REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 18 OF 2016

BETWEEN

CHINA WUYI COMPANY LIMITED …..……..….. APPELLANT

AND

JOSEPH OTIENO NYAKURE ……..….RESPONDENT

(An appeal from the judgment and decree of Hon. P.K. Rugut Esq. (RM)

in Rongo SRMCC No.24 of 2014 dated 24th March, 2016)

JUDGMENT

1. CHINA WUYI COMPANY LIMITED (the appellant) has contested the decision made in favour of **JOSEPH OTIENO NYAKURE** (the respondent) where the trial court entered judgment in favour of the respondent in the sum of Kshs.1,032,000/= together with costs and interest.

2. The background to this matter begun when the respondent filed suit seeking general, exemplary and private damages plus costs and interest arising from activities involving the appellant company. The respondent and one **GEORGE JUMA NYAKURE** were leasees and properties of Sugarcane standing on plot **No.LR NORTH SAKWA/ KAMASOGA/958** whereas the appellants were engaged in stone/ballast extraction. The complaint was that the appellant in collusion with **ANYANGO ORIYA, RICHARD, MARTHA OKINYI, JULIUS OTIENO ANYANGO** and **EVERLINE ADHIAMBO**, destroyed and removed the respondent's sugarcane resulting in loss of three harvests when the appellant was involved in prospecting and excavating stone in September 2013.

3. It was the respondent's case that the appellant in collusion with the agricultural personnel caused the **AWENDO DIVISIONAL AGRICULTURAL OFFICER** to prepare a Crop Damage Assessment Report which ignored his interests.

4. The Appellant denied liability and pleaded that if any damage to the crops ever occurred then it was through the actions of a Third Party or the respondents. In any event the contention was that the appellant had entered into a lease agreement with the other named individuals and even paid valuable consideration so as to remove the cane from the land and invoke the doctrine of **Non est factum**.

5. The appellant had also pleaded on a without prejudice basis that there was infact no cane standing on the farm capable of destruction at the time of excavation, and they had no prior knowledge of any lease between the respondent and the other persons who were the appellant's co-defendants.

6. At the hearing, the respondent (PW1) informed the trial court that he had entered into a lease

agreement in September 2012 with one **RICHARD ORIA ANYANGO** and he cultivated the land measuring 1 acre and planted sugarcane. The lease which was for three harvests was to last 5 years, and the leased parcel was **NO. CENTRAL SAKWA/**

KAMASOGA/PLOT 958.

7. He cultivated the land and planted seed cane but did not harvest because the crop was destroyed. It was his evidence that he found the appellant's tractor alongside other vehicles, in the field and it was destroying the sugarcane by uprooting it. The appellant had planted the cane with an intention of taking the proceeds to **SONY SUGAR COMPANY** although he did not have a contract with them. He had expected to harvest 90 tons of sugarcane which was selling at Kshs.4300/= per ton. He produced a copy of the agreement dated 9/9/12 to prove the existence of a lease agreement. He had paid Kshs.18000/= for the lease.

8. On cross examination, the respondent explained that he bought seed cane from a seller who did not issue him with a receipt. He then paid for an ox plough and used the oxen to plough the field – drawing a total expense of Kshs.21,000/= but he had no receipts to support this as in the village receipts have never been issued to a buyers. He also confirmed that he did not report the destruction of his cane to the police but he reported to the area chief.

9. When a crop damage report was prepared by the agricultural officer, the appellant realized that his interest was not included.

10. PW2 GEYA JUMA NYAZAZE confirmed that the respondent had planted sugarcane on plot No.958 and that at the time of destruction it was 13 months old. He also presented the price list from SONY to bolster the claim of Kshs.4300/= per ton.

11. The defence closed its case without calling any witness since its witness had travelled to China for 2 months.

12. The trial magistrate in her judgment was satisfied that from the agreement dated 19/09/2012, the respondent had entered into a 5 year lease agreement and there was evidence that he had planted sugar cane thereon which was subsequently destroyed by the appellant who was excavating for stones.

13. She pointed out that the appellant had a duty to exercise due diligence and check on the status of the land before embarking on excavation and it cannot be absolved from liability

14. The trial magistrate relied on the price list produced as **Exhibit 6** which she noted was not challenged to find that the respondent has proved the sum payable per acre per tonnage. She however held that the respondent could have realized 8 tons per hectare for the 3 cycles and worked it out as follows:-

1 hectare x 80 tons of cane per hectare x Kshs.4300/= per ton x 3 cycles = 1,032,000/=.

15. This decision is challenged on grounds that the trial magistrate failed to appreciate the facts in the appellant's defence and the set of documents relied on. Further that the trial magistrate shifted the burden of proof and there was a complete remoteness of damage as between the appellant and the respondent.

16. The appellant also contended that even if the appellant was found liable she ought to have apportioned liability as between the appellant's co-defendants who had failed to enter defence. The appellant stated that in failing to apportion liability, the trial magistrate removed herself from the position of an impartial arbiter.

17. The appeal was canvassed by way of written submissions, the appellant's counsel submitted that the respondent did not specifically plead the amount of damages he was claiming and this violated the provisions of **Order 4 Rules 2** and **6** of the **Civil Procedure Rules 2010** that:-

"Where the plaintiff seeks the recovery of money the plaint shall state the precise amount claimed.

(b) Every plaint shall state specifically reliefs which the plaintiff claims either specifically or in the alternative."

18. Counsel also poked holes at the evidence presented before the trial court to the effect that crops were in the field saying –

1. No such crops assessment report was produced.

2. The agricultural officer who allegedly prepared a crop damage report was never called to testify.

3. No particulars of damage were set out in the pleadings and none was demonstrated by the Respondent.

4. Particulars of destruction or removal of sugar cane was not pleaded.

19. It is on this basis that the appellant's counsel contends that there was no basis for making a finding in favour of the respondent.

20. It is also argued that although the respondent made reference to an assessment of crop damage by an agricultural officer which fixed some figures, he was never given the cost nor was not produced in court.

21. Mr. Mudeyi submitted that what the respondent purported to produce was a strange document which he never sanctioned and did not relate to his plot specifically but an attempted generalization of the farm or area.

22. It was also argued that the report sought to be relied on by the Kenya Sugar Research specifically stated that the mean yield of the various varieties grown in the region range from 8.00 to 9.5 tons per hectare. Mr. Mudeyi contends that such yield could not have been achieved using the rudimentary crop husbandry employed by the respondent, and the trial magistrate just speculated that the respondent had met the conditions. As a result there were no special circumstances to warrant the respondent's claim being assessed on a different standard of proof other than the principles set for special damages.

23. Counsel relied on the decision of **JIVANJ –VS- SANYA ELECTRONIC COMPANY LIMITED CA NO.225 OF 2001** which emphasized that special damages must first be pleaded and strictly proved.

24. Mr. Mudeyi also faulted the trial magistrate for failing to give reasons for her decision or even an explanation as to why despite an interlocutory judgment having been entered against the other defendants – the final decision made no mention of them saying that at worst, liability should have been apportioned among the defendants.

25. In opposing the appeal, Mr. Odhiambo Kanyangi submitted on behalf of the respondent that the respondent proved his claim on a balance of probabilities and his evidence was corroborated by PW2.

26. Counsel urged the court to believe the respondent's testimony, saying he gave an account of how he engaged local labour to plant the cane and he went to the plot and found the applicant's agents uprooting and destroying the cane. Mr. Odhiambo Kanyangi defended the documents the respondent relied on, saying **Exhibit 4 & 5** were reports prepared by the Kenya Sugar Research Foundation based at Opapo showing the sugarcane yield within the South Nyanza Region. Further that **Exhibit 5** clearly showed the prevailing price of sugarcane per ton in relation to the nearest Milling Factory.

27. It was argued that the appellant did not offer any evidence to disprove the evidence tendered by the respondent who had lost his sugarcane and the expected income.

28. As to whether the respondent should have quantified the loss as a special damage claim, Mr. Kanyangi referred to the decision in **JOHN RICHARD OKUKU OLOO –VS- SOUTH NYANZA SUGAR COMPANY LIMITED KISUMU CA NO.278 OF 2010** where the Court of Appeal did not follow the case of **JIVANJI** and took the position that as long as the evidence on the number of cycles of sugar cane claimed times the estimated tonnage per hectare is proved times the relevant price of sugar cane times the area of the plot is disclosed, then that is sufficient evidence to establish a claim for loss of value of the cane. He cited **JOHN RICHARD OKUKU** case (supra) that –

> **"… there is no obligation on a trial judge who is in possession of all the material facts to enable him make a fair assessment of all the damages to order an inquiry in that regard thereto."**

29. As to the non apportionment of liability Mr. Kanyangi submitted that the respondent had prayed for judgment against the defendants jointly and severally, and the judgment was rightly directed at the appellant.

30. The agreement dated 14th June 2011 which the respondent relied on was really a sub-lease from **ANYANGO ORIA RICHARD** who had leased the land from **BOAZ ONYANGO ORONDO**. Thereafter **RICHARD ORIYA** sub-leased the parcel to the respondent by a document dated 19/9/2012.

31. However on 29/09/2013, the said **RICHARD** was among those who entered in an agreement allowing the appellant to use that land for purposes of excavation. How then was the appellant to know that there was a sub-leaser where the agreement described **RICHARD** as being among the registered proprietor, beneficial owners and occupants of the parcel within **AWENDO** area known as Kamasoga/958? Even if the appellant had exercised due diligence and conducted a search at the Land Registry; it would not have disclosed the winding arrangement made transcending **BOAZ ONYANGO ORONDO, GEORGE JUMA NYAKUNE, ANYANGO ORIA RICHARD** and cascading down to the respondent.

32. The agreement between the appellant and the 2nd defendant infact provided for compensation to be paid by the appellant for any crops and trees growing on the land, the inconvenience caused by the excavation such as vibration, dust, loose flying rocks material and any conceivable damage to the land. There was no evidence presented to confirm that information had been given to the appellant to the effect that the crops belonged to a third party other than the one who was leasing out the land. That is why the appellant argued that whatever compensation was due had been paid to the persons it had contracted with - certainly the appellant had no privity of contract with the respondent.

33. Was there evidence that there were crops in the field? What was their value?

There was no evidence that the respondent's cane (if it was in the field) was ever assessed by an agricultural officer and I concur with Mr. Mudeyi that what the respondent sought to rely on was a **"strange document"** (totally unrelated to his claim) – from the Ministry of Agriculture, Livestock and Fisheries with the title **CROP DAMAGE ASSESSMENT** dated 25th October, 2013 relating to damage caused by the grader to the sugarcane on plot No. KAMASOGA/958 measuring 4 hectares in respect to the family of the late ANYANGO ALOMA and listing among others the 4 defendants who were named as the owners of the farm or crop. As far as any rational approach goes – the respondent is a stranger to this document and cannot adopt the figures relied on in assessment to make his claim. In any case the maker of this document did not even testify in court.

34. Admittedly in the moral setting, using rudimentary farming methods as those described by the respondent, it would be the odd situation to find receipts being issued. However nothing could have been easier than for him to call the labourers, the owners of the plough to confirm what he claimed regarding his expenditures. I also take judicial notice that even with the three crops cycle for sugar cane – the amount realized in the first crop, can never be the same quantity for the 1st and 2nd ratoon – it diminishes and so would the price. The trial magistrate erred in adopting a constant figure.

35. As regards special damages being specifically pleaded and the two cases cited by both counsel, I will

say this – Did the respondent present to the trial court all the material facts as contemplated by the **JOHN RICHARD OKUKU OLOO CASE** (supra) – I think not. I have already pointed out the gaps in what was relied on to prove tonnage, and price. In my opinion the conditions were not met.

36. The trial court had already entered interlocutory judgment against the other four defendants, yet the final judgment was only against the 1st defendant – why? Mr Kanyangi says the prayer on judgment to be entered jointly and severally – which would mean that liability may be apportioned either among the parties or only one of the parties or that each liable party is individually responsible. The trial magistrate did not specify whether judgment was jointly and severally.

37. In any event no reason was given as to why judgment was not entered against the other four and this was prejudicial to the appellant. Why would the appellant be directed to pay the respondent what it had already paid in other matter? This is double jeopardy.

38. The upshot is that the appeal has merit and is allowed. The judgment entered herein be and is hereby set aside. The appeal is allowed with costs to the appellant.

Written and dated this 15th day of February, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 15th day of February, 2017 at Migori

A.C. MRIMA

JUDGE