup>nd</sup> ratoon subject to deductions. The respondent admitted that harvest and transport charges were recoverable from his proceeds. DW 1 stated that the harvesting charges were Kshs. 210/= per tonne and the transport charges were Kshs. 399/= per tonne. The respondent is therefore entitled to a sum of Kshs.13, 808.3/= computed as follows;

0.3 Ha x 48.76 tonnes x Kshs. 1553 = 22,717.3

Less

Harvesting charges - 210 x 14.628 = 3,072

Transport charges – 399 x 14.628 = 5,837

16. Ordinarily interest for a claim for special damages will accrue from the date of filing suit. In this case however, the respondent filed his suit on 15<sup>th</sup> September 2004 and judgment rendered on 1<sup>st</sup> September 2016 more than a decade later. In the course of the proceedings, the matter was once dismissed for lack of prosecution. I therefore agree with the appellant's contention that the respondent was lethargic in prosecuting his claim and it would be unjust to penalize the appellant for this. I therefore award interest at court rates from the date of the judgment before the trial court until payment in full.

17. For the foregoing reasons, I allow the appeal in the following terms

a. The judgment of the subordinate court is hereby set aside and substituted with a judgment for Kshs.13, 808.3/= together with interest from 1<sup>st</sup> September 2016 until payment in full.

b. The respondent shall have the costs of the case before the trial court.

c. The appellant shall have the costs of this appeal.

**Dated, signed and delivered at Kisii this 3<sup>rd</sup> day of October 2019.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Wesonga h/b for Mr. Odero for the Appellant**

**Respondent      Absent**

**Rael              Court clerk**