South Nyanza Sugar Company Limited v Mboga (Civil Appeal 141 of 2019) [2025] KECA 546 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 546 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 141 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 21, 2025

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED ..... APPELLANT

AND

BARNABAS OLONDE MBOGA ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Migori, (Mrima, J.) dated 9th April, 2019 in HCCA No. 23 of 2017)

JUDGMENT

1. The respondent herein commenced action at the Kehancha Resident Magistrate's Court vide a plaint dated 21st September, 2004 seeking for a declaration that the appellant herein was in breach of the cane contract between themselves; for the value of the unharvested sugar cane at the rate of Kshs. 1,730 per tonne; costs of the suit' and interests.

2. In sum, the respondent's averments were that he had entered into an agreement with the appellant whereby he was to cultivate sugar cane on Plot No. 284 A Field No. 148 vide Account No. 411234; and that by the terms of the contract, the appellant was to harvest, purchase, and transport the sugar cane to the factory on its maturity and pay the respondent for its value.

3. The respondent averred that pursuant to the agreement, he grew the sugar cane on a parcel of land measuring 0.40 Ha and on its maturity asked the appellant to harvest and purchase it as per the agreement but that the appellant failed or refused to do so in breach of the contract thereby causing the sugar cane to get abandoned, damaged and dried up on the farm. Consequently, the respondent sought compensation for the total value of the sugar cane and the 1st and 2nd ratoon crops as per the contract.

4. In its statement of defence, the appellant denied the claim although it conceded to the existence of the contract between the parties. However, the appellant claimed that no sugar cane was cultivated

by the respondent that could achieve satisfactory yield in total breach and complete disregard to the provisions of their contract; and that, therefore, no liability accrued to the respondent against the appellant.

5. When the matter was listed for hearing before the trial court on 24th July, 2014, the two advocates for the parties entered into a consent as follows:

   i. Plaintiff to file and serve statement and documents in support of this case together with submissions within 14 days of this date.

   ii. Defendant to file and serve witness statements and any documents in support of their case and also submissions within 14 days of service.

   iii. The court to render a decision based on the statements and submissions filed or to issue any other directions once the events herein before mentioned have been fulfilled.

6. Subsequently, the respondent complied with the directions while the appellant did not. Judgment was eventually delivered on 20th August, 2015. It is a terse one in which the learned magistrate dismissed the respondent's claim, holding, in pertinent part that:

> "The plaintiff says that he entered into a contract with the defendant and that he planted three crops of sugarcane. He presented in evidence a copy of the contract, it is dated 16th August, 1995. However, he does not provide any documents to support the assertion that he cultivated and developed cane. If there was cane on his land, he would have documents to show that it was cultivated and developed. He failed to provide such documents.
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> The question for determination therefore is whether the plaintiff proved that he developed the crop. No documentary proof that the crop cycles were developed was adduced by the plaintiff. It is unlikely and improbably that there would fail to be a single document, such as a job completion certificate, showing that the plaintiff developed or cultivated a cane crop. Therefore, the failure to avail such evidence is suspect and it tarnishes the plaintiff's claim."

7. Ultimately, the learned magistrate dismissed the suit with costs. The respondent was aggrieved by that decision and lodged an appeal in Migori High Court Civil Appeal No. 26 of 2016. His grounds of appeal were that:

   1. The learned magistrate erred in law and fact, when he failed to consider, evaluate and balance the pleadings, evidence and submissions, thereby reaching a wrong conclusion that the respondent failed to approve (sic) that he developed the ratoon crop.

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

   3. The learned magistrate was biased against the appellant.

8. Directions were taken and the appeal was canvassed of by way of written submissions.

9. In a judgment dated 15th June, 2017, the learned Judge found that there was no dispute that a contract existed between the parties and that the plant crop was developed up to maturity and the first crop duly harvested by the appellant, and the deceased paid his net dues. Thus, he coined one issue for determination, which was: whether the respondent developed the ratoon crops up to maturity and

if so, whether the crop was harvested. In his determination in this regard, the learned Judge held as follows:

> " A look at the pleadings reveal that the appellant's claim is anchored on the allegation that the respondent failed to harvest the plant crop and as such compromised the development of the ratoon crops. In proof of his case, the appellant relied on his written statement; the contract; the Schedule of Sugar Cane prices and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. The appellant's testimony was not controverted by any contrary evidence since the respondent did not file any witness statement. The foregone (sic) coupled with the fact that the respondent admitted the existence of the contract is prima facie evidence of proof of the claim. Further, the appellant admitted that the respondent supplied him with inputs and offered other services. I therefore find and hold that the appellant proved that he planted and took care of the plant crop up to matruity but the respondent failed to harvest the crop. The respondent, therefore, breached the contract."

10. The learned Judge, then, assessed damages payable to the respondent as follows:

> According to the plaint and the evidence, the appellant rightly prayed for the proceeds from the plant crop and the two ratoon crops in accordance with the contract. There is no dispute on the size of the land as 0.5 Ha. The appellant further relied on the Yields Report from the now defunct Kenya Sugar Research Foundation, which was succeeded by the now Kenya Agricultural and Livestock Authority (KALRO) and the respondent's Cane Prices Schedule.
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> According to the Yields Report, the average expected cane yields over the whole area forming the respondent's zones are clearly stated. In this case, since the contract was entered in August, 1995, the plant crop was expected to be harvested sometime in July, 1997, when the cane prices were Kshs. 1730 per tonne and the average yields were 85 tonnes per hectare. The second ratoon crop was expected in March 2001 where the average yioeld were 53 tonnes per hectare and the can prices were Kshs. 2,015 per tonne.
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> The total expected earnings from the three cycles would have been Kshs. 231, 519. That amount would however, have been subjected to the would-be harvesting and transport expenses, but no indication was tendered on the then existing rates.

11. The appellant is aggrieved by that judgment by the High Court. The Memorandum of Appeal contains a whopping 20 grounds of appeal. For completeness, we have reproduced them below. The appellant complains that:

    1. The Learned Judge, erred in law when in the circumstances of the appeal as was before him, he awarded compensation beyond what had been pleaded, on the basis of pleadings and on no proof and in respect of the appellant's alleged failure to harvest plant crop, ratoon 1 and ratoon 2 sugarcane which were never developed and which never existed at all.

    2. The Learned Judge erred in law when he made a conclusive finding that the respondent's testimony was not controverted by any contrary evidence since the Appellant did not file any witness statement.

    3. The Learned Judge erred in law when he held that the mere fact that the Appellant had admitted the existence of the contract between her and the Respondent is prima-facie evidence of proof of the claim as the respondent had mounted before the trial court.

4. The Learned Judge erred in law when despite there being no evidence which was led before the trial court, and there being no record which was availed before him, he found and held that the Respondent proved that he planted and took care of the plant crop up to maturity but the appellant failed to harvest the crop and thus the appellant therefore breached the contract.

5. The Learned Judge erred in law when he held that the Respondent was entitled to compensation in the circumstances of the appeal which was before him on the basis of what he had stated in Migori High Court Civil Appeal No. 10 of 2016 *South Nyanza Sugar Co. Ltd. vs. Joseph O. Onyango* (2017) eKLR, as he had previously dealt with a similar issue, and since he had not changed his position on the same.

6. The Learned Judge erred in law when he held without evidence that according to the plaint and the evidence, the appellant rightly prayed for the proceeds from the plant crop and the two ratoon crops in accordance with the contract and since on the basis of the Yields Report the average expected cane yields over the whole area forming the Respondent's zones were clearly stated and in holding that the total expected earnings for the three cycles would have been Kshs.231,590/= and which amount would however have been subjected to the would-be harvesting and transport expenses, but no indication was tendered on the then existing rates, thereby awarding compensation beyond the contemplated income, by failing to take into account from the award, the deductibles.

7. The Learned Judge erred in law when he held that the Respondent had proved the claim against the Appellant when no evidence at all was led, when no such contract was availed and produced in evidence and on the face of the clear denial of the alleged breach of such a contract by the appellant.

8. The Learned Judge erred in law, when having held that the Respondent did not lead any evidence, 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.

9. The Learned Judge, having found and held that the alleged plant crop matured and was ready for harvest by July, 1997, he failed to notice and appreciate that the alleged breach of contract occurred if at all in July, 1997 and that since the Respondent's suit was filed in 2004, it was filed outside the time limits set by the statute of limitation and the court did not have jurisdiction to entertain it.

10. The Learned Judge, erred in law when he ordered the appellant to pay damages of Kshs.231,590/= to the respondent based on figures which he himself came up with, on the face of lack of evidence led before the trial court that the respondent had failed to lead any evidence that he had developed any crop circles and thus the appellant's alleged failure to harvest them did not arise, as they never existed and against the background that only special damages, specifically pleaded and strictly proved by way of evidence can be awarded for breach of contract.

11. 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 of bias was led before the trial court to support such a holding and when the issue was never raised by any of the parties either before him or before the trial court.

12. The Learned Judge erred in law, and wrongly exercised his discretion when he held that interest on the speculative amounts he gave 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 of the High Court and thus the Appellant's obligation to pay them only arose on the date of the appellate judgment and decree and not before.

13. 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.

14. The Learned Judge erred in law when he truly misapprehended the appeal before him and the 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.

15. 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 figures which were contained in documents which were never produced in evidence before the trial court.

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

17. The Learned Judge erred in law when he multiplied the plot size, average yield and cane price and held that the sum of Kshs.231,590/= 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 despite finding and holding that the same were to be paid subject to contractual deductions, like in respect of cane harvesting and transport, which he failed to take into account.

18. The Learned Judge erred in law when he held without evidence, and on the basis of his prior holding in other cases, that the Respondent had a no duty and obligation in the circumstances of the contract between the parties, to mitigate his losses, if at all any, when termination of the contract and contracting cane to another miller was an open option to the Respondent.

19. The Learned Judge, erred in law in awarding to the Respondent compensation in respect of three crop circles, as opposed to the claimed and pleaded value of un-harvested sugarcane, and in respect of an amount which had neither been pleaded nor proved by evidence and was not supported by the record of the trial court which was availed before him.

20. The Judge decided the appeal against the pleadings, on no evidence and purely on speculation and without proof and could only further err in failing to dismiss the Respondents appeal as was before him with costs.

12. The appeal before us was argued by way of written submissions. Both parties filed their written submissions through their respective advocates. During the plenary hearing of the appeal, Mr. Odero, learned counsel, appeared for the appellant while Mr. Achola, learned counsel, appeared for the respondent. The advocates entirely relied on their written submissions.

13. 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.

14. 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, six issues of law present themselves for determination in this appeal:

    a. Whether the respondent's suit was statute-barred.

    b. Whether the learned Judge decided the appeal and wrongly reversed the trial court's verdict based on issues not properly raised on appeal.

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

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

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

    f. Whether the award of interests was lawful.

15. For its first salvo but tucked in as ground 9 of appeal, the appellant raises, for the first time, statute of limitations as a ground of appeal. It claims that the claim before the subordinate court was statute-barred since, going by the dates in the contract between the parties, the commencement date for the contract was August, 1995 and the alleged breach occurred around August, 1997. The suit, therefore, should have been filed no later than August, 2003. Since the plaint was only filed in September, 2004, this rendered the claim statute-barred.

16. In making this argument, and in conceding that it did not raise this defence at the trial court and at the first appellate court, the appellant makes the argument that statute of limitation is a jurisdictional issue which can be raised at any time. It relies on Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] eKLR for this proposition.

17. We have addressed this question in a recent decision: *South Nyanza Sugar Company Ltd v David Rankai* Kisumu Civil Appeal No. 172 of 2019. By way of comprehensively responding to this ground of appeal, we reproduce our analysis below:

> 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):
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> > " 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. 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 jurisdiction 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."

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.

18. The appellant also complains that the High Court erred when it determined the appeal on issues which had not been pleaded before the magistrate's court and were also not appealed. It relied on *Raila Amolo Odinga & Another vs. IEBC & 2 Others* [2017] eKLR, wherein it was held that "the settled legal position is 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 consideration. The issues arise only when a material preposition 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." Stemming from this authority, the appellant argued the issue for determination framed by the learned judge was neither informed by

the pleadings of the parties nor the issues raised in the memorandum of appeal. The appellant, thus, complains that the learned judge pronounced himself on unpleaded matters.

19. The appellant also cited *David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others* [2014] eKLR for the proposition that it is impermissible for the court to make determination on unpleaded issues, and contended that the learned judge anchored his finding that the appellant had breached the contract and that the respondent deserved to be awarded damages, on a false premise which was without evidence. Rather, the appellant argued, the conclusion was purely based on an assumption. In reaching his conclusions, the appellant argues, the learned Judge went beyond the powers of a civil court when sitting on an appeal as stipulated in section 70 of the *Civil Procedure Act*.

20. We first consider whether the learned Judge determined the appeal on impermissible un-appealed issues. We do not think he did. The first two grounds of appeal that were before the learned Judge were framed thus:

    1. The learned magistrate erred in law and fact, when he failed to consider, evaluate and balance the pleadings, evidence and submissions thereby reaching a wrong conclusion that the appellant had failed to prove that he developed the ratoon crop.

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

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

22. Turning to the complaint that the issues which the learned Judges decided were not in the plaintiff's pleadings, we have had difficulties understanding that complaint. As we briefly rehashed above, the respondent, in his plaint, averred that pursuant to the agreement, he grew the sugar cane on a parcel of land measuring 0.40 Ha and on its maturity asked the appellant to harvest and purchase it as per the agreement but that the appellant failed or refused to do so in breach of the contract thereby causing the sugar cane to get abandoned, damaged and dried up on the farm. Consequently, the respondent sought compensation for the total value of the sugar cane and the 1st and 2nd ratoon crops as per the contract.

23. The case, as framed from the magistrate's court, was one for breach of contract. These were matters which were explicitly pleaded and responded to.

24. The next issue raised by the appellant is whether the learned Judge impermissibly relied on documents which had not been produced in evidence. 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."

25. This argument by the appellant is largely misconceived. As explained in the procedural history of the case above, in this case, the parties agreed, by consent, to rely on all witness statement and documents filed in the trial court. These, then, were taken as produced documents in evidence. For the respondent, this included his written statement; the contract; the Schedule of Sugar Cane prices and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. As the learned Judge observed, the respondent's testimony was not controverted by any contrary evidence since the respondent did not file any witness statement or any other documents. There is, therefore, no basis whatsoever, for the complaint that the learned Judge impermissibly relied on documents which had not been produced

26. The appellant also argues that "there was no justification, in the law or in the record for the judge to find and hold [that the appellant was in breach of contract] because the appellant did not harvest the respondent's plant crop in breach of the contract between the appellant and the respondent, the respondent's opportunity and ability to develop the ratoon crops were compromised and consequently, the respondent lost the ratoons, in spite of the self-explanatory and unequivocal pleading by the respondent in his plaint at the subordinate court that he had developed the ratoons."

27. The curious argument the appellant makes is that since the respondent claimed he "developed" the ratoon crops in his pleadings, his claim must be denied because failure to harvest the sugarcane crop automatically compromises the ratoon crops. 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 Ist ratoon was to be harvested not later than 27 months after the harvest of the plant crop. It therefore follows that the farmer has about 22 months to take care of the Ist 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.

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 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. 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.

31. 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."

32. 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.
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> 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.

33. 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.

34. 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."

35. 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.

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

37. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.

HANNAH OKWENGU

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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