



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**CIVIL APPEAL NO. 36 OF 2016**

**JOSEPH AKECH NUNDU.....APPELLANT**

**-VERSUS-**

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

***(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Rongo Principal Magistrate's Civil Suit No. 18 of 2014 delivered on 24/05/2016).***

**JUDGMENT**

1. This is an appeal against the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 24/05/2016. By a Growers Cane Farming and Supply Contract dated 15/06/2008 (hereinafter referred to as '**the Contract**') the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD**, contracted the Appellant herein **JOSEPH AKECH NUNDU**, to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 1456 measuring 0.7 Hectares in Field No. 29D Kakmasia in Migori County. Clause 2(a) of the Contract however indicated that the contract was deemed to have commenced on 17/12/2007.
2. The Contract was for a period of five years or until one plant crop and two ratoons of the sugarcane were harvested from the subject parcel of land whichever event occurred first.
3. By a Complaint dated 10/09/2014 and filed on 13/11/2014, the Appellant claimed for damages for breach of the Contract against the Respondent for failure to harvest the cane at maturity, costs and interest at court rates. The Appellant particularized the loss he suffered from the expected crop yields at a total of Kshs. 708,750/=.
4. The Respondent filed a Statement of Defence dated 16/02/2015 denying the claim and on a without prejudice averred that if at all the Appellant suffered any loss then the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard so as to warrant the crop to be harvested and milled by the Respondent.
5. The suit was fully heard where both parties were represented by Counsels. The Appellant was the sole witness and adopted his Statement and List of Documents as part of his evidence. The Respondent called one witness who was its Senior Field Supervisor and thereafter the trial court delivered the judgment upon the parties filing their respective submissions. The court was not convinced that the Appellant had proved his case in law and the suit was dismissed with costs.
6. That was the judgment that necessitated the Appellant to file the appeal subject of this judgment.
7. The Appellant proposed six grounds of appeal in the Memorandum of Appeal dated 23/06/2016 and

evenly filed in Court. The grounds were tailored as under:

- 1. The learned trial magistrates erred in law in finding that the plaintiff's sugarcane crop was not maintained as required on suspect, insufficient or no evidence or at all.**
- 2. The learned trial magistrate erred in law in calling for “documentary proof” of development of the sugar cane crop on the appellant's farm, whereas farming/husbandry in essence is not a documented undertaking and the finding was in effect unreasonable and erroneous.**
- 3. The learned trial magistrate erred in law in failing to find that the damage to plant crop through neglect of necessity means that no subsequent crops is likely to redevelop and the trial magistrate exhibited a serious lack of knowledge of the subject at hand, and grossly misdirected himself.**
- 4. The learned trial magistrate erred in failing to take into account that under the contract, the Respondent was obligated to develop the sugar cane in case the appellant failed to do so, and charge it to the appellant, and the respondent could not therefore absolve itself from responsibility.**
- 5. The learned trial magistrate erred in law in treating the “warning as a notice under the contract and failed to further find that there was no evidence of the said warning or notice having been served as provided so as to afford the defendant a defence to the claim.**
- 6. The trial magistrate erred by failing to assess damages as may have been awarded.”**

8. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions. In his submissions the Appellant argued grounds 1 and 2 together and each of the rest separately. The main ground in the appeal is in essence the Appellant's contention that the dismissal of the suit was not founded in law since the Respondent did not prove that the Appellant was in breach of the contract by not maintaining the crop as expected and for want of such evidence. The Appellant relied on the decisions of **Martin Akama Lango vs. South Nyanza Sugar Co. Ltd High Court Civil Appeal No. 20 of 2000 (UR)** and **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR** in support of the appeal.

9. The Respondent supported the trial court's decision. In taking this Court through the evidence as adduced, the Respondent submitted that the failure of the Appellant to maintain the crops was proved. It further submitted on the expected yield if at all the appeal was to succeed and urged the Court to be guided by the estimates provided by the Respondent instead.

10. As the first appellate Court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**.

11. I have carefully and keenly read and understood the proceedings and the judgment of the trial court as well as the grounds and the parties' submissions on appeal. I will first deal with the elephant in the room which is whether or not the Appellant breached the contract by not maintaining the crops as expected. The Respondent properly so pleaded the breach in its pleading. Pursuant to **Section 107** and **Section 109** of the **Evidence Act**, Chapter 80 of the Laws of Kenya, the Respondent was then under a duty to prove such a defence. In so doing the Respondent's witness stated that he was the Respondent's Senior Field Supervisor and knew all farms which had been contracted by the Respondent and was under a duty and indeed visited them regularly. That in so visiting the Appellant's farm, the Respondent's witness found out that the Appellant had failed to weed the main crop, failed to protect animals from grazing into the farm

and also failed to maintain clear boundaries. The Respondent then issued the warning letter dated 01/01/2009 which was produced in evidence and stated that the letter did not however vitiate the contract.

12. The Appellant vehemently denied receipt of the warning letter as well as the truthfulness of its contents. He also denied that he was ever in breach of the contract either a alleged or otherwise and maintained that it was the Respondent which was in breach of the contract by failing to harvest the main crop when it was ready and moreso despite being so notified. On the issue of receipt of the letter the Appellant referred to **Clause 9 of the Contract** and argued that the Respondent had failed to prove that the warning letter was ever served as required under the contract or at all. **Clause 9** of the contract states as follows:

***"Any notice or demand by the Miller under this agreement shall be deemed to have been properly served upon the Grower if delivered to the Provincial Administration for onward transmission to the Grower or delivery by hand or sent by registered post or facsimile at the address of the Grower shown in this agreement. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by registered post at 10 a.m. Seven (7) days following the date of posting (notwithstanding that it is returned undelivered) or if sent by facsimile on the completion of transmission. Where the notice or demand is sent by registered post it will be sufficient to prove that the notice or demand was properly addressed."***

13. I have carefully gone through the record but did not find any evidence of service of the warning letter as required under the said Clause 9. It will therefore be without any basis for this Court to assume that service of the warning letter was effected on the Appellant. I therefore decline the Respondent's contention that it served the warning letter upon the Appellant after visiting his farm. Even if the letter would have been served pursuant to the said Clause 9, it was still the Respondent's evidence that the letter did not vitiate the contract. That therefore means that the contract would still run and the Respondent would have been obliged to invoke say **Clause 6.2** of the contract to salvage the crop. The said Clause 6.2 states as follows:

***"The Miller shall be entitled to upon expiry of a fourteen day notice and at its own discretion and without relieving the Grower of the obligations under this agreement, in the event that the Grower does not prepare, plant and maintain the plot and the cane in accordance with his obligations under this agreement and / or instructions and advise issued by the Miller to (but not limited to) carry out such operations on the plot which the Miller shall in its sole discretion deem necessary to ensure satisfactory yield and quality."***

14. From the foregone and looking at the wording of the warning letter it is apparent that the letter was at variance and inconsistent with the contract. I say so because the letter stated that the Appellant was in breach of the contract and called him to indicate how he was intending to clear the bills for the services rendered by the Respondent whereas the contract gave room to the Respondent to intervene and salvage the crop in such circumstances. The letter therefore even if it was found to have been properly served as required could not be used to oust clear provisions of the contract and that letter on its own could not have made a court to find that the Appellant was in breach of the contract. The Respondent ought to have adduced further and better evidence in pursuit of its defence.

15. Further the letter had incorrect information and one wonders if at all the same was authored as alleged or was so done for the purposes of the defence case. A case at hand is the information that the crop was only 4 months when the letter was issued on 01/01/2009. It is not in dispute that the contract commenced on 17/12/2007 and by the time the letter was authored the crop was well over 12 months and not 4 months. The upshot is that Respondent failed to prove that the Appellant was in breach of the contract as alleged or otherwise. With tremendous respect therefore the learned trial magistrate erred in finding that the Appellant was in breach of the contract. On the other hand there is evidence on the preponderance of probability that the Respondent was in breach of the contract in failing to harvest the main crop when it matured and as such the Appellant's suit ought to have succeeded.

16. But before I look at the remedies available to the successful Appellant I wish to also point out that the learned magistrate again fell into error in failing to assess damages even after dismissing the Appellant's claim. It was incumbent upon the judicial officer to assess such damages that would have been awarded had the suit succeeded.

17. Having found that the Appellant was entitled to judgment, the remedy available to him from the breach of contract is what the Appellant would have reasonably received as the proceeds under the contract crystallized as special damages and not damages at large or general damages. (See the Court of Appeal case of **Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR)**). In this case the contract provided a period of 5 years or until one plant crop and two ratoons of sugar cane were harvested from the subject land whichever event occurred first. Further the contract under **Clause 1(f)** indicated that the plant crop was expected not later than 24 months from planting whereas the first ratoon crop was expected not later than 22 months after harvesting the first crop and the second ratoon crop was expected not later than 22 months after harvesting the first ratoon crop.

18. The above being the prevailing position in law, I am alive to the truism that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity. I however concur with the qualification made by the Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR** that:

*"...the degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.*

*In the Jivanji case (supra) a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v. Murunga & others Nairobi CA NO. 192 of 1992 (ur) appears in the Jivanji case.*

*"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v. Nakaye [1972]ea 446, Ouma v. Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v. Chebon Civil Appeal Number 22 of 1991 (ur). In the latest case, Cockor JA who dealt with the issue of special damages said in his judgment:*

*"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v. Nairobi City Council [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532 - 533 in Ratcliffe v. Evans [1892]QB 524, an English leading case of pleading and proof of damage.*

*"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damages is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."*

19. The Court of Appeal in the case of **J. Friedman v. Njoro Industries (1954) 21 EACA 172** observed that:-

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

20. In expounding further the foregone the Court in the case of **John Richard Okuku Oloo** (supra) stated

that:

***"It was held by the Court of Appeal in England in the case of Chaplin Hicks [1911]KB 786 that the existence of a contingency which is depended on the volition of a third person does not necessary render the damages of a breach of contract incapable of assessment.***

***The following passage appears in the judgment of Vaughan Williams, LJ in the Chaplin case:***

*"Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it was possible to apply the doctrine of averages at all; I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however, that damages might be so unassessable that the doctrine for averages would be inapplicable because the necessary figures for working upon would not be forthcoming; there are several decisions, which I need not deal with, to that effect. I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages."*

***Vaughan Williams, LJ goes on to state, and we fully agree, that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.***

21. Turning to the way the Appellant tailored his pleading, **paragraph 7** of the Plaintiff stated as follows:

***"7. In breach of the aforestated contract, the defendant neglected to harvest either the plant crop or the 1st and 2nd ratoon crops when the same was mature and ready for harvesting in time, leaving the crop to go to waste, causing the plaintiff to suffer loss and damage."***

22. I am therefore of the very considered view that the special damages in this case were specifically and properly pleaded. As to the proof of the special damages the Appellant worked out the estimated crop yield at 135 tonnes at the rate of Kshs. 2,500/= per tonne for all the three cycles. The Respondent on the other hand submitted that the average yields in Kakmasia was 66.56 tonnes per hectare for the main crop and 48.76 tonnes per hectare for the ratoon crops and that was attainable upon applying good husbandry unlike in the case of the Appellant who did not use any fertilizer or urea. It called for adoption of even a lower expected crop yield. The Respondent's proposal was based on some estimates it developed whereas the Appellant did not lay any basis on his proposal of 135 tonnes per hectare. I have also come across in the record a guide developed by the now defunct **Kenya Sugar Research Foundation** in 2008 on the estimated yields. The guide gives an estimate of 80 tonnes per hectare but only if all the conditions of development from land preparation to harvesting and delivery to the factory were met. That may explain why the Respondent came up with its own estimates which are lower than the estimates provided for in the guide.

23. It is not in dispute that the Appellant did not meet all the conditions of development from land preparation to harvesting and delivery to the factory. He admitted that he did not use either fertilizer or urea. That therefore compromised the yields and could not get the expected yields under the guide. It is on the foregone basis that I find the estimates developed by the Respondent as reasonable in the circumstances of this particular case. I will therefore adopt the same in computing the proceeds the Appellant stood to get from the contract. It is also not in dispute that the Respondent would have deducted all its inputs and services and pay the Appellant the balance. The Respondent tabulated all the inputs and services in its written submissions before the trial court which I find as reasonable and within the contract.

24. In view of the Respondent's computation, the Appellant would have earned a net of Kshs. 49,693.78 for the plant crop and Kshs. 41,441.00 from the first ratoon crop and a further Kshs. 41,441.00 from the second ratoon crop. The total would be **Kshs. 132,575.78** which amount I hereby allow against the Respondent. This sum shall attract interest from the date of filing of the suit.

25. Following the foregone discourse, the upshot is that the following final orders do hereby issue:-

- a) **The appeal hereby succeeds and the finding of the learned magistrate dismissing Rongo Principal Magistrate's Civil Suit No. 18 of 2014 be and is hereby set - aside accordingly;**
- b) **Judgment is hereby entered for the Appellant as against the Respondent for special damages at Kshs. Kshs. 132,575.78;**
- c) **The sum of Kshs. 132,575.78 shall attract interest at court rates from the date of filing of the suit;**
- d) **The Appellant shall have costs of the suit as well as costs of the appeal.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 14<sup>th</sup> day of February 2017.**

**A. C. MRIMA**

**JUDGE**