



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. 55 OF 2016**

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

**-versus-**

**PETER ODERA AMBARO.....RESPONDENT**

**-and-**

**PETER ODERA AMBARO.....APPELLANT**

*(By Cross-Appeal)*

**-versus-**

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

*(By Cross-Appeal)*

***(Being an appeal and a cross-appeal from the judgment and decree by Hon. E. Muriuki Nyaga, Senior Resident Magistrate (as he then was) in Migori PMCC No. 98 of 2015 delivered on 26/07/2016).***

**JUDGMENT**

1. The judgment of the trial court delivered on 26/07/2016 elicited the twin appeals before this Court. The Appellant herein, **SOUTH NYANZA SUGAR CO. LTD**, raised the issue of the time from which interest ought to run from. On the other hand, the Respondent herein, **PETER ODERA AMBARO**, who is the Cross-Appellant by way of the cross-appeal, raised the issue of his entitlement to penalty interest over and above the compensation and normal interest. The two are the main issues for determination in this matter.
2. The brief background of this matter is that the Appellant and the Respondent entered into a Growers Cane Farming and Supply Contract dated 31/03/2005 (hereinafter referred to as '**the Contract**') where the Appellant contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land being Plot No. 431 measuring 0.3 Hectares in Field No. 201 Zone I Kajulu in Migori County. Clause 2(a) of the Contract however indicated that the contract was deemed to have commenced on 18/08/2004.
3. 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.
4. Thereafter, the Respondent filed a Statement of Claim dated 17/09/2009 on 21/09/2009 before the then Sugar Arbitration Tribunal (hereinafter referred to as '**the Tribunal**'). The Respondent claimed for a

declaration that the Appellant had breached the Contract by not harvesting the cane when it matured, compensation for the value of the unharvested cane, penalty interest under the then Sugar Act and interest at court rates.

5. The Appellant filed a Statement of Defence denying the claim and on a without prejudice basis averred that if at all the Respondent suffered any loss then the Respondent 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 Appellant.

6. The claim was fully heard before the trial court upon the repeal of the Sugar Act and the disbandment of the Tribunal. Both parties were represented by Counsels. In the rendered judgment, the lower court found that the Appellant had breached the Contract by not harvesting the cane when it had matured and awarded compensation, interest from the date of filing suit and costs.

7. That was that judgment that necessitated the filing of the appeal and the cross-appeal.

8. Directions were taken and both the appeal and the cross-appeal were disposed of by way of written submissions. Both parties duly complied with the filing of the submissions. In their respective submissions the parties made reference to various judicial decisions.

9. As to the time when the interest ought to start running from, the Appellant submitted that it should be upon the delivery of judgment by the trial court. Its reason for such a position is that the Respondent's claim as tailored is for unliquidated/general damages which remain unknown until assessment by the trial court. In support of that argument the Appellant referred to the decisions of **Shariff Salim & Another v. Malundu Kikava (1989) eKLR** and **Orix Oil (Kenya) Limited v. Paul Kabeu & 2 others (2014) eKLR**.

10. The Respondent on his part is in support of the finding of the trial court. He argues that from the pleadings (paragraph 6 of the Statement of Claim) it is plain and clear that the claim is for special damages since the Respondent has even plainly sought for compensation to the tune of Kshs. 150,000/= with interests including penalty interest. In support of his position, the Respondent relied on the decisions of **Dodhia v. National & Grindlays Bank Ltd & Ano (1970) EA 195, .** Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR**, **Kisii High Court Civil Appeal No. 177 of 2000 Dora Okech Oduk vs. South Nyanza Sugar Co. Ltd**, **Kisii High Court Civil Appeal No. 176 of 2000 Rosalina D. Ouko vs. South Nyanza Sugar Co. Ltd**, **Kisii High Court Civil Appeal No. 61 of 2001 Hulda Oduk vs. South Nyanza Sugar Co. Ltd**, **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Co. Ltd** and **Migori High Court Civil Appeal No. 104 of 2015 Cleophas Okidi vs. South Nyanza Sugar Co. Ltd**.

11. On the issue of payment of the penalty interest, the Respondent submitted that the basis for such a prayer is the repealed Sugar Act as well as the contract itself. To the Respondent, once the Appellant defaulted in its obligations under the contract then it was not only under a legal obligation to compensate the Respondent for the loss suffered but to also pay interests thereon including the penalty payment from the date of filing the suit. The Respondent relied on the decision of the Court of Appeal at Nyeri in **Civil Appeal No. 52 of 2005 Hghway Furniture Mart Ltd vs. The Permanent Secretary Office of the President**.

12. The Appellant on its part is of the view that the penalty interest is only payable in instances where a miller (the Appellant) physically received the cane from a Farmer/Grower (the Respondent) and delayed payment thereto otherwise it would be difficult, if not impossible, to ascertain from when such penalty interest would be deemed to start running from.

13. I will now look at the two issues raised in this matter but first the role of this appellate court.

14. 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**.

15. 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 together with the decisions referred to. In this matter, there is no contention as to whether or not the contract was breached by the Appellant. The fact of the breach is admitted by both parties.

16. This Court has had an opportunity and dealt with the issue as to when the normal interest would start running from in such matters like the one subject of this appeal. Since I still hold the position that such interest should run from the date of filing of the suit, I will reproduce the discussion I ventured into in the case of **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Co. Ltd** as under: -

***“16. Having found that the Respondent breached the contract, the question that now begs an answer is whether the Appellant has any remedy(ies) in law. It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR) emphatically expressed itself thus:***

*‘.....As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....’*

***17. The reason as to why general damages cannot be awarded in cases of breach of a contract was explained in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR as follows:***

*“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 the principle as 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))”.*

***18. I fully agree 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 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 a;;. 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.**

**21. As stated elsewhere above, the Appellant in paragraph 4(b) of the amended Statement of Claim particularized his claim as follows:**

*'Amount = 2.4 (Ha) x 100 tons yield per (Ha) x price per tone Ksh. 2,015 x 2 cycles.'*

**22. I am therefore of the very considered view that looking at the nature of the Contract and how the loss occurred, the above Appellant's averment was adequate to make a court assess the special damages accordingly. In affirming the position, the Court in the John Richard Okuku Oloo (supra) had the following to say:**

*"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 filing suit.** (emphasis added).*

17. The foregone analysis renders the Appellant's appeal unsuccessful.

18. On the issue of the Appellant's payment of the penalty interest over and above the compensation and the normal interest, the starting point is the contract. I have carefully perused the contract and have come across **Clauses 5.1** and **5.2** which are relevant to this discussion. The said Clauses are tailored as follows:-

### **5. Payments**

**5.1 The rate of payment and the period within which payment will be made together with the penalties for late payment, will be in accordance with the price fixed the Pricing Committee of the Kenya Sugar Board.**

**5.2 Interest at the rate of 3% per month shall be payable by the Grower to the Miller on all sums due under this agreement and not paid on their due date.**

19. However, the record in this case does not include evidence of the payments and penalties for late payments as fixed by the Pricing Committee of the defunct Kenya Sugar Board. Be that as it may, it is instructive to note that the contract contemplated instances where the parties would make payments within the expected timelines and also instances where the parties would default in making the required payments and as result penalties for such late payments would follow. The contract remains silent on the nature of the penalties for the late payments moreso given the absence of the contemplated evidence from the Pricing Committee of the defunct Kenya Sugar Board.

20. That being the case, what did the repealed **Sugar Act 2001** (hereinafter referred to as '**the Act**') have to say on the issue? The **Second Schedule** of the **Act** in **Part 2** on the **Roles of Institutions in the Industry** at paragraph 6 on the role of the Miller provided that: -

**"Pay the sugarcane farmer within 30 days of accepting delivery or otherwise pay interest on the sum due at market rates plus penalty interest per month on the late payment at 3%."**

(emphasis added).

21. To this Court, the payment of the penalty interest is therefore dependent upon the miller accepting delivery of the sugar cane from the farmer. **But why did the Act expressly emphasize on the delivery of the sugarcane to the miller by the farmer?** That was a deliberate provision which in essence meant that there would be instances where the miller, for good and valid reasons, would rightly not accept the delivery of the sugarcane from the farmer. In such instances, it goes without saying that, the miller would not be under any obligation to make any payments. To me the provision is so clear, not vague and/or ambiguous and indeed speaks for itself and would not require a contrary interpretation. May be that position may change on the evidence of the contemplated penalties from the Pricing Committee of the defunct Kenya Sugar Board.

22. I therefore find that penalty interest, in the context of the contract in this matter and in the absence of the contemplated evidence of the penalties from the Pricing Committee of the defunct Kenya Sugar Board, would only accrue in instances where the miller accepts delivery of the sugar cane from a farmer and defaults to make payments as stipulated under the contract and/or the law and not in instances where the miller fails to harvest the sugar cane on attaining maturity.

23. The above finding hence determines the cross-appeal in the negative.

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

**a) Both the appeal and the cross-appeal are hereby dismissed accordingly;**

**b) Each party shall bear its own costs of the appeal and the cross-appeal;**

**c) Pursuant to the orders of this Court made on 27/03/2017, this judgment shall apply in Migori High Court Civil Appeals No. 57 of 2016, No. 58 of 2016, No. 63 of 2016 and No. 64 of 2016.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 10<sup>th</sup> day of May 2017.**

**A. C. MRIMA**

**JUDGE**