REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

CIVIL APPEAL NO. 83 OF 2015

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

-VERSUS-

DICKSON AORO OWUOR.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. L. K.

Sindani Resident Magistrate in Migori Chief Magistrate's

Civil Suit No. 150 of 2013 delivered on 25/03/2015).

JUDGMENT

1. By a Growers Cane Farming and Supply Contract dated 14/11/2007 (hereinafter referred to as **'the Contract'**) the Appellant herein, **SOUTH NYANZA SUGAR CO. LTD,** contracted the Respondent herein **DICKSON AORO OWUOR,** to grow and sell to it sugarcane at the Respondent's parcel of land being Plot No. 1075A measuring 0.4 Hectares in Field No. 106C Kakmasia in Migori County. Clause 2(a) of the Contract however indicated that the contract was deemed to have commenced on 24/08/2007.

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 occured first.

3. By a Plaint dated 30/08/2013 and filed on 03/09/2013 **in Migori Chief Magistrate's Court Civil Suit No. 150 of 2013 (**hereinafter referred to as **'the suit'**), the Respondent claimed for damages for breach of the Contract against the Appellant for failure to harvest the cane at maturity, costs and interest at court rates. The Respondent particularized the loss he suffered from the expected crop yields in the plaint.

4. The Appellant filed an evenly dated Statement of Defence on 08/10/2013 in which the Appellant denied ever failing to harvest the crops as expected and further averred that if at all there was any breach on its part then that breach was caused by extreme bad weather which damaged the road networks and that was beyond its control and hence it cannot be held liable. It is also contended that when the weather conditions improved the Appellant visited the Respondent's farm to assess the quality of the yield with a view to harvesting the same but it was surprised to discover that the Respondent had illegally cut and alienated the cane. The Appellant then prayed for the dismissal of the suit.

5. The suit was fully heard where both parties were represented by Counsels. The Appellant called its sole witness and the Respondent called two witnesses. The trial court then delivered its judgment where it allowed the Respondent's claim and accordingly awarded special damages together with costs and

interests.

6. That was the judgment that necessitated the Appellant to file the appeal subject of this judgment.

7. The Appellant proposed eight grounds of appeal in the Memorandum of Appeal dated 16/04/2015 and filed in Court on 17/04/2016. The grounds were tailored as under:

> *1.* ***The Learned Magistrate erred in fact and in law failing to consider relevant evidence, in importing evidence into the proceedings and in misconstruing the evidence before him and in failing to consider the evidence in its entirety.***
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> *2.* ***The Learned Magistrate erred in law and in fact in failing to find that the Plaintiff had not proved his case on a balance of probability as required by law.***
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> *3.* ***The Learned Magistrate erred in law and fact in failing to find that the plaintiff's claim was statute barred since the agreement which gave rise to the cause of action was dated 29th August 2007 and the cause of action in he suit arose 24 months after the said date when the defendant failed to harvest the plant crop that being August 2009 a fact which was confirmed by the plaintiff in evidence.***
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> *4.* ***The Learned Magistrate erred in law and in fact in failing to find that the plaintiff had breached the contract by failing to employ a farm manager for purposes of managing the farm and coordinating with the miller, the plaintiff without permission or written consent from the miller parted with possession of the cane and the plaintiff failed to produce any records to confirm that indeed he took good care of the cane as directed by the defendant.***
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> *5.* ***The Learned trial Magistrate erred in law and in fact in finding that the plaintiff was entitled to maximum yield yet the plaintiff failed to prove that he took good care of the sugar cane and followed the directions of good agricultural husbandry to entitle him to a maximum yield as awarded by court.***
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> *6.* ***The Learned trial Magistrate erred in law and in fact in failing to appreciate that the plaintiff failed to prove that there was cane on his farm in the year 2009 when the said plant crop was to be harvest neither did the plaintiff go to court to seek for orders to compel the defendant to harvest the said cane when they were due for harvest.***
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> *7.* ***The Learned Magistrate erred in law and in fact if awarding costs of the suit to the plaintiff yet the plaintiff failed to prove that he had served the defendant with a demand notice and notice of intention to sue.***
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> *8.* ***The Learned Trial Magistrate erred in law and in fact in relying on the evidence of PW2 a witness who failed to produce any documents to confirm his qualifications as an expert***."

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 its submissions the Appellant condensed the above grounds into mainly two grounds being that the suit was not proved as enquired in law and that even if the same was so proved the court erred in the assessment of damages by not taking into account the fact that the Respondent had failed to mitigate his loss. The Appellant relied on the decision of **African Highland Product Limited vs. Kisorio (2001)172** in support of the appeal.

9. The Respondent supported the trial court's decision. He argued that he had proved his case in law and relied on the Court of Appeal decision of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR** among other persuasive decisions. He prayed that the appeal be dismissed with costs.

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 ground on whether or not the Respondent proved his case as required in law.

12. The starting point is the parties' pleadings. The Respondent's suit placed bare the cause of action as having arose out of an alleged breach of contract for failure by the Appellant to harvest the cane as and when it was ready to be harvested. The Appellant by its Statement of Defence admitted the fact that the Respondent had entered into the Contract with the Appellant but it specifically and categorically denied being in breach of the Contract. As reiterated elsewhere above the Appellant went further and averred that if at all there was any breach on its part then that breach was caused by extreme bad weather which damaged the road networks and that was beyond its control and hence it cannot be held liable. It is also contended that when the weather conditions improved the Appellant visited the Respondent's farm to assess the quality of the yield with a view to harvesting the same but it was surprised to discover that the Respondent had illegally cut and alienated the cane. At this point in time I am reminded of the binding decision of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281** that a defendant must raise by his pleadings all matters which show the suit not to be maintainable.

13. Pleadings aside, I will now turn to the evidence as adduced before the trial court. The Respondent testified and called a witness. In his testimony he stated that he was a contracted farmer and had entered into the contract with the Appellant. That issue was readily admitted by the Appellant. The Respondent went further and referred to and as well produced the contract document. The Respondent further admitted that indeed the Appellant had supplied him with cane seeds, fertilizers and had even surveyed his land, It was the Respondent's further evidence that when the cane matured the Appellant failed, ignored and refused to harvest it despite numerous calls for such and moreso that the Appellant had its officers on the ground who never bothered to have the cane harvested. He called a retired Agricultural Extension Officer who had visited the farm on 25/09/2010, carried an assessment thereon and filed a report which was produced in evidence. The Respondent then prayed for compensation in terms of what he would have earned out of the contract. According to the Respondent's witness, the farm could have yielded 47 tonnes for the plant crop, 39 tonnes for the first ratoon crop and 30 tonnes for the second ratoon crop.

14. The Appellant availed one witness **(DW1)** who confirmed the existing of the contract and the fact that the Appellant had surveyed the farm and supplied the Respondent with fertilizers whose total cost was to be deducted from the value of the harvested cane. The Appellant however contended that the Respondent instead of waiting for the Appellant to harvest the cane he hurriedly disposed it off to a third party so as to avoid repaying the costs of services provided by the Appellant. In so doing the Appellant contended that it was the Respondent who instead breached the contract. The Appellant only managed to salvage 15.85 tonnes of cane whose cost was Kshs. 49,578/80 and that the Respondent had a balance of Kshs. 84,458/95 to clear.

15. DW1 further stated that according to the Appellant the best yields the Respondent's crop could have fetched was 66.67 tonnes for the plant crop and 48.76 tonnes for the ratoons and that by 2010 the cost of one tonne was Kshs. 3,128/=.

16. On cross-examination DW1 admitted that the Appellant salvaged the crop one year post the harvest time and that they managed to get the 15.85 tonnes.

17. I have considered the Respondent's case in totality. A look at the pleadings reveal that the Respondent was consistent on its pleadings which were supported by the oral evidence of the Respondent and the Extension Officer. The exhibits in support of the Respondent's case left no doubt that the Respondent

successfully proved that the contract had been breached by the Appellant as pleaded and proved.

18. On the other hand the Appellant did not tender any evidence in support of the allegation that the breach of the contract was occasioned by extreme weather conditions that caused the collapse of the road network hence making it impossible to access the Respondent's farm either as alleged or otherwise.

19. As to whether the Respondent alienated the cane to a third party as alleged in the Defence, the evidence of DW1 fell short of such proof. DW1 confirmed that the Appellant went to harvest the cane one after its maturity and even by then managed to secure as much as 15.85 tonnes. No evidence went on to prove the allegation that the Respondent sold the cane to a third party; not even the cases allegedly filed against the Respondent by the Appellant on cane poaching. The allegations then remained bare and cannot be a basis of sustaining such a serious defence. The Appellant therefore failed to prove breach of the contract on the part of the Respondent.

20. This Court hence concurs with the finding of the trial court that there was proof that the Appellant had breached the contract and that the Respondent was entitled to judgment.

21. The second ground related to the contention that the Respondent failed to mitigate losses upon realizing that there was breach of the contract. According to the Appellant the Respondent did nothing to mitigate further losses on realizing the breach of contract. To it the Respondent would have sold the cane to another miller or he would have rushed to court to seek an order to compel the Appellant to harvest the cane. The decision of **African Highland Product Limited vs. Kisorio (2001)172** was referred to. I have to say that I do find the argument that the Respondent would have sold the cane to another miller not in tandem with the evidence of DW1 where he contended that the Respondent had breached the contract by selling the cane to another miller. Therefore if selling the cane to another miller is to be considered as a mitigating factor one wonders why the Appellant was opposed to such a move in the first instance. To this Court the twin position taken by the Appellant on the same issue amounts to approbating and reprobating which in itself translates to an abuse of the process of the Court. That argument thereby fails.

22. I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be earlier. Therefore the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the contract, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the contract.

23. Looking at the contract, there are several restrictive clauses such that it would not be possible for the Respondent to take any reasonable steps to mitigate the loss unless the Appellant takes the first step in informing the Respondent of its intended breach of the contract. The nature of the contract in issue herein therefore distinguishes the cited decision of **African Highland Product Limited vs. Kisorio (2001)172** which dealt with a car which had been taken for repairs and the owner did not care to remove it upon the consequent wrong on which the owner of the car sued. The Appellant's argument that the Respondent failed to mitigate his loss cannot stand and is hereby rejected.

24. Having found that the Respondent proved his case against the Appellant and that the twin grounds of appeal by the Appellant have not succeeded, this Court shall look at the assessment of the damages. On the expected yield, this Court will go by the evidence of the Appellant's witness; that is 66.67 tonnes for the plant crop and 48.76 tonnes for the ratoons crops. On the acreage of the Respondent's farm, this Court will go by **paragraph 4** of the Plaint as well as the evidence of the Respondent and PW2 that the Respondent's farm was **0.4 Hectares**. And on the value of each tonnage in 2010 the figure of **Kshs. 3,128/=** as proposed by the Appellant's witness will suffice.

25. Since the cause of action is based on breach of contract, then the available remedy to the Respondent

is special damages and not damages at large or general damages. (See the Court of Appeal finding in the case of **Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR).** As also clearly settled in law a claim based on special damages must 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.***
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> ***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.***
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> *"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:*
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> *"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.*
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> *"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 insists upon more would be the vainest pedantry."*

26. 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 fair assessment of the damages to order an enquiry in regard thereto..."***

27. 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.***
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> ***The following passage appears in the judgment of Vaughan Williams, LJ in the Chaplin case:***
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> *"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 wa 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 necessary of paying damages for his breach of contract.

28. From the above discourse therefore and in view of paragraphs 12 and 13 of the Plaint it is possible to get the exact amount of special damages in this case which translates to the expected value of the proceeds from the crop plant and the two ratoons. That would make a total sum of **Kshs. 206,434/50.** Out of this amount the balance of **Kshs. 84,458/95** is to be deducted on account of the expenses incurred by the Appellant. That leaves the balance of **Kshs. 121,975/55** which amount is payable to the Respondent.

29. In arriving at the above finding, I am further guided by the Court of Appeal holding in the case of **John Richard Okuku Oloo** (supra) that :

"In case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.

The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.

We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.

Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit."

30. The foregone discourse hence brings this Court to make the following final orders:-

a) The appeal herein be and is hereby dismissed;

b) The judgment of the trial court is hereby affirmed save that the sum of Kshs. 121,975/55 shall be payable as special damages for the compensation;

c) The Appellant shall bear the costs of this appeal as well as the costs of Migori Chief Magistrate's Court Civil Suit No. 150 of 2013;

d) Interests at court rates from the date of filing of the suit.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **MIGORI** this **17th** day of **February 2017.**

A. C. MRIMA

JUDGE