South Nyanza Sugar Company Ltd v Lawi (Civil Appeal 173 of 2019)
[2025] KECA 1611 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1611 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 173 OF 2019

HA OMONDI, LK KIMARU & JM NGUGI, JJA

OCTOBER 3, 2025

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD ..... APPELLANT

AND

ISAIAH OWINO LAWI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court at Migori (Mrima, J.) dated 9th April, 2019 in HCCA No. 25 of 2017)

JUDGMENT

Judgment Of The Court

1. This appeal emanates from a suit filed by the respondent against the appellant in 2004. The suit was Kehancha Resident Magistrate's Court Civil Case No. 127 of 2004. It was a claim for breach of contract in which the respondent sought the following prayers:

    a. A declaration that the defendant is in breach of the cane contract with the plaintiff.

    b. The value of unharvested sugar cane at the rate of Kshs. 1,730/= per tonne.

    c. Cost of this suit.

    d. Interest on a, b and c above at court rates.

    e. Any other relief the Honourable Court may deem fit to grant in the circumstances.

2. The facts of the case as pleaded in the respondent's plaint are that on 11th April, 1996, the respondent and appellant entered into a contract in which the respondent was to cultivate sugarcane on Plot No. 414 A, Field No. 96, measuring 1.0 ha, and the appellant was to harvest/purchase and transport the said sugarcane to the factory upon its maturity and pay the respondent the value thereof vide Account No. 412247. Pursuant to that contract, the respondent grew sugarcane and upon its maturity, asked the

appellant to harvest/purchase it as per their contract but the appellant refused to harvest the sugarcane which later got abandoned, damaged and dried up on the farm; thereby causing loss to the respondent. The respondent contended that the refusal to harvest was unreasonable and amounted to a breach of contract.

3. In his statement dated 16th December, 2014, and filed in court, the respondent contended that he developed sugarcane on the plot and the appellant was to harvest/purchase three cycles, that is: the plant crop and the 1st and 2nd ratoons. However, the appellant breached the contract by failing to harvest the plant crop, thereby compromising the development of the 1st and 2nd ratoons.

4. The respondent averred that he expected a yield of 100 tonnes from each cycle at the price of Kshs. 1,730/= per ton, exclusive of deductible costs which included harvesting and transportation costs. Additionally, he sought costs and interests at court rates since the date of filing the suit. But in his plaint, he indicated that he expected a yield of 85 tonnes from the plant crop at the price of Kshs. 1,730/= per ton; and did not mention the 1st and 2nd ratoons or lay any claim in their regard. He also sought costs of the suit and interest at court rates.

5. In its statement of defense dated 2nd November, 2004, the appellant admitted the existence of a contract between itself and the respondent but denied breaching it. It averred that under the contract, it was specifically the duty and obligation of the respondent to plant, tend and avail to it the sugarcane that could achieve satisfactory yield when milled. However, no such sugarcane was cultivated by the respondent in a manner that could achieve satisfactory yield, which was in total breach and complete disregard of the contract.

6. The appellant averred that it was not bound to purchase any cane or at all from the respondent. Rather, it was only bound to harvest cane from plots that had been well maintained and from which satisfactory cane yield could reasonably be expected to be achieved; and the respondent's plot was poorly maintained, neglected and abandoned, despite receiving necessary inputs and services from the appellant at considerable costs.

7. Further, the appellant averred that if sugarcane in the respondent's plot got abandoned, damaged and/or dried up, the same was solely caused or occasioned by the respondent and the appellant ought not to be blamed; as it was the sole responsibility of the respondent to take care of his plot and protect it against waste and damage under the contract. Additionally, the appellant denied that the respondent's plot could not have yielded 85 tonnes as pleaded; and even then, the price of raw cane per ton at the time was Kshs. 1,553/= (which was subject to deductions in respect to Sony Outgrowers Company levy, presumptive income tax, harvesting and transport charges and cess) and not Kshs. 1,730/= as alleged by the respondent.

8. In any event, the appellant averred that the respondent never availed his sugarcane to be harvested and milled. Hence, no loss or damage as pleaded or at all was suffered by the respondent.

9. Lastly, the appellant averred that the respondent's suit was statute barred and incompetent as it had been filed outside the limitation period without leave. The appellant also questioned the jurisdiction of the lower court as the cause of action arose in Migori District, outside the local limits of the jurisdiction of the court but within the local limits of the court at either Migori or Rongo. It also averred that general damages cannot be awarded for breach of contract; and the respondent ought to have specifically pleaded special damages. Thus, the suit was bad in law and ought to be dismissed with costs.

10. When the suit was set for hearing, the respondent testified and adopted the contents of his statement filed on 16th December, 2014. He also presented his list of documents as evidence. The documents in

the list included: the Outgrowers Contract (Agreement Book); the Yield Asssessment Report by the defunct Kenya Sugar Research Foundation KESRF; and a Schedule of Sugarcane prices.

11. On the other hand, the defence did not call any witness and despite being given a chance to file statements of their witnesses and written submissions, it failed to do so.

12. Upon considering the case, the trial court dismissed it with costs on the ground that the respondent did not provide any documents to support the assertion that he cultivated and developed the plant crop, the 1st ratoon and the 2nd ratoon. According to the court, the respondent should have produced documentary proof such as a job completion certificate to show that he cultivated and developed the sugar cane crop. The trial court, thus, concluded that the respondent had failed to satisfy his burden of proof. The trial court, in its ratio, reasoned thus:

> " The question for determination therefore is whether the plaintiff proved that he developed the crop. No documentary proof that the crop cycles were developed was adduced by the plaintiff. It is unlikely and improbable that there would fail to be a single document, such as a job completion certificate, showing that the plaintiff developed or cultivated a cane crop. Therefore, the failure to avail such evidence is suspect and it tarnishes the Plaintiff's claim.
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> It is trite law that he who alleges must prove. The plaintiff in this case failed to prove that as a contracted farmer, he cultivated or developed any cane crop. I therefore dismiss the suit with costs."

13. The respondent was aggrieved by the decision of the lower court and filed an appeal against it at the High Court.

14. Directions were taken and the appeal was disposed by way of written submissions by both parties.

15. Upon analyzing the pleadings and record of appeal, the High Court (Mrima, J.) held thus:

> " 10. From the judgment, the suit was unsuccessful because the Appellant failed to adduce documentary proof that the crops were developed.....
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> 11. A look at the pleadings and the evidence reveal that the Appellant's claim is anchored on the allegation that the failed to harvest the plant crop and as such compromised the development of the ratoon crops. In proof of his case the Appellant relied on his oral testimony, written statement, the Contract, the Schedule of Sugar cane prices and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. The Respondent filed the Witness statement but unlike the Appellant the statement was not tested in cross-examination.
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> 12. .....
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> 13. The evidence which was before the trial court was hence adequate for the court to find that the Appellant took good care of the plant crop until it matured. The Respondent's contention that the Appellant did not maintain the crop to the required husbandry is hence for rejection. As the Respondent took the foregone position it is clear that it did not even bother to harvest the plant crop. On a preponderance of probability, the Appellant therefore proved that Respondent failed to harvest

the plant crop at maturity and that the Respondent was in breach of the contract. Having failed to harvest the plant crop the development of the ratoon crops was undoubtedly compromised. Respectfully, the learned trial magistrate's finding must be interfered with.

16. The High Court then granted the following final orders:-

    a. The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;

    b. Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 253,475/=.

    c. The sum of Kshs. 253,475/= shall attract interest at court rates from the date of filing of the Plaint;

    d. The Appellant shall have costs of the suit as well as costs of the appeal."

17. Aggrieved by the decision of the High Court, the appellant filed a Notice of Appeal dated 10th April, 2019, and a Memorandum of Appeal dated 9th August, 2019, in which it listed fourteen (14) grounds of appeal as follows:

    1. The learned judge erred in law when in the circumstances of the appeal was before him, he awarded damages in respect of the appellant's alleged failure to harvest ratoon 1 and ratoon 2 sugarcane which was never developed and which never existed at all.

    2. The learned judge erred in law when he made an erroneous conclusive finding without basis that the respondent's testimony was never controverted, and in relying on documents which were never formally produced as exhibits before the trial court to award compensation and in the absence of proof.

    3. The learned judge erred in law when he shifted the burden of proof on the appellant, and on issues, including issuance of notice as against the appellant, which was never raised by the parties before him.

    4. The learned judge erred in law when he held that the alleged plant crop matured and was ready for harvest by March 1998, and that the average yield were 116 tons per hectare and that ratoon 1 crop was expected to mature by January 2000, and the average yield was 65 tons per hectare and that ratoon 2 crop was expected to mature by November 2001 and the average yield was 53 tons per hectare, when no such evidence was led before the trial court and thus such finding was not supported by the record which was before him.

    5. The learned judge erred in law when he ordered the appellant to pay damages of Kshs. 253,475/= on the basis of an alleged expected earnings for three crop circles to the respondent, in the face of lack of evidence led before the trial court that the respondent had developed the three crop circles and thus the appellant's alleged failure to harvest them did not arise, as they never existed and against the background that only special damages specifically pleaded and strictly proved by way of evidence can be awarded for breach of contract.

    6. The learned judge erred in law and wrongly exercised his discretion when he held that interest on the speculative amounts he awarded as compensation were to be calculated from the date

of filing suit, when such compensation was only assessed by the court and awarded and not proved as damages on the date of judgment; and thus obligation to pay them only arose on the date of the appellate judgment and decree.

7. The learned judge erred in law when he awarded speculative damages to the respondent as against appellant based on an alleged estimate of expected yield and using information from documents which were not formally produced as exhibits before the trial court by a party who was not called as a witness.

8. The learned judge erred in law when he truly misapprehended the appeal before him and claim which was before the trial court and decided the case in favour of the respondent based on no evidence at all but purely conjecture and speculation.

9. The learned judge erred in law when he held without evidence that there was loss of yield for the plant crop, and that such loss comprised the development of the ratoon crops whose alleged value he subsequently awarded to the respondent.

10. The learned judge erred in law when he held that the respondent was entitled to compensation arising from three crop circles, contrary to the known principles of law that only special damages lay for breach of contract, and for such damages to be awarded, they must be specifically pleaded and claimed in the plaint and thereafter strictly proved by way of evidence during the trial which was not done in the appeal which was before him.

11. The learned judge erred in law when he multiplied the plot size, average yield and cane price and held that the sum of Kshs. 253,475/= which he arrived at from his own calculations, and not from evidence led by the respondent, was the damage which the respondent had suffered and in proceeding to allow the same against the appellant.

12. The learned judge erred in law when he failed to hold that the respondent had a duty to but failed to mitigate his losses, if at all any despite the provision that termination of the contract was an open option to the respondent.

13. The learned judge, in having awarded to the respondent compensation in respect of three crop circles, in respect of a contract, and which amount had neither been pleaded nor proved by evidence and was not supported by the record of the trial court which was availed before him.

14. The judge decided the case against the weight of evidence purely on speculation and without proof and failing to dismiss the respondent's appeal as was before him.

18. The appeal was argued by way of written submissions. Only the appellant filed its written submissions while the respondent failed to do so despite being served with the notice of the hearing. Mr. Odero, learned counsel, appeared for the appellant, while there was no appearance for the respondent despite service.

19. This is a second appeal. As such, we are limited to considering matters of law only unless it can be demonstrated that the courts below considered matters they should not have considered or failed to consider matters they should have considered or the decision of the superior court is, on the whole, perverse. See Charles Kipkoech Leting vs. Express (K) Ltd & another [2018] eKLR.

20. Having considered the record of appeal, the judgment of the two lower courts, the appellant's grounds of appeal and the appellant's submissions, the issues raised in the appeal can be grouped into five questions for determination:

a. Whether the learned judge decided the appeal based on issues not properly raised on appeal.

b. Whether the learned judge relied on material which was not properly on record.

c. Whether the respondent proved his case on a balance of probabilities.

d. Whether the award of damages was justified in the circumstances.

e. Whether the award of interest was lawful.

21. On the first issue, the appellant made reference to respondent's three grounds of appeal at the High Court and contended that the learned judge failed to restrict himself to the same, and yet it is trite that any court of law is bound by the parties' pleadings to the same extent that parties are bound by their pleadings in any cause. According to the appellant, the matters raised by the respondent in his grounds 1 and 2 of his appeal at the High Court did not raise any question as to whether the appellant breached the contract, which was an issue in the appeal.

22. The grounds of appeal that were before the learned judge were framed thus:

1. The learned magistrate erred in law and fact when he dismissed the appellant's case on a mere ground that the appellant did not have any job completion certificate yet it was the duty of the respondent to issue the appellant with the said job completion certificate if any.

2. The learned trial magistrate erred in law and in fact by purporting to raise the threshold of standard of proof to as level higher than that required by the law.

3. The learned trial magistrate was biased against the Appellant.

23. The appellant argued that, given the respondent's plaint, the learned judge was confined to determining whether the respondent had proved cultivation of the plant crop, the 1st ratoon, and the 2nd ratoon, and whether the appellant failed to harvest the plant crop in breach of contract. Reliance was placed on Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR to emphasize that courts are bound by the parties' pleadings.

24. Stemming from this authority, the appellant argued that the learned judge pronounced himself on unpleaded matters.

25. The appellant, relying on David Sironga Ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR, argued that the learned judge erred by determining unpleaded issues. It was contended that the finding of breach of contract and award of damages rested on assumptions without evidential basis, and that in so doing the judge exceeded the appellate powers under section 78 of the *Civil Procedure Act*.

26. In considering whether the learned judge determined the appeal on impermissible un-appealed issues, it is our view that he did not since his obligation as the first appellate court is to re- evaluate the evidence de novo.

27. The learned magistrate in determining whether there was a breach of contract, found that the respondent did not avail any documentary proof to prove that he indeed developed/cultivated the plant crop. Thus, he dismissed the case on the ground that as a contracted farmer, the respondent failed to prove that he cultivated/developed the cane crop. On the other hand, the learned judge, upon analyzing the evidence on record, found that the respondent's claim was anchored on the allegation that the appellant failed to harvest the plant crop which compromised the development of the ratoon crops.

28. This Court has pronounced itself on exactly this question in a related case, to wit, South Nyanza Sugar Company Limited v Mboga [2025] KECA 546 (KLR), where we remarked as follows regarding exactly the same complaint by the appellant against similarly-phrased appeal which begat a similarly-phrased judgment at the High Court:

> " Looking at the two issues raised on first appeal, it seems eminently obvious that the learned Judge determined the appeal on issues that were raised, and in exercise of his obligation to re-evaluate the evidence de novo. The question whether the learned magistrate had wrongly analyzed the evidence; and whether the learned magistrate had deployed a standard of proof unknown in law were both before the learned Judge as they are before us. The learned Judge ruled that the learned magistrate's analysis was wrong; and the adopted standard of proof that required documentary proof to succeed in a claim for breach of contract was similarly wrong. We do so as well."

29. Our answer remains the same.

30. Second, the appellant alleged that the learned judge relied on documents which had not been produced in evidence and relied on James A. Niala vs. South Nyanza Sugar Co. Ltd [2019] eKLR for the proposition that the production of a document in evidence per se is not proof of its contents. The appellant also cited the case of South Nyanza Sugar Co. Ltd vs. Phoeby Atieno Oduara [2018] eKLR and South Nyanza Sugar Co. Ltd vs. Mary A. Mwita & Another [2018] eKLR, both of which demonstrated the legal principle as accepted in our case law, that evidence is produced by formally tendering the document in evidence. This, the appellant stated, was the holding in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others [2015] eKLR where this Court said:

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."

31. In this case, the record shows that the respondent testified at trial, adopted his witness statement, and produced a list of documents which included his written statement, the contract, the schedule of sugarcane prices, and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. The trial court properly admitted these documents as evidence. As the learned judge correctly observed, the respondent's evidence remained unchallenged, since the appellant neither called a witness nor filed a statement or submissions despite being afforded the opportunity. The appellant's contention that the judge relied on documents not on record is therefore without foundation.

32. The appellant contended that the learned judge relied on matters of general notoriety without evidential basis, arguing that the respondent failed to prove that the ratoon crops were developed, since sugarcane requires cultivation and does not grow unaided. To support this position, reliance was placed on South Nyanza Sugar Co. Ltd v. Francis Aderi Degeri (Migori HCCA No. 47 of 2019), where Chitembwe, J. (as he then was) dismissed a similar claim for want of proof on a balance of probabilities. The appellant argued that, as in that case, the respondent herein ought to have mitigated his loss or replanted alternative crops. Further reliance was placed on Jael A. Omolo v. South Nyanza Sugar Co. Ltd [2019] eKLR (A.K. Ndung'u, J.), where the court emphasized the necessity of cogent evidence—such as expert reports, photographs, or eyewitness testimony—to prove that cane was planted, matured, and was not harvested. On this basis, the appellant submitted that the learned judge erred by applying a lower standard of proof than the balance of probabilities, effectively accepting uncorroborated assertions as sufficient proof of breach of contract.

33. However, this reasoning was debunked by this Court in an earlier case, to wit, South Nyanza Sugar Company Ltd v Mary Anyango (Suing as Administratrix of the Estate of Jared Onyango Onguka (Civil Appeal No. 171 of 2019) [2024] KECA 694 KLR (21 June, 2024) (Judgment). What we said in that case regarding this attempted conflation of the duty to mitigate damages and the alleged failure to produce evidence of breach of contract to the required standard applies in this case. What we stated in that case comprehensively responds to this line of reasoning and it suffices to quote from that decision in extenso thus:

> " The view that the respondent, on record, satisfied her burden of proof is fortified by looking at Clause 11 of the Agreement between the parties. While the appellant has heavily relied on the decision of Chitembwe, J. (as he then was) in South Nyanza Sugar Company Ltd vs. Francis Aderi Dedege (supra), wherein he held that it was the outgrower's responsibility to inform the sugar Page 21 of 26 company when the ratoon crop was ready and that the failure of a farmer to prove that they did so is fatal to a claim of this nature, Clause 11 of the Agreement between the parties provides as follows:
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> .....
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> > The wording of the said clause clearly indicates that there are scheduled visits by the Company to the farmer's shamba and notification thereof of the farmer by the Company of any works or operations that may be required to be done. Therefore, it goes without saying that it was the duty of the appellant to inform the respondent or his representative of the appointed date of each harvesting or any other works or operations. This is to say, according to the wording of the contract, it was not the duty of the respondent to notify the appellant that the plant crop or the first ratoon was ready for harvesting. The contract reveals that there is a system developed by the appellant to ensure scheduled and/or follow up visits to the farmer's shamba to ensure that the farmer has maintained, cultivated and tended his shamba for purposes of obtaining satisfactory yield. It is telling that despite that elaborate system, the appellant did not have any evidence whatsoever to demonstrate that the respondent had failed to maintain the shamba satisfactorily; or that it had valid reasons to rescind its contract with the farmer on account of breach of contract on her part."

34. The final issue concerns whether the learned judge erred in awarding interest from the date of filing. The appellant objected on three grounds: that no specific sum was pleaded or prayed for; that awarding interest from 2004, when the suit was filed, was unfair given the delays in litigation; and that such

interest would result in an excessive burden on a public company. It was urged that interest, if any, ought to run from the date of judgment, not filing. The appellant cited the decision in New Tyres Enterprises Ltd vs. Kenya Alliance Insurance Company Ltd [1988] eKLR. In that case, this Court stated, as per Kwach, JA:

> "In the present case, the liability of the respondent to pay for the appellant's loss was not determined until the date of the judgment, and that is the date from which interest should be payable. I am satisfied that the judge is perfectly in consonance with the normal practice and was a proper and fair exercise of his discretion."

35. We have read the cited authority by this Court as we have read the governing provision of the law being section 26 of the *Civil Procedure Act*. That section provides as follows:

    1. Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

    2. Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

36. The section is explicit that the court has discretion to award interest on the principal sum where the decree is for the payment of money and further that the court has discretion to determine the appropriate rate of such interest. None of the limitations the appellant urges us to impose are found in the statutory provision. This was a liquidated claim based on a breach of contract. There is absolutely no justification to limit the interest payable on account of the fact that the ultimate amount payable was not specifically determinable at the time of filing suit. In any event, it is our considered view that the statement made by Kwach, JA., in the New Tyres Enterprises Ltd Case does not lay any hard and fast rule of law in such cases. It is our understanding that the same only explains why in that particular instance, the Court was not ready to reverse the application of discretion by the trial judge to award interest from the date of judgment. Similarly, there is no justification to limit the award of interest because the case has taken too long to reach this stage, the fact that it is so is merely a reflection of the delay of the appellant in meeting its obligations. There is also no principle in law that public companies are absolved from their financial obligations merely on account of them being "public". Finally, the fact that there was a termination clause in the agreement has no bearing on the calculation of payable interest or the rates to be used. It may have a bearing on the calculation of damages in appropriate cases (which does not apply in the present case) but not on interest payable upon adjudgment of a breach.

37. Suffice to say, in the New Tyres Enterprises Ltd Case, this Court had the following to say immediately before the citation above provided by the appellant:

> "It is evident from the reading of this provision that the Court enjoys a wide measure of discretion on the question of interest. And being an appeal against a trial judge's exercise of his discretion this Court is enjoined to treat the original decision with the utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong."

38. This is the correct position in law. We have no reason to fault the learned judge's application of his discretion in the award of interest.

39. The upshot is that the appeal wholly lacks merit. It is hereby dismissed. Since the respondent did not participate in the appeal, we award no costs.

40. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 3 RD DAY OF OCTOBER, 2025.

H. A. OMONDI

.... JUDGE OF APPEAL

L. KIMARU

.... JUDGE OF APPEAL

JOEL NGUGI

.... JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR