

**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT MIGORI**  
**CIVIL APPEAL NO. 128 OF 2018**  
**SOUTH NYANZA SUGAR CO.**

**LTD.....APPELLANT**

**- versus -**

**PETER BODI**

**OMBAGA.....RESPONDE  
NT**

*(Being an appeal from the judgment and decree by Hon.  
Odeny Senior Principal Magistrate in Migori Chief Magistrate's  
Civil Suit No. 583 of 2005 delivered on 29/08/2018).*

**JUDGMENT**

By a plaint dated 20<sup>th</sup> July 2005 the Respondent sued the Appellant seeking that the court enters judgment declaring that the Appellant was in breach of the cane contract with the Respondent; the Respondent also prayed for value of the unharvested sugar cane at the rate of Kshs.1730/= per tone; costs of the suit and interest on the above claims.

The claim arose out of the Growers Cane Farming and Supply Contract Account No 480062 dated 5<sup>th</sup> May 1995 where the Appellant contracted the Respondent, to grow and sell to it sugarcane at the Respondent's parcel of land being Plot No. 2060 Field No. 8 measuring 0.4 Hectares in Koguta Sub-Location, South Kabuoch Location in Homa-Bay County.

The Appellant in its evidence in chief admitted the existence of the contract but alleged that the farmer diverted ratoon one to a third party and ratoon 2 was not developed and the same was communicated to the farmer through the Provincial Administration. The Appellant denied breaching its terms and contended that it was the

Respondent who failed breached the terms of the contract and urged the court to dismiss the suit.

The Trial Magistrate considered the claim for the Respondent and the defense by the Appellant and established that the Appellant breached the contract and therefore was obliged to compensate the Respondent for the ensuing losses incurred.

The Respondent was awarded Kshs 117,280/= after deduction of harvesting and transportation costs. Interest and costs were also awarded by the Trial Court.

The Appellant was aggrieved by the finding of the Trial Court and lodged appeal herein vide Memorandum of Appeal dated 22<sup>nd</sup> September 2018 on the following grounds:

- THAT the Learned Trial Magistrate erred in law and fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion
- THAT the Learned Trial Magistrate erred in law and fact by entering judgment without evaluating the limitation period as pleaded in the defence and submissions, hence ignoring that the suit was statute barred
- THAT the Learned Trial Magistrate erred in law in entering judgment on interest from the date of filing suit when the same was not a liquidated claim as the amount could only be ascertained after trial.
- THAT the Learned Trial Magistrate erred in law and fact in failing to evaluate contract between parties and to determine

the obligations of the parties before entering judgment and also failing to consider the documents relied on by the Appellants especially the survey certificate of 0.4 plot area.

- THAT the judgment is unlawful and contrary to the law.
- THAT the Learned Trial Magistrate completely misinterpreted the contract between the parties and the evidence that arrived at a wrong conclusion as to the import and effect of the evidence placed before him.

Reasons wherefore the Appellant prayed that this appeal be allowed and the judgment of the lower court be set aside and in its place an order be made dismissing the Respondent's suit with costs.

The appeal herein was canvassed by way of written submissions. The Appellant's submissions are dated 11<sup>th</sup> October 2022 and are to the effect that the burden of proof as provided under Section 107 of the Evidence Act rests on the Plaintiff who sought that court enters judgment in his favor (see Evans Nyakwana Vs Clephas Bwana Ongaro (2015) eKLR)

The Appellant submitted that the Respondent was not able to prove that he planted the Plant Crop, 1<sup>st</sup> and 2<sup>nd</sup> Ratoon crops and that they were nurtured and well taken care of by weeding and application of fertilizer at the appropriate time.

It was also submitted that the Respondent also failed to avail evidence such as photos of mature cane and report of the full-time farm manager (showing records of maintenance and development of the cane to maturity) in court that indeed the cane matured and was ready

for harvest. It was submitted that the Respondent breached Clause 3(3.8) of the Growers Cane Farming and Supply contract.

The Appellant relied on the authority of ***Pancras O. Onyango Vs South Nyanza Sugar Co. Ltd Civil Appeal No. 49 of 2005*** to support its position that the Respondent was not entitled to compensation since he did not oblige to his part of the bargain.

It was also submitted that the Respondent did not show that his farm could yield 91 tones per cycle as claimed in the Plaint. It was argued that the Appellant's witness DW1 testified that the Respondent never developed 1<sup>st</sup> and 2<sup>nd</sup> Ratoon and the same was never availed to the Appellant and therefore the Respondent breached Clause 3.1.2 of the contract.

The Appellant also submitted that the Respondent did not produce expert report to show that he maintained the cane well to expect tones claimed. That the Respondent's claim was controverted by the Appellant's witness DW1 who produced a cane yield report for the area where the Respondent's farm was situated and it shows the yield is 80 tones.

It was also submitted that the Respondent admitted that the Appellant had assisted him in developing the cane by providing various services in accordance with Clause 7 of the contract which services were to be deducted from the cane proceeds namely:

- Harvesting charges at Kshs.307/= per tone
- Transport charges at Kshs. 690/= per tone
- Cess at 1% of the total cane value

- Levy at 1% total cane value
- Interest at 17%

The Appellant further submitted that the Respondent failed to prove his claim on a balance of probability as he did not develop the 1<sup>st</sup> and 2<sup>nd</sup> Ratoon and that is why the same was never harvested by the Appellant.

It was also submitted that the Appellant's obligation was to inspect and authorize the farmer to harvest sugar cane upon maturity and deliver at the weigh bridge, and that it was not the obligation of the Appellant to harvest. The Appellant referred the court to the case of ***Philip Okoth Matuga Vs South Nyanza Sugar Co. Ltd Civil Case No 97 of 2012*** where claim was dismissed for reasons that clause 3.1.2 provided that legal obligation to harvest was upon the Plaintiff and not the Defendant.

The Appellants also argued that the Respondent did not take steps to mitigate the loss and that if indeed he was sure that he had informed the Appellant to collect the mature cane then he had every right to deliver the cane to the factory or another miller to crush the same to jaggery to mitigate the loss. Reliance was placed in the case of ***African Produce Ltd Vs Kisorio Civil Case No. 264 of 1999*** where the court emphasized on the guiding law in mitigating of losses

On the issue of general damages the Appellant relied on the holding in ***Migori HCCA NO. 138 OF 2015 South Nyanza Sugar Co. Ltd Vs Hillary M. Marwa(2017) eKLR*** where the court addressed the issue as follows:

***“.....having dealt with this issue at length in Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited. In that case I found that there can be no award of general damages for a claim on breach of contract. However, the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (restitution in integrum’). The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. I substantiated those findings with various case law. I must say that I am still of that position”***

The Appellant referred the court to several other authorities including ***Kenya Industrial Estate Ltd Vs Lee Enterprises Ltd NRB CA CIVIL APPEAL NO 54 OF 2004[2009]Eklr; Kenya Breweries Ltd Vs Natex Distributors Ltd Milimani HCCC No. 704 of 2000[2004]Eklr; Joseph Urigadi Kedeva Vs Ebby Kangishai Kawai Kisumu Civil Appeal No. 239 of 1997(UR)*** where the position in Migori HCCA NO. 138 of 2018 was reiterated.

The Appellants further submitted that a remedy in breach of contract cases lies in special damages and the general legal position is that such damages must be pleaded and proved strictly. The Appellant also quoted and relied on the holding in ***John Richard Okuku Vs South Nyanza Sugar Co. Ltd*** where it was held:

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

**of. In 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 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 acts themselves by which the damages is done”**

The Appellants further relied on the court of Appeal case of **J. FRIEDMAN V NJORO INDUSTRIES (1954) 21EACA 172** where it was observed:

**“...there is no obligation on the 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...”**

Further in **John Richard Okuku Oloo Vs South Nyanza Sugar Co. Ltd (supra)** the Appellants sought to rely on Vaughan Williams LJ who said:

**“...the fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying damages for the breach of contract”**

The Appellant argued that since the Respondent failed to discharge the burden of proof by failing to tender evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Ratoon s were nurtured and that they were well taken care of through the weeding and fertilizer application at the appropriate time the judgment of the trial court should be set aside and appeal allowed.

I have perused the file herein and did not find the Respondent's submissions. Similarly, I accessed the Case Tracking System and established that the pleadings have not been uploaded. In the circumstances this court will determine the appeal based on the records of the trial court, the grounds of appeal and the submissions and authorities relied upon by the Appellant.

### **ANALYSIS AND DETERMINATION**

As a first appellate court, this Court is obliged to re-evaluate, re-analyse, and reconsider the evidence on record and draw its own conclusions, bearing in mind that it did not see or hear the witnesses. This position was settled in the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**. This court is also aware of the principle 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 evidence 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***.

Having carefully considered the records of the trial court, the grounds of appeal and the submissions by the Appellant as well as the decisions referred thereto, the issues for determination are:

1. Whether the suit before the trial court was statute-barred.
2. Whether the trial court misapprehended the contractual obligations of the parties.
3. Whether the Respondent proved his case on a balance of probabilities.
4. Whether the award of damages was lawful and supported by evidence.
5. Whether the award of interest from the date of filing suit was in error.
6. What orders should issue regarding the appeal and costs.

On whether the suit is statute barred, although limitation was pleaded in the defence, the Appellant produced no documentary evidence establishing the actual maturity or expected harvesting dates for the plant crop, 1<sup>st</sup> ratoon, or 2<sup>nd</sup> ratoon. The burden of proof of limitation lies on the party raising it. Once pleaded, the Appellant ought to have produced factory harvest schedules, inspection reports, or date-of-maturity records. None was tendered. Without such evidence, the trial court cannot be faulted for rejecting the limitation defence. The Appellant did not discharge its burden. The ground on limitation therefore fails on its face.

On whether the trial court misapprehended contractual obligations the Appellant argued that Clause 3.1.2 placed the obligation to harvest squarely on the farmer. It relied on ***Philip Okoth Matuga v SONY Sugar***. However, the standard SONY contract imposes mutual obligations. While the farmer tends the crop, harvesting is a coordinated process requiring inspection, scheduling, and authorization—these are functions that are controlled by the miller.

In this case, the Appellant did not produce any harvest schedule, inspection report, or written notice to the farmer indicating diversion of cane or failure to develop ratoons. Mere assertions that the 1st ratoon was diverted to a third party, allegedly communicated “through provincial administration”, were unsupported by any written communication. The Trial Magistrate was therefore correct in holding that breach was on the part of the Appellant and no misdirection is established by the Appellant.

On whether the Respondent proved his case the Appellant argued that the Respondent failed to produce photographs, expert reports, or farm-manager records to prove development of the crop. Proof in civil cases is on a balance of probabilities. There is no legal requirement for photographic or expert evidence in sugarcane farming unless specifically required by contract. The Appellant’s own witness admitted existence of the plant crop. No evidence was tendered to contradict the Respondent’s claim that he developed the ratoons. Notably, the Appellant failed to produce inspection notes or farm-status reports to rebut the Respondent’s testimony. The finding of this court is that the Respondent proved breach on a balance of probabilities.

On whether the award of damages was proper, damages for breach of contract must be specifically pleaded and strictly proved. Cane-contract damages, however, are calculated from the farm size (0.4 Ha); the expected tonnage per hectare; the contract price per tonne; less contractual deductions.

The trial court used **80 tonnes per hectare**, a figure supported by the Appellant’s own witness (DW1) who produced a cane yield report for the location.

Applying this to 0.4 Ha and deducting harvesting and transport charges yielded Kshs. 117,280. That method is consistent with established jurisprudence in sugar-contract litigation and was based squarely on the evidence available. The assessment of damages was sound and supported by evidence.

On whether interest should run from the date of filing the Appellant argued that interest should run from date of judgment. The award herein was not general damages but a quantifiable contractual entitlement determinable from evidence. Kenyan courts routinely award interest from date of filing in such circumstances. Even if discretionary, no basis has been laid to interfere with the trial court's exercise of discretion. The award of interest from date of filing was not erroneous.

Having re-evaluated the entire record, this Court finds that none of the grounds of appeal has merit. The trial court's findings on liability, breach, and quantum were properly supported by evidence and consistent with law.

The appeal is hereby dismissed in its entirety with costs of the appeal to the Respondent.

The judgment and decree of the Trial Court are upheld.

Any party aggrieved by the judgment of this court may appeal within 30 days.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 5<sup>TH</sup> DAY OF FEBRUARY 2026.**

**ANNE ONG'INJO  
JUDGE**