Ayunga v South Nyanza Sugar Co. Ltd (Civil Appeal E079 of 2023) [2026] KEHC 3036 (KLR) (4 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3036 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E079 OF 2023

DKN MAGARE, J

MARCH 4, 2026

BETWEEN

OYAGI AYUNGA .... APPELLANT

AND

SOUTH NYANZA SUGAR CO. LTD .... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of Hon. C.N.C. Oruo delivered on 5.10.2023 in Rongo PMCC No. 159 of 2017.
2. The Appellant pleaded a single ground in the Memorandum of Appeal dated 6.11.2023 that the learned magistrate erred in law and fact in failing to state that interest would start running from the date of filing the suit.
3. The appeal is clearly against a portion of the judgment dated 5.10.2023. The lower court found the Respondent in breach of contract and awarded losses incurred by the Appellant due to inaction by the Respondent. The Respondent was said to have not harvested the Appellant's sugarcane when the same became due, as a result of which the 1st ratoon and 2nd ratoon were compromised, leading to losses.
4. In its judgment, the court stated as follows:
    i. I award the Plaintiff Ksh. 179,411.44/= for ratoon 2.
    ii. Costs and interest.

Proceedings

5. PW1 was the Appellant. He relied on his list of documents. There was a contract. It was for plant crop. The sugarcane was to be harvested, but the Respondent did not harvest it. The Appellant did not plant

ratoon crop due to the non-harvest. The Respondent thus breached the contract and the Appellant incurred loss.

6. The Respondent called DW1, Justus Otieno George, who testified that the cane was harvested and transported successfully. He stated that the harvesting process was completed without any hindrance. However, no written contract was produced in evidence. He further indicated that the purported contract was incomplete.

Submissions

7. The Respondent filed submissions dated 26.11.2025. It was submitted that the lower court relied on an incomplete contract book. Reliance was placed on South Nyanza Sugar Co. Limited v Niala (Civil Appeal 68 of 2019) [2022] KEHC 11988 (KLR) (12 May 2022) (Judgment).

8. The Respondent submitted that the Appellant did not prove breach of contract.

9. On interest, it was submitted that this was a special damages claim and interest would apply from the date of filing suit.

Analysis

10. The issue that falls for this Court's determination is whether the lower court erred in law and fact by note stating when interest could start running. The court will also determine the issue on computation of 1% cess. On the cross appeal, the issue is whether the Appellant proved breach of contract and consequential loss.

11. Section 26 of the *Civil Procedure Act* provides as follows:

    26. Interests

        (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.

12. This being a first appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact

> if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

13. The impugned interest, though not stated by the Appellant, was simple interest under Section 26 of the *Civil Procedure Act*. It is settled that simple interest on liquidated damages should commence from the date of filing the suit. In the celebrated Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469 the court stated as follows:

> The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.

14. The trial court erred in not stating when interest would start running. Leaving it open the way she did implied that simple interest could be applied by default at court rates from the date of judgment which was erroneous and would limit the Appellant's entitlement to full interest at court rates. In the case of Intraspeed Logistics Ltd & 15 others v Commissioner of Police & another [2018] eKLR, the court stated as follows:

> ...The plaintiffs are entitled to interest but in the absence of proof of commercial rates they are only entitled to interest at court rates.

15. Therefore, the Appellant was entitled to simple interest at court rates from the time of filing the suit which was 3.7.2017. Interest on liquidated damages that the Appellant sought and obtained in the lower court accrued from the date of filing the suit, not the date of Judgment. I interfere with the judgment to this extent. In Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR, the court stated as follows:

> 32. I have come to the conclusion that the Learned Trial erred by not adverting her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts' repeated application of Section 26 of the *Civil Procedure Act*. The cases cited above reached the conclusion that where a claim is for liquidate damages, unless there is good cause, the interest should be calculated from the date of filing the suit.

16. It is thus the finding of this Court that the lower court ought to have specified interest on a liquidated sum from the date of filing suit.

17. The Respondent alleged that the contract as produced in the lower court was incomplete and missing parts of the contract that had been added in the appeal to this court. I do not understand the Respondent's case to be that the parts of the contract document ought not to be part of the contract. The Respondent's case is that the said part of the contract was not availed in the lower court and for that reason only, they should not be considered in this appeal.

18. I have perused the Respondent's defence and pretrial proceedings in the lower court, and nothing was raised against the production of such a document as incomplete. Parties were bound by their

pleadings, and without pleadings, the court could not draft its own pleadings. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"

19. In any event, it is not the case of the Respondent that the terms of the contract were contained in the portion of the contract said to have not been filed in the lower court. If the Respondent relied on submissions without pleading, the submissions were not evidence. I find no basis to interfere with the lower court's finding on the issue of cess. in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 the Judge expressed himself as follows:

> "Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

20. On the cross appeal, the Respondent's case was that the Appellant did not prove breach of contract. The Appellant asserted that he proved breach of contract. In National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

> A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

21. There was no dispute that there was contract. The Appellant planted and maintained his sugarcane which the Respondent was supposed to harvest but the Respondent did not harvest. The Appellant proved that the contract was subject of the sugarcane plant. I find no basis to interfere with the finding of the lower court. The Respondent's evidence that there was no contract or there was incomplete contract was not credible as a contract book as produced was a contract. On the proof of the allegations of breach of contract, in Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR the Court of Appeal stated thus:

> "When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with

divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."...

...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

22. Therefore, the Appellant proved his case to the required standard. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

23. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

24. The appeal was largely successful, and the cross appeal failed. This leaves the question of costs, which are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

25. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR), as follows:

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation
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> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

26. In the circumstances of this case, each party will bear their costs.

Determination

27. In the upshot, I make the following orders:

    a. The appeal is allowed and interest applied at court rates from the date of filing the suit on 03.07.2017.

    b. The cross appeal is dismissed.

    c. Each party will bear its costs in respect of the cross-appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 4TH DAY OF MARCH, 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Bosire for the Respondent

Court Assistant – Michael