



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 239 OF 2009

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

AND

AUGUSTINE JUMA OTIENO.....RESPONDENT

(An appeal from the judgment and decree of Mrs. S.M. Shitubi, SPM, dated and delivered on the 27th day of October 2009 in Migori SPMCC NO.404 of 2005)

JUDGMENT

1. By a plaint dated 20th July 2005 the respondent sued the appellant in respect of an alleged breach of cane contract. It was pleaded that on or about the year 1996 the respondent and the appellant entered into an agreement/contract whereby the respondent was to grow sugarcane on plot No.1155 Field No.28 vide Account No.450869 and by the terms of the said agreement/contract the appellant was to harvest and transport sugarcane to the factory on its maturity and to pay the respondent the ratio thereof.
2. It was pleaded that the appellant unreasonably, negligently and or recklessly and in total breach of the contract refused to harvest the said crop estimated to weigh 12 tones at Kshs.1730/= per tone. The respondent therefore sought a declaration that the appellant was in breach of cane contract and claimed the value of unharvested sugar cane at the rate of Kshs.1730/= per tone together with costs and interest thereon.
3. By a defence dated 26th September 2005 the appellant denied the existence of any lawful or valid out growers cane development contract between her and the respondent and further stated that the respondent in collusion with the appellant's dishonest employees falsely generated the same.
4. It was further pleaded that the respondent never had any land on which he could develop cane, neither did the same develop any cane, nor availed cane on plot No.1155. It was further stated that if the respondent's plot was 0.1 hectares as claimed the same could not have yielded the claimed 12 tones of sugar cane and further that the price of raw sugar cane per tone at that time was only Kshs.1553/= and not Kshs.1730/= as pleaded.
5. It was further pleaded that if the cause of action arose in 1995 as alleged, then the same was statute barred and was therefore incompetent as it had been filed without leave outside the limitation period.

6. Based upon these pleadings the matter proceeded for trial wherein the respondent testified as PW1 and stated that he entered into a cane contract with the appellant in 1993 and signed the contract book in 1994 and was to grow sugarcane on plot No.116, field No.113 Account No.450187 on a plot measuring 0.6 hectares. He further stated that as per the contract the appellant was supposed to harvest three times. It was his further evidence that the first plant crop was harvested and it produced about 52 tones.

7. It was the respondent's further evidence that the first ratoon was not harvested leading to an estimated loss of Kshs.86,500/=. He further testified that it was due for harvesting in 1995. Under cross examination he stated that he could not take the unharvested cane to a jaggery as he respected the contract.

8. PW3 Paul Muherei Simo testified on behalf of the respondent that on 16th December 2004 he went to the farm of the respondent whose sugar cane had matured and dried in the farm. He estimated that it could have produced 71 tones if harvested and at the close of the respondent's case the appellant opted not to call any evidence.

9. In entering judgment for the respondent the trial court pronounced herself as follows:-

“The defendant did not offer any evidence. It is clear that in failing to harvest the sugar cane as scheduled as per the written contract the defendant breached the contract.

I am satisfied in the absence of expert evidence to the contrary that had the crop been properly harvested it could have yielded 71 tones as the cost of Kshs.1730/= per tone making a total of Kshs.122,830/= which I award.”

10. Being dissatisfied by the said judgment the appellant filed this appeal and raised the following grounds of appeal:-

1) *The Learned Trial Magistrate erred in law and in fact when she embarked on a process of determination of and assessment of General Damages for breach of contract, which damages are not awardable in law.*

2) *The Learned Trial Magistrate erred in fact and in law when she failed to consider and to decide on the defence of Limitation that had been raised before her.*

3) *The Learned Trial Magistrate erred in law and in fact when she awarded general damages for breach of contract in the sum of Kshs.122,830/= which amount had neither been prayed for, specifically pleaded in the plaint nor strictly proved at the trial.*

4) *The Learned Trial Magistrate erred in law and in fact when she failed to appreciate and to apply the hallowed principles of law that only Special Damages, may be awarded for breach of contract and that such special damages as may be awarded must first be pleaded specifically and thereafter strictly proved by evidence during the trial which was never done in this case.*

5) *The Learned Trial Magistrate erred in law when she held that since the appellant exhibited nothing to show that cane had not been properly maintained at the respondent's farm and in failing to appreciate that it was incumbent upon the respondent to prove his case and that the burden of proof at all times rested and remained with the respondent and at no time shifted to the appellant.*

6) *The Learned Trial Magistrate decided the case against the weight of evidence when she based her award on an alleged yield of 71 tons for the ratoon 1 crop at the alleged rate of Kshs.1730/= per ton while the respondent had herself testified that her plot, which measured 0.6 hectare, actually produced a gross yield of 52 tons from the plant crop.*

7) *To the extent that the respondent's farm in his own words could yield only 50 tons per hectare, and owing to the fact that only the net as opposed to the gross can be used as a basis of compensation, the*

learned trial magistrate erred when she failed to find and hold that the subsequent ratoons could not yield more than the plant crop. The sum of Kshs.122,830/= therefore, which was awarded was thus without basis and had not been pleaded nor proved at all and was against the weight of evidence led at the trial.

8) The Learned Trial Magistrate erred in law and in fact when she failed to take into account by discounting from the amounts she found due as the gross value of the cane, the operational expenses, costs of inputs and services which ordinarily the appellant, according to contract would have deducted from the value of cane proceeds had the same been availed to the appellant, harvested, transported, milled and thereafter paid for.

9) The Learned Trial Magistrate erred in law and in fact when in the circumstances she failed to dismiss the respondent's suit in the court below with costs but instead plucked figures from the air and awarded the same to the respondent.

10) The Learned Trial Magistrate erred in fact and in law when she failed to notice the apparent material differences, discrepancies and contradictions between the respondent's pleadings, the evidence he led at the trial and that of his witnesses and in failing to dismiss the suit with costs in the circumstances.

11. Directions were given that the appeal be heard by way of written submissions and at the time of writing the judgment, it was only the appellant which had on 11th December 2014 filed her submissions.

SUBMISSIONS

12. It was submitted on behalf of the appellant that the respondent pleaded a contract Account No.450869 on plot No.1155 field No.28 which pleadings was never supported by the evidence on record and therefore the trial court fell into error in failing to appreciate the material discrepancy between the respondent's pleadings and the evidence contrary to **Order 2 Rule 6 (1) of the Civil Procedure Rules 2010**. It was further submitted that PW2 assessed Ratoon 1 could have yielded 71 tones whereas the respondent expected 50 tones.

13. In support of the appellant's submissions reliance was placed upon the following cases:-

a) Joseph Ungadi Kedera -vs- Ebby Kangisha Kavai – Kisumu civil Appeal No.239 of 1997 which the Court of Appeal held that there cannot be an award of general damages for breach of contract.

b) Jivanji -vs- Sanyo Electrical Company Limited – Court of Appeal at Nairobi Civil Appeal No.225/01 where the court held that special damages must be pleaded and strictly proved. The degree of certainty and particularity depends on either circumstances and the nature of act complained of. It was further held in this case that profits recoverable are not gross profits.

14. This principle was further followed in the following cases involving the appellant and submitted by the appellant's advocate.

a) Margaret Muga Oduk -vs- South Nyanza Sugar Company Limited – Kisii HCCA No.207 of 2001.

b) South Nyanza Sugar Company Limited -vs- Hezron Ndarera Mogwasi – Kisii HCCA No.103 of 2006.

c) Moses Onyango Dianga -vs- South Nyanza Sugar Company Limited – Kisii HCCC No.206 of 2011.

15. From the pleadings, proceedings and submissions the following issues have been identified for determination:-

a) *Whether there was a valid contract between the appellant and the respondent.*

b) *Whether the respondent proved that there was a breach of the said contract.*

c) *Whether the respondent's claim was statute barred.*

16. From the pleadings herein the alleged agreement was entered into in 1995 in respect of plot No.1155 field No.28 in Central Kamagambo Kabuor sub location measuring 0.1 hectares Account No.450869 whereas in his evidence before the trial court the respondent testified that he entered into contract with the appellant in 1993 in respect of plot No.116 field No.113 Account No.450187 dated 4th November 1993 and allegedly signed on 12th April 1994, the survey done was also in respect of Account No.450187 field No.113 Plot No.113 measuring 0.595.

17. Since parties are bound by their pleadings, it therefore follows that the respondent failed to prove his case against the appellant on a balance of probability and therefore in entering judgment in favour of the same the trial court fell into error in view of the appellant's pleadings in response thereto wherein the same alleged fraud on the part of the respondent.

18. It is further clear that the respondent's claim herein was special damages which as per the authorities cited herein should have been specifically pleaded and proved as at the time of pleading the value of the alleged loss was known to the respondent and should have therefore pleaded the same.

19. It is also clear that the trial court fell into error by awarding the respondent Kshs.122,830/= arrived at based on 71 tones at the cost of Kshs.1730/= whereas the respondent's expectation was Kshs.86,500/= at 50 tones. The trial court should have taken into account net profit and not gross profit expected.

20. The respondent was also under obligation to mitigate his loss which he admitted in his evidence on cross examination that he failed to do. In awarding the respondent the court should have taken into account how much he would have earned had he mitigated his losses.

21. On the issue of limitation of action, it was the respondent's evidence that the cane should have been harvested in 1999 as per the contract which was never rebutted by the appellant and since limitation for an action under contract is six years, I find that the suit was properly filed within the limitation period.

22. By reason stated herein above, I allow the appeal herein, set aside the judgment of the trial court and substitute the same with an order dismissing the respondent's suit with costs to the appellant. The appellant shall also be entitled to costs of the appeal and it is hereby ordered.

Delivered, signed and dated on this 4th day of February, 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Mr. Sagwa for Okongo Wandago for the Appellant

N/A by the Respondent