REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E076 OF 2024

[As Consolidated with

CIVIL APPEAL NO. E087 OF 2024]

ROSE ATIENO OWUOR..... APPELLANT

VERSUS

SUKARI INDUSTRIES LIMITED..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of Hon. S.N. Mutava (RM) delivered on 28.10.2024 in Rongo PMCC No. E070 of 2022. The appellant was the plaintiff in the lower court. The court heard her case and awarded Ksh. 50,000/= as damages, with costs. The Appellant was aggrieved and filed a Memorandum of Appeal dated 14.11.2024 and set forth the following grounds of appeal, in Appeal No. HCCA E076 of 2024:
    a) The learned magistrate erred in law and fact in disregarding the available evidence hence a wrong decision.

b) The learned magistrate erred in law and fact in substituting exemplary damages for special damages.

c) The learned magistrate erred in law and fact in awarding a prayer the Appellant did not pray for.

2. Appeal number HCCA E087 of 2024, was filed by the defendant. The memorandum of appeal set out the following grounds:

a) The learned magistrate erred in fact and law in rendering a self-contradictory decision, by awarding the respondent exemplary damages of Kshs. 50,000/= even after finding that the Respondent had failed to produce the cane price list and the cane yield reports that would have aided the court in assessing the damages.

b) The learned magistrate erred in law and fact by ignoring that the Respondent's pleadings are of special damages and awarding exemplary damages that were not pleaded and were not an issue in the suit herein.

3. The plaint dated 24.3.2024 claimed the value on unharvested cane, costs, and interest. The Appellant averred that, by a written agreement entered into on 11.8.2011, the Respondent contracted the Appellant to grow and sell to it sugarcane on the Appellant's land measuring 0.7 ha. It was further the case of the Appellant that the Respondent did not harvest the

sugarcane when mature, which affected the first and second ratoons.

4. The Respondent breached the contract by failing to harvest the sugarcane when it was ready. The expected yield for the plant sugarcane and the 2 ratoon sugarcane was 210 tons, which the appellant averred that she lost.

5. The Respondent filed a defence dated 27.4.2022 denying the allegations in the plaint.

Proceedings

6. PW1 was the Appellant. She relied on her list of documents. She testified that she was a farmer. She contracted the Respondent. She produced the documents in her list filed in the lower court. On cross-examination, she testified that she contracted the Respondent in 2009. The agreement was dated in 2011. 3 harvests would yield 210 tons. The price per ton was Ksh. 3,800/=.

7. The Respondent called DW1, John Okinda. He was an agricultural officer of the Respondent. He testified that there was a valid contract. According to him, the Respondent did not harvest the sugarcane as Sony Sugar had already harvested it. On cross examination, he had no proof that Sony Sugar harvested the cane.

Submissions

8. The respondent filed submissions as the appellant in E087 of 2025. They submitted that there can be no liability without fault, and the Plaintiff has to establish a nexus. Reliance was placed on the case of **Kiema Muthuku -v- Kenya Handling Services Ltd. [1991] 2 KAR 258** where the court stated as follows:

> **There is yet no liability without fault in the legal system in Kenya (emphasis ours) and the Plaintiff must prove some negligence against the defendant where the claim is based on negligence…**

9. They emphasized the question of proof that the Plaintiff must adduce evidence of facts on which the claim for damages is based. On question of proof, and burden thereof, it is stated in *Charlesworth & Percy* on negligence, 9th edition at P.387:

> "…in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element … Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.

10. Further reliance was placed on the case of **Treadsetters Tyres Ltd -v- John Wekesa Wepukhulu[2010] eKLR**, to support the submission that there was no evidence of negligence. It was submitted that it is within the balance of

probability and in fact lower to require an independent witness to testify as to the drying of the sugarcane rather than requiring a crop assessment report to prove damage as was held in **China Wuyi Company Limited -v- Joseph Otieno Nyakure [2017] eKLR** that, there being no crop damage assessment report and there being no evidence that the cane was ever assessed by an agricultural officer, there was no proof that there was any damage to the crop.

11. They submitted that the parties are bound to contracts of which they have signed. It was their submissions that the contract produced by the respondent is not signed by the Appellant and as such the Appellant cannot be bound by it. Reliance was made on the case of **Curtis v Chemical Cleaning & Dyeing Co. Ltd [1951] ALL ER** 63, where Lord Denning, M.R. stated that where a party signs a contract, that signature is evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud.

12. Alternatively, they submitted that should this honourable court be inclined to find that the appellant is bound by the contract filed by the respondent, they humbly pray that parties be held to their contractual obligations in accordance to the clauses of the contract. Reliance was placed on the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR**).

13. They submitted that as a matter of law and course court was in error to refer to and rely on these documents that were not produced as an exhibit in court. They relied on the case of **County Government of Homa Bay V Oasis Group International & Ga Insurance Limited 2017 KEHC 5024(KLR),** where the court frowned upon a court of law relying on a marked document to make a determination. They relied on the Court of Appeal as follows:

> 48. The foregone position has been fortified by the Court of Appeal in the case of Kenneth Nyaga Mwige -v- Austin Kiguta & 2 others (2015) eKLR which decision I hereby reproduce a substantial part thereof on what my Lordships rightly held on the issue:
>
> 23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa -v- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

14. They also submitted that the appellant was under obligation to harvest cane and give notice of breach. They submitted that the appellant never notified the Respondent of the alleged breach when it was a condition of the agreement and therefore cannot purport to find the respondent at fault for breach of contract for failing to harvest in time when she did not invoke the condition of notice in prior. Reliance was placed on the case of **Francis Joseph Kamau Ichatha -v- Housing Finance Company of Kenya Limited [2014] eKLR,** where it was held that failure to issue a notice as stipulated under a contract, constituted a breach of contract. Odunga held that:

> 70.The next issue …is whether the failure to give notice constituted a breach of contract…From the documentary evidence produced in this suit it is clear that though the Defendant was entitled to vary the rate of interest it could only do so on serving the plaintiff with not less than four months' notice to that effect…., it is clear that the requirement for 4 months' notice was never complied with by the Defendant. They relied on the case of William Kazungu Karisa -v- Cosmas Angore Chanzera [2006] eKLR.

15. They relied on the obligation to deliver cane as per the contract.

16. On quantum they stated that the damages were not proved. Reliance was placed on the case of **British Westinghouse Electric & Manufacturing Co. v- Underground Electric Railways Company of London Limited [1912] AC 673**

cited in *Nalinkumar M. Shah -v- Mumias Sugar Company Ltd [2010] eKLR*, where it was stated as follows:

> "the fundamental basis is thus compensation for precautionary loss naturally flowing from the breach; but the principle is qualified by a second, which imposes on the Plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of the damage which is due to his neglect to take such steps…

17. They also relied on parties being bound by their pleadings. Reliance was placed on the case of **Migore v South Nyanza Sugar Co Ltd [2018] KEHC 5465 (KLR)**.

18. They submitted that there was at no particular point at the trial stage did the respondent pray for exemplary damages and therefore the same was wrongly awarded by the trial court and it should be set aside. Reliance was placed in the case of **Juma Mikidadi v Ali Khalfan & another** [2004] KEHC 2665 (KLR), where Ochieng J, as he then was, stated as follows:

> "As regards exemplary damages, the same are only to be awarded in limited instances.
> The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of Halsbury's Laws of England, as follows:
> "Exemplary damages should be awarded only in cases within the following categories:
> 1. Oppressive, arbitrary on unconstitutional action by servants of government;

2. Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
3. Cases in which the payment of exemplary damages is authorized by statute.

19. In the second submissions dated 9.102026, the appellant submitted that the appellant bore the burden of proof to show the causal link between the respondent's action and the appellant's loss. Reliance was placed on the case of HCCA No.152 of 2003, **Statpack Industries Limited Vs James Mbithi** quoted in *Timsales Ltd V Willy Nganga Wanjohi [2006] eKLR* that:

> "It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce in evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessary as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."

20. The appellant filed two sets of submissions for each of the two appeals. They submitted that the plant crop dried up thereby compromising the development of 1st and 2nd ratoons. They submitted that the impugned documents were produced by consent on 15.03.2023. This was said to be binding. They stated that the appellant was entitled to damages but disassociated themselves with exemplary

damages. They prayed that the damages for breach are special in nature and not general damages to restore the injured person, under the principle of restitution integrum. It is thus compensatory in nature. They state that exemplary damages, also called punitive damages, are damages meant to punish a wrong doer. They by no means restore the innocent party. The appellant never prayed for exemplary damages.

21. Reliance was placed on the case of **South Nyanza Sugar Co. Ltd v George Ouma Odera [2020] KEHC 4636 (KLR),** where Mrima J, posited as follows;

> 23. In Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR I dealt with the issue as to why general damages cannot be awarded in claims hinged on breach of contracts. This is what I stated: -
>
> 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 principle is 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).

24. In **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** I found that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. Equally, when a Miller fails to harvest the first ratoon crop then the farmer is entitled to compensation for the first and second ratoon crops subject to the contract and the pleadings.

22. They submitted for a sum of Ksh 200,830/= for crop, Ksh. 179,690/= for first ratoon and Ksh. 163,835/= for the second ratoon totaling Ksh. 544,355/=.

Analysis

23. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own

conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

24. This court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of **Mbogo and Another vs. Shah** [1968] EA 93 the court stated:

> "…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

25. The duty of the first appellate court was set out in the case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the Judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court … is by way of re-trial and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

26. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

27. This court's jurisdiction to review the evidence should be exercised with caution. In the cases of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

28. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own conclusions.

29. The Appellant urged the court to find that the lower court erred in awarding her Ksh. 50,000/= only that was without basis. This court is entitled to reevaluate by way of a retrial

the pleadings and evidence at the lower court. On the proof of the allegations of breach of contract in **Raghbir Singh Chatte v National Bank of Kenya Limited [1996] KECA 99 (KLR)** 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."...**
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> **...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."**

30. The burden was with the Appellant to prove her case against the Respondent. On this subject, Section 107-109 of the *Evidence Act,* Cap 80 Laws of Kenya provides that:

> 107 (1) 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.**
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**
> **108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**
> **109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof** of that fact shall lie on any particular person.

31. A party who invokes the aid of the law and asserts affirmative of an issue has the burden to prove the matters in issue. In **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

> *"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."*

32. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending

on the circumstances of the case. The burden of proof also casts upon any party, the burden of proving any particular fact which he desires the court to believe in its existence.

33. In **Nyakwana v Ongaro [2015] KEHC 8440 (KLR)** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

34. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **William Kabogo Gitau V George Thuo & 2 Others** [2010] KEHC 4124 (KLR) 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."

35. Courts have established that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability**.** Lord Nicholls of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

36. The preponderance of probabilities as degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. Furthermore in **Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] KECA 616 (KLR)** the Judges of Appeal held that:

> "Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

37. With the above guide, in the instant appeal, the Appellant claimed 3-cycle harvests that were lost as a result of the failure to harvest the sugar cane by the Respondent.

38. It was pleaded that if they had harvested, the respondent could have paid Ksh 3,800/= per tonne. The payment formula was set out in the contract. The contract is admitted. It is not the duty of this court to amend or redraft a contract. In the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR)** [Tunoi, Shah & Keiwua JJ A] as follows: -

> A Court of law cannot re-write 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. There was not the remotest suggestion of coercion, fraud or

undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

39. The respondent did not denounce the contract. So the court could not require more than what was provided. The formula is laid as follows:

$$\text{Cane per metric tonne} = \frac{\text{net price of sugar per metric tonne} \times \text{farmers share}}{TC/TS}$$

The farmers' share = 50%

TC/TS= 10

Net price of sugar per metric tonne = Ex-factory price of sugar per metric ton excluding VAT and SD;

40. The cane was grown in Kakmasia sub-location in North Sakwa location. The first harvest could have paid a sum of Ksh. 3,000/= in 2014 and the same for a ratoon. The plantation was 0.7 ha. The yield was approximately 75.5 tons for the crop and 66 tons per hectare for the ratoon. However the appellant pleaded 70 tonnes per hectare. The expected yields for the three cycles ought to work out as follows;

i. Crop plant works out as follows: 70 x 0.7 x 3,000 = Ksh 147,000/=
ii. First ratoon works out as follows: 66 x 0.7 x 3,000 =Ksh. 138,600/=

Total – **Ksh. 285,600/=**

41. This was not a claim for special damages but for failure to harvest the cane that was contracted. The respondent has a duty to disclose the annual prices as a basis for determining contractual terms. Farming is not an exact science. It is based on the best available evidence and admissions. The court cannot fail to award simply because there was no agricultural report. In a wide-scale farming like coffee, tea, and sugar, the averages will always work out. In this case the reports were produced by consent as exhibits 3 and 4. The court was plainly wrong in failing to award damages for the loss of the crop and the first ratoon. A second ratoon cannot arise in the absence of the first ratoon.

42. The appellant had a duty to mitigate losses. Therefore, only the first ratoon and the crop plant could be awarded. Therefore a sum of Ksh. 285,600/= were due and owing to the appellant.

43. The court awarded a sum of Ksh. 50,000/= being exemplary damages. This was not prayed for. A court cannot award in vacuo. The award of exemplary damages is therefore set aside. Exemplary damages were not left to the court. The court

cannot deal with an unpleaded issue that was not left to the court. See odd jobs.

44. Parties are bound to plead their cases fully. In the case of **Migore v South Nyanza Sugar Co Ltd [2018] KEHC 5465 (KLR)**, A C Mrima, J, stated as follows:

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues

as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial

by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

45. 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:

> 58. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:
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> ....
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> 52.Further, the court went on and observed that:
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> "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. The court cannot exercise discretion of ordering recounting of ballots just to enable the

election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.

46. Exemplary damages were not left to the court. Consequently, the court was plainly wrong in awarding exemporary damages. The same is set aside. Consequently, the appeal in E087 of 2024 is allowed.

47. The net effect is that the appeal and the cross appeal are allowed. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be**

added to the costs and shall be recoverable as such.

48. Costs 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.**

49. 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
> 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.

50. Costs follow the event. Both parties were successful. Therefore, they shall bear their own costs.

Determination

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

a) Appeal number HCCA E087 of 2024 is allowed. The award of Ksh. 50,000/= as exemplary damages is set aside. The award of exemplary damages is dismissed.
b) Appeal number HCCA E076 of 2024 is allowed. The failure to award damages was plainly wrong. The order dismissing the claim for the value of the unharvested cane is set aside. Judgment is entered for the appellant against the respondent for a sum of Ksh. 285,600/=.
c) 30 days stay of execution.
d) Each party to bear their own costs in the appeal.

e) The appellant in Appeal number HCCA E076 of 2024 will have costs in the court below.
f) 14 days right of appeal.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **21st** day of **April, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ouma for the Appellant

Ms. Ogola for Mr. Olembo for the Respondent

Court Assistant – Michael