REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 122 OF 2011

DUNCAN AYIEKO ODHIAMBO.....APPELLANT

VERSUS

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

(Appeal from the judgment and decree of the Resident Magistrate P.L. Shinyada dated 25th May 2011 in CMCC No. 715 of 2005 Kisii)

JUDGMENT

1. The appellant and respondent entered into an outgrowers cane agreement on 4th September, 1994. The appellant alleges that the respondent breached that contract which caused the filing of Kisii CMCC No. 715 of 2005. The trial magistrate heard the suit, found it unmerited and dismissed it with costs. The appellant being aggrieved by that decision lodged this appeal in which he has raised the following grounds of appeal;

a. The Learned Trial Magistrate erred in law in faulting the pleadings regarding damages and consequently denying the appellant an award of damages in failing to appreciate that the plaintiff's claim was one of a liquidated demand;

b. The Learned Trial Magistrate erred in law in failing to assess the damages payable had the appellant succeeded in the suit, yet sufficient material was adduced and was available to enable her make an appropriate award; and

c. The Learned Trial judge erred in holding that the plaintiff had not proved his case on a balance of probabilities and in doing so relied on altered and manipulated documents tendered by the defendants which documents had no probative value.

2. When this matter came up for directions, the parties were directed to dispose of the appeal by way of written submissions. The appellant filed skeletal arguments on 20th November, 2017. The respondent did not file any nor did it participate in the appeal.

APPELLANT'S SUBMISSIONS

3. On 3rd July, 2018, Mr. Oduk, counsel for the appellant, relied on his abovementioned skeletal arguments and the submissions filed in the lower court. He proceeded to highlight the same.

4. It was his submission that the contract between the parties was to run for 5 years during which period the respondent was to harvest the sugarcane from the appellant's parcel of land thrice. The plant crop was to be harvested after 24 months, Ratoon 1 crop would be harvested 18 months after and Ratoon 2, 18 months after the harvest of Ratoon 1. The respondent harvested the Plant Crop on 19th June 1995. This meant that Ratoon 1 was to be harvested on 19th December 1996 but was not harvested then. Consequently, the appellant lost the crop when it got burnt by arsonists.

5. Counsel for the appellant refuted the respondent's claim that it had harvested Ratoon 1 on 4th June 1999. He argued that the evidence presented by the respondent would lead to absurd results, as it would mean that the cane was over 48 months when it was harvested. He submitted that what the respondent harvested on 4th June 1999 was the 2nd Ratoon crop and that Ratoon 1 was not harvested as agreed.

6. He argued that the Trial Magistrate did not evaluate the evidence and arrived at a wrong conclusion. He concluded by submitting that if this court found the claim for Ratoon 1 justified, the damages be assessed as set out in his submissions.

7. From the grounds of appeal, the record and the submissions made by the appellant, the following issues arise for determination;

a. Whether the trial court erred in finding that the plaintiff had not proved his case on a balance of probabilities;and

b. Whether the plaintiff specifically pleaded and proved his claim for damages.

8. This being a first appeal, this court is required to, "*reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect." (See* ***Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126****)*

9. When this matter came up for hearing before the trial court, both the appellant and the respondent's witness agreed that there had been an agreement between the parties for the cultivation and harvesting of sugar cane on the appellant's parcel of land plot No. 842; field No. 70 measuring approximately 0.9 hectares. They were both in agreement that the contract was to last for 5 years or until the plant crop and 2 Ratoon crops were harvested or whichever period was less.

10. On his part, the appellant testified that the agreement commenced on 4th September, 1994. He testified that the plant crop was harvested and he was paid Kshs. 210,000/=. As for Ratoon 1, he testified that the respondent failed to harvest it when it was due and that it got burnt in July 1997.

11. DW1, Richard Muok testified for the respondent. He testified that the respondent harvested the plant crop and the two Ratoon crops as agreed. He produced a copy of a Job Completion Certificate and statement proving that the plant crop was harvested on 19th June 1995. He also produced a copy of a Job Completion Certificate and statement proving that Ratoon 1 was harvested on 4th June 1999 more than 48 months after the first harvest. The witness then produced a copy of a statement and a copy of a Job Completion Certificate indicating that Ratoon 2 was harvested on 24th December 2000 and the appellant paid for it. He marked these as exhibits 4 and 5 respectively. On being cross examined, the witness admitted that the copy of the statement, exhibit 4 had been cancelled out by hand and that the plot number originally indicated on the statement was 279e yet the appellant's plot number was 842A.

12. Both parties were in agreement that the plant crop was harvested on 19th June 1995 and the appellant paid for it. What the parties disagree on is whether Ratoon 1 and 2 cane crop were harvested as agreed.

13. For a civil case to be said to have been made out on a balance of probabilities,the facts as set out by the Plaintiff must be more likely than the version presented by the Defendant.On this, Lord Denning in ***Miller vs Minister of Pensions {1947} 2ALL ER 372***held that if the tribunal thinks the evidence more probable than not then the burden is discharged.

14. Turning to the present case, the trial court found that the respondent sufficiently proved that it had adhered to the agreement. It held that if indeed the cane was to be harvested within 18 months, then the respondent had satisfied that requirement. The trial court proceeded to find that the appellant had not proved his case on a balance of probabilities.

15. Looking at the evidence adduced before the trial court, it is clear that the plant crop was harvested on 19th June 1995. It is also not in dispute that the next harvest was done on 4th June 1999, nearly 48 months later.

16. Dw1 testified that what was harvested on 4th June 1999 was Ratoon 1 and that Ratoon 2 was harvested on 24th December 2000. He did not explain the delay between the first harvest and the second one. If indeed the respondent harvested the appellant's cane on 24th December 2000, it was in breach of contract, as by then the time stipulated in the contract had run out. The trial court thus erred in finding that the cane was harvested on time.

17. I am convinced by the appellant's argument that Ratoon 1 was to be harvested 18 months after the harvest of the plant crop and that what was in fact harvested on 4th June 1999 was Ratoon 2. I find it more likely more than not that the respondent failed to compensate the appellant for his 1st Ratoon sugar cane crop and as such hold that the appellant satisfied the burden of proof in that regard.

18. Having found that the respondent was in breach of contract, the issue that remains for determination is whether the appellant was entitled to an award of damages as sought.

19. The trial court found that the appellant had not only failed to specifically plead his claim in law as special damages but had also failed to prove special damages. The appellant on his part submitted that the pleadings related to Ratoon 1 and that this had been specifically pleaded and proved. The appellant fortified this with the case of **John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR Civil Appeal No. 278 of 2010**.

20. In his plaint, the appellant stated as follows;

> *"3. On or about the 4th day of September, 1994, pursuant to its known objectives, the defendant contracted the plaintiff to grow and sell to it sugarcane at his local land parcel being plot number 842 field number 70 measuring* ***1.8 hectares****, Kogelo Sublocation, Migori District.*
>
> *12. The average cane proceeds per hectare was 135 tonnes and the plaintiff's claim against the defendant is for payment of pro-rata tonnes of cane on* ***1.8 hectares*** *at the rate of Kshs. 1,730/- per tonne being the average yield unharvested by the defendant together with punitive damages."*

21. During trial however, the appellant testified that he entered into a contract with the respondent for sugar cane planting on his plot No. 842; field No. 70 measuring approximately 0.9 hectares. Dw1 also testified that the appellant's plot measured 0.9 hectares.

22. This court notes that there is a clear departure between the pleadings and the evidence adduced which offends Order 2 Rule 6 of the Civil Procedure Rules. It is trite that a party may not depart from his pleadings in evidence, to do so the party must first amend his pleadings. This is especially important given that a claim for special damages must be pleaded and specifically proved with a degree of certainty and particularity. This was the position held by the Court of Appeal in **Sande Vs Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)**and reiterated in ***Douglas Odhiambo Apel & Anor Vs Telkom Kenya Ltd CA No.115 of 2006*** where the court rendered itself thus*;*

> *"[A] Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed..."*

23. In **John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd (supra)** the appellate court noted that in paragraph 3 of the Plaint the measurement pleaded was in hectares in whereas at paragraph 12 the proceeds were pleaded in acres. The court referred the matter back to the High Court for calculation using the appropriate conversion rate. The Court of Appeal further held that the fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying damages for his breach of contract. The court further held;

> *"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of."*

24. Guided by above authority, I find that damages as set out in the plaint were quantifiable and specific enough considering the circumstances. The appellant was only able to prove that his parcel of land measured 0.9 hectares. Having already found that the appellant has proved his case on a balance of probabilities, I find that this appeal is merited and accordingly allow it. The orders of the trial court are hereby set aside. I enter judgment for the appellant and award him the sum of Kshs. 210,195/= *made up as follows;*

Kshs. 1,730/= x 135 tones x 0.9 ha x 1 crop cycle = Kshs. 210,195/="

25. The appellant shall have the costs of the appeal and costs of the subordinate court case. Interest shall accrue from the date of this judgment.

Dated, signed and delivered this **14th**day of **November** 2018.

R.E.OUGO

JUDGE

In the presence of;

Appellant	Absent
Respondent	Absent
Mr. Omoyo	Court/clerk