South Nyanza Sugar Company Limited v Rankai (Civil Appeal 172 of 2019) [2025] KECA 427 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 427 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 172 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 28, 2025

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED ..... APPELLANT

AND

DAVID RANKAI ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Migori, (Mrima, J.) dated 8th August, 2018 in HCCA No. 105 of 2017)

JUDGMENT

1. The respondent herein filed a plaint dated 20th September, 2014 at the Senior Principal Magistrate's Court at Migori in Civil Suit No. 341 of 2014 on a claim for breach of contract against the appellant. In the plaint, the respondent sought a declaration that the appellant was in breach of a cane contract they had entered into, the value of the unharvested cane he claimed he was left with following the alleged breach, costs of the suit, and interests.

2. In brief, the respondent claimed that he had entered into a contract with the appellant on 29th May, 2003, for the cultivation of sugar cane on his land known as Plot no. 160A, Field No. 19 measuring 1.0 hectares. His contract, he claimed, was account no. 712848. By the terms of the contract, he was to plan and grow sugarcane until maturity whereupon the appellant was to harvest and purchase the entirety of it including the first and second ratoon crops thereof.

3. The respondent claimed that he grew the sugarcane as agreed but the appellant refused and/or failed to harvest the plant crop thereby compromising the development of the first and second ratoon crops. As a result of the failure, the respondent claimed that he lost approximately 150 tons of the plant crop and another 150 tons for each of the two ratoon crops. His suit, therefore, was to recover damages for the breach of contract.

4. The appellant's statement of defence dated 18th November, 2014 denied the respondent's claim in toto, including challenging the existence of the contract. In the alternative, the defendant pleaded that any amounts payable to the respondent should be less than the farm inputs it had provided and other deductibles.

5. The trial began before the trial court on 03rd June, 2015 when the respondent testified. He adopted his witness statement and the documents in his list of documents as evidence; testified that he had entered into a contract with the appellant as alleged; that the appellant ploughed his land and provided the fertilizer as agreed but failed to harvest and purchase the crop as the contract. In cross-examination, he conceded that he had not produced a survey certificate and further conceded that the appellant's expert would probably have more informed views about the expected tonnage of the crop and ratoon crops.

6. The adopted witness statement by the respondent rehashed the respondent's claim as above while the list of documents adopted as evidence included a copy of the contract between the respondent and the appellant dated 29th May, 2003 (Out growers Cane Agreement) also described as the "Agreement Book". The other documents in the respondent's list of documents which were thereby admitted included: Inputs and Services documents; Yield Assessment Report by Kenya Sugar Research Foundation; Yield Assessment Report by Paul Simon; Leave to file Suit of time; Specimen harvest statements; and Schedule of Sugarcane Prices.

7. After a few adjournments, the appellant presented its defence witness, Richard Muok, on 12th July, 2017. He is the Senior Field Supervisor with the appellant. On the witness stand, he adopted his witness statement dated 16th February, 2016 together with a list of documents already filed in court and rested. He was not cross-examined.

8. In the adopted witness statement, Mr. Muok denied the existence of the contract between the appellant and the respondent and claimed that it was fraudulently obtained. He then "clarifies clarified" that "should there have been a contract between the two parties, then the Company must recover all the costs of inputs and services rendered to the farmer after every harvest."

9. In the list of documents dated 22nd May, 2015, the appellant included three documents: a Report from Kenya Sugar Research Foundation; a Cane Yield Report; and a Cane Produce Price List.

10. The learned trial magistrate decided the case on the critical question of whether the respondent had proved that he had entered into a contract with the appellant, which was then breached. In deciding in the negative, the learned trial magistrate consequentially held that:

> " The next issue to decide on is whether there was a contract. The plaintiff stated that he has (sic) entered into a contract with a (sic) defendant in 2003. The defendant disputed that claim. Thus sec. 107 of the *Evidence Act* comes into play. It was on the plaintiff to prove that there was a contract (sic). True in his filed exhibits, the plaintiff included a photocopy of an agreement book said to have been signed by the defendant and himself. When he testified in court, the plaintiff did not (produce the original contract) ensure leaving the court unsure whether or not it exists. Once the defendant had raised the issue of genuineness of the contract, the best evidence would have been the original agreement."

11. Additionally, the trial court faulted the respondent for adducing evidence that was unrelated to his claim. This was in respect to statements of accounts filed by the respondent respecting Bernard Opiyo,

Joash Mola, and Alloys Oketch. The trial magistrate was persuaded that this illustrated the dubiety of the plaintiff's claim. He held thus:

> " Further, from among the documents that accompanied the plaint, were some statements of accounts. However, none of them is in the name of the plaintiff and there is no evidence in the proceedings to show how the plaintiff is related to the said Bernard Opiyo; Joash Mola, Alloys Oketch and Parl Adongo Adero...all of at whose statements (sic) have been helped (sic) as part of the list of documents."

12. With that, the trial court dismissed the respondent's claim. Dissatisfied, the respondent appealed to the High Court raising two grounds thus:

    a. The learned trial magistrate erred in law and in fact, when he held that the plaintiff had failed to prove that there was a contract between him and the defendant yet the plaintiff produced a duly executive contract book to prove that there was a contract between him and the defendant.

    b. The learned trial magistrate erred in law and in fact when he failed to note that the statements of one Benard Opiyo, Joash Mola and Alloys Oketch which were filed with the other documents were specimen statements which were meant to prove yield and not the relationship of the plaintiff/appellant with the bearers of those specimen statements.

13. Upon consideration of the appeal, the High Court (Mrima, J.) reversed the trial court's findings on both questions, found that there was a contract that was breached by the appellant and assessed damages from the breach. The appellant is aggrieved by that judgment by the High Court dated 08/08/2018. The Memorandum of Appeal contains a whopping 15 grounds of appeal. For completeness, and, in part to demonstrate the prolix nature of the grounds, we reproduce them there. The appellant complains that:

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

    2. The Learned Judge erred in law when he held that the Respondent had proved the existence of a contract with the Appellant when no such contract was availed and produced in evidence and on the face of the clear denial of the existence of such a contract by the appellant.

    3. The Learned Judge erred in law, when having held that the Respondent did not lead any evidence on the applicable cane price, he nevertheless used figures which were never led in evidence by the Respondent to award compensation to him, thereby violating the Appellant's rights to a fair hearing.

    4. The Learned Judge, having found and held that the alleged plant crop matured and was ready for harvest by May 2005, he failed to notice and appreciate that the alleged breach of contract occurred if at all in 2005 and that the Respondent had until May, 2011 to file the suit, and since the Respondent's suit was filed in 2014, the same was incompetent as it had been filed outside the period of limitation, and in failing to hold that the suit as a whole was statute barred.

    5. The Learned Judge, erred in law when he ordered the appellant to pay damages of Kshs.365,300/= to the respondent in the face of the evidence led before

the trial court that the respondent had failed to develop the two ratoon crops 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 when he held that the trial magistrate was biased against the Respondent when there is no record that such evidence was led before the trial court to support such a holding and when the issue was never raised by any of the parties before him.

7. 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 were 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.

8. The Learned Judge erred in law when he awarded speculative damages to the Respondent as against the Appellant based on an alleged estimate of yields 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, and disregarding the Appellant's direct evidence on yields.

9. 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 on conjecture and speculation and ignored empirical documentary evidence of the actual yields led by the Appellant and the value thereof.

10. 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 compromised the development of the ratoon crops whose alleged value he subsequently awarded to the Respondent on the basis of gross loss which the respondent allegedly suffered.

11. The Learned Judge erred in law when he held that the Respondent was entitled to compensation arising from the 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.

12. The Learned Judge erred in law when he multiplied the plot size, average yield and cane price and held that the sum of Kshs.365,300/= 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.

13. 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, in respect the contract

despite finding and holding that termination of the contract and contracting cane to another miller was an open option to the Respondent.

14. 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.

15. The Judge decided the case against the weight of evidence purely on speculation and without proof and in failing to dismiss the Respondents appeal as was before him with costs

14. The appeal was argued by way of written submissions. Both parties filed their written submissions through their respective advocates. During the plenary hearing of the appeal, the parties' advocates entirely relied on their written submissions.

15. 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 v Express (K) Ltd & another [2018] eKLR.

16. Having exhaustively considered the record of appeal, the judgment of the two lower courts, the appellant's grounds of appeal, and the rival submissions of the parties, five issues of law present themselves for determination in this appeal:

    a. Whether the statute of limitations ousted the jurisdiction of the High Court to grant any relief to the respondent;

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

    c. Whether the learned Judge impermissibly relied on material which were not properly on record to reach his verdict;

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

    e. Whether the award of interests was lawful.

17. The appellant adopted arguments about the statute of limitations as its lead argument in favour of the appeal. This one argument, which the appellant ponderously makes in a whopping 24 (of its 40) pages of its submissions (far exceeding the limitation of 12 pages total communicated in a scheduling order by the Honourable Deputy Registrar) is that the respondent's claim was time-barred and should not have been allowed.

18. The appellant concedes that it never raised the defence of statute of limitations in its statement of defence (in fact, in the statement of defence, it conceded to the jurisdiction of the court). It also concedes that it never raised the statute of limitations at the High Court on appeal. As such, it is raising, for the first time on this second appeal, the argument about statute of limitations.

19. In defending its right to raise the statute of limitations on second appeal, the appellant argues that the statute of limitations is a jurisdictional issue – one that can be raised at any time – even on a second

appeal. In this regard, the appellant relies on this Court's decision in Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] eKLR where the Court said:

> " In would, therefore, have been prudent for the appellant to raise the question of jurisdiction before the superior court, as that way, this court would have had the benefit of the reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In Floriculture International Ltd v Central Kenya Ltd & 3 Others [1995] eKLR, the Court held that the issue of jurisdiction can be argued at any time..... the reasoning is that even where the question of jurisdiction is not raised, that does not necessary (sic) confer jurisdiction on the court if it has none....Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal, having not raised in the superior court."

20. The appellants are correct that this is the general jurisprudential position respecting jurisdiction. There is no question that a court of law can only deal with a subject matter whose jurisdiction it has. The famous words of Nyarangi, JA in The Owners of the Motor Vessel "Lillian S" v Caltex [1989] eKLR ring as clear today as they did more than three decades ago:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
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> 'By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.'
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> See Words and Phrases Legally defined – Volume 3: I – N Page 113."

21. As the appellants point out, so important is the issue of jurisdiction that it can be raised at any time in the proceedings including on appeal even if it was not raised earlier. In Lemita Ole Lemein v Attorney General & 2 Others [2020] eKLR, Karanja, JA took the view that:

> " In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need to be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence, therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The court can suo mottu determine

the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal, or even on second or third appeal."

22. While the position that jurisdictional objections can be raised for the first time on appeal remains firmly true, it does not obtain for matters of preclusive jurisdiction. These are jurisdictional matters which only become so when a party to a litigation raises them as affirmative defences. Once so raised and established in limine, they act to divest the trial court of jurisdiction in the case at bar. One example of such an affirmative defence is the exhaustion doctrine. Regarding this issue, this Court recently stated the following in Philip Otiende Adundo v County Assembly Service Board of Kisumu County & 5 Others (Civil Appeal No. 258 of 2019)(2025 KECA 239 (KLR(13th February, 2025):

> "Before addressing the issues that we discern, we must first dispose of the issue of jurisdiction that was raised by the 1st, 2nd and 4th respondents. In their submissions these respondents challenged the jurisdiction of this Court to hear this appeal, on the grounds that the appellant did not exhaust the resolution mechanism provided under the *County Governments Act*, Section 77 of which provided for an appellate process from the Board, to the Public Service Commission. However, a perusal of the response by the 1st, 2nd and 4th respondents, to the appellant's amended statement of claim, does not reveal any objection to the jurisdiction of the ELRC in hearing the suit. Nor was the issue raised in the submissions that were filed before the learned Judge in the trial court. Therefore, the learned Judge was not called upon to render an opinion on the issue of jurisdiction, and the matter cannot, in the circumstances of this case, be raised before this Court for the first time. We say this even though we are aware that it is a sound principle of law that jurisdictional questions can be raised at any time in proceedings even for the first time on appeal. See, for example, Lemita Ole Lemein v Attorney General & 2 Others [2020] eKLR; Jamal Salim v Yusuf Abdulahi Abdi & Another (Civil Appeal No. 103 of 2016 [2018] eKLR and Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577.
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> While that is the general rule regarding jurisdictional questions, it is different where the jurisdictional question is pegged on the doctrine of exhaustion. This is because the doctrine of exhaustion bereaves a court of juridiction only by preclusion: that the court is precluded from considering the dispute presented to it until the litigant has first pursued available statutory remedies outside the court. Consequently, the doctrine of exhaustion has known exceptions. It can also be waived or forfeited. The circumstances under which exhaustion requirements may be excepted, waived or forfeited by the parties to a litigation are factual and require factual findings. This is the reason the doctrine of exhaustion as a jurisdictional bar must be raised in the first instance at the trial court. A party cannot wait and raise it on appeal where the adversary cannot present factual material to demonstrate the non-applicability of the doctrine to the particular controversy before the court."

23. The position is exactly the same respecting statute of limitations. The statute of limitations, like the doctrine of exhaustion, is an affirmative defence. It must be raised in the first responsive pleading by a party or shortly thereafter or only later in the trial with the leave of the trial court. It is not preserved as a defence if it is not raised during trial and cannot be raised for the first time on appeal. Its jurisdictional bite is lost when a party fails to raise and pursue it at trial; it is considered forfeited or waived. As this Court explained in the Joseph Otiende Adundo Case, the reason for this is one

of fairness though jurisdictional, both the doctrine of exhaustion and the statute of limitations are defences which, though statutory bars to a court's jurisdiction, are fact-sensitive unlike subject matter jurisdiction. For these affirmative defences, the adversary can marshall other facts which might displace the application of the affirmative defence. For example, in the case of the statute of limitations, it is an intensely factual question when a cause of action arose. An adversary cannot be expected to respond to the factual claims at the appellate level where an appellant permitted to mount the statute of limitations for the first time on appeal.

24. We will now consider the substantive issues raised in the appeal.

25. First, the appellant argues that the respondent did not prove his case to the required standard, that is, on a balance of probabilities. In aid of this argument, the appellant also claims that the learned Judge relied on documents including the contract which were not produced by either party at the trial. The appellant cited the case of James A. Niala v 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 cites a number of other cases which demonstrated the legal principle, well accepted in our caselaw, that a document must be produced for a court to rely on it in Kenya. This is done by formally tendering the document in evidence. As the appellant points out, this was the holding in Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR where the 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."

26. This argument by the appellant is manifestly misconceived. As rehashed in the procedural history of the case above, the respondent testified as a witness during the trial. On the witness stand, he adopted not only his witness statement but, without any objection from the appellant, adopted all the documents in his list of documents. As outlined in paragraph *6* of this judgment, these documents included: the Out growers Cane Agreement also described as the "Agreement Book" dated 29/05/2003; the Inputs and Services' documents; Yield Assessment Report by Kenya Sugar Research Foundation; Yield Assessment Report by Paul Simon; Leave to file Suit out of time; Specimen harvest statements; and Schedule of Sugarcane Prices. Regarding these documents, the learned Judge remarked that:

> " There was no objection to the production of the documents by the appellant. The documents were hence rightly produced by the appellant and the documents became part of the evidential record in the suit. The documents included the contract. Therefore, in the absence of any objection by the respondent on the production of a copy of the contract, there was no need for the original document. The respondent had knowledge of the copy of

the contract since inception of the suit and did not raise the issue of inspection and discovery of documents even at the pre-trial stage."

27. The appellant also argues that "the findings of the learned Judge were based on no evidence and no law" and that "the Court took a guillotine approach to the issues raised at the High Court" because "it is readily discernible that the learned Judge anchored his finding that the appellant had breached the contract in issue and that the respondent thus deserved the damages which he awarded the Respondent, in a false premise, absent evidence. It was purely an assumption." In making this argument, the appellant argues that there was no evidence that the respondent sought the appellant's consent to dispose of the sugarcane to third parties, or the open market, as the Respondent pleaded, but the Appellant refused to give him that consent. The implication being that the Respondent was at liberty to seek consent, but did not. The implication being that the Respondent was not helpless, at all. The appellant heavily relied on the holding of Chitembwe, J. (as he then was) in Migori HCCA No. 47 of 2019 — South Nyanza Sugar Company Ltd v Francis Aderi Degeri. In that case, Chitembwe, J., in another similar tussle between the appellant and a cane farmer, reasoned as follows:

> "This is a civil claim and the standard of proof is one of balance of probabilities. It was expected that the Respondent was to prove that indeed the 1st ratoon was developed. The second ratoon is subject to the harvesting of the first one. The first ratoon comes out after the main crop is harvested. It is not automatic that the moment the main crop is harvested then the 1st ratoon will grow on its own upto maturity. The farmer has to tend to the 1st ratoon. The agreement indicates that the I st ratoon was to be harvested not later than 27 months alter the harvest of the plant crop. It therefore follows that the farmer has about 22 months to take care of the I st ratoon.
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> The cane cannot grow on its own (or that period of almost two years without the weeds being removed and all other relevant cane farming requirements alone. The Respondent's position is that since there is no evidence of harvesting of the first ratoon then automatically it has cultivated but not harvested. It could be possible that upon harvest of the first crop, the farmer cultivated the land and planted other crops.
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> There is no evidence that the Respondent notified the Appellant that the 1st ratoon was ready for harvesting and the Appellant failed to do so. There is no photograph showing the growing ratoon. It can be argued that the Respondent did not expect the Appellant to fail to harvest the cane and therefore could not have taken photos. Be that as it may the respondent could have realized that the Appellant had failed to harvest the 1st ratoon and prepared himself for the loss and build up his claim. He could have notified the assistant chief who witnessed the contract that the Appellant had failed to harvest the cane. He could have sent a demand letter to the Appellants to go and harvest the cane otherwise he would have sold the cane to other millers so as to mitigate his losses despite his contractual obligations to sell the cane to the Appellant. There was a contract between the parties. It is normal for a party alleging breach of the contract to notify the party in breach about the impending breach and the consequences thereof."

28. The appellant urges this Court to adopt the reasoning by Chitembwe J. arguing that the respondent had the chance, first, to mitigate his losses (as observed by Chitembwe, J) and, second, by removing the unharvested plant crop and cultivating another crop, then another crop, and selling those two crops to other entities.

29. We debunked this reasoning 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 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
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> 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.

30. We will next consider whether the learned Judge's assessment of damages for the breach of contract was fair and sound in the circumstances. In the present case, as we have analyzed above, the learned Judge relied on documents produced by both the appellant and the respondent to reach his conclusions about both the fact of loss, the extent of the loss, and the damage suffered by the respondent. This is how the learned Judge analyzed this aspect of the case:

> " The appellant particularized his claim under paragraphs 4 and 5 of the Plaint based on the acreage of 1.0 hectare, the expected yield of 150 tonnes per crop and the price of between Kshs. 2,000 and Kshs. 3,500 per tonne. He prayed for compensation for the plant crop and the two ratoon crops. The respondent denied the acreage, the expected yield and the price of the cane.
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> The contract provided the acreage of the appellant's land as 1.0 hectare. On the price of the can, the appellant did not adduce any such evidence, but the respondent relied on its Cane Produce Prices Schedule. I will use the said Schedule as the basis of the cane prices. Lastly, on the expected yield, the appellant relied on the Cane Yields Schedule developed by the Kenya Research Foundation (KESREF) whereas the respondent relied on its Sugar Cane

Productivity Schedule. I have considered both documents and I opt to be guided by the one developed by the KESREF. I say so because the Cane Yields Schedule developed by the KESREF is a product of extensive research undertaken by experts in the sugar sector over a long period of time."

31. The learned Judge then used these documents to deduce that the respondent's crop was expected to yield 80 tonnes at the price of Kshs. 1,800 per tonne hence yielding the expected income of Kshs. 144,000. He then deducted the expenses of Kshs. 60,900 to come up with a net expected income of Kshs. 83,100. Using similar calculations informed by the documents relied on, the learned Judge came up with a net income of Kshs. 115,100 for the first ratoon crop and Kshs. 167,100 for the second ratoon crop. The learned Judge, therefore, found that the total net earnings from the breached contract, then would have been Kshs. 365,300 which is the amount he awarded the respondent.

32. We found the reasoning of the learned Judge and his reliance on the documents free from reversible error. All the documents the learned Judge relied on had been tendered in evidence by the parties and where he elected to go by one over a rival document, the learned Judge offered satisfactory reasons for doing so.

33. As to whether the respondent was obligated to mitigate her losses, an argument raised for the first time on this second appeal, we only observe that the respondent could not have so mitigated her losses by disposing of the yield of the first and second ratoon crop to third parties because the contract strictly forbade any such action.

34. The final issue for determination is whether the learned Judge was wrong in awarding interests as he did. As we understand it, the appellant's objections to the award of interest from the date of filing are three-fold: first, that the award of interest should be limited because the exact amount payable to the respondent was not determinable until it was fixed in the judgment by the High Court; second, that the award of interest from the date of filing is unfair because it has taken too long for the case to be heard through the different rungs of the justice system it having been first filed in 2011 and that it was not the appellant's fault that it took so long to be heard; and third, that awarding interests from the date of filing of the case would lead to too high an award against a public company.

35. Principally, the appellant argues that the award of interest from the date of the filing of the suit was unjust and disproportionate. It argues that the pleadings in this case were drawn not for compensation for specific sums, which would justify the imposition of interest from the date of filing. The pleadings in the present case, the appellant argues, asked for an indefinite sum, which was only made certain by the judgment of the High Court. As such, the learned Judge should have awarded interest from the date of the judgment and not from the date of filing. The appellant cited the decision in New Tyres Enterprises Ltd v 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."

36. 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.

37. 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. We do not understand the statement made by Kwach, JA in the New Tyres Enterprises Ltd Case as laying down any hard and fast rule of law in such cases. It was only an explanation 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.

38. In fact, in the New Tyres Enterprises 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."

39. 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. In short, this ground of appeal fails as well.

40. The upshot is that the appeal wholly lacks merit. It is hereby dismissed with costs to the respondent.

41. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

. JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR