South Nyanza Sugar Co. Ltd v Anyango ((Suing as the Administratrix of the Estate of Jared Onyango Onguka)) (Civil Appeal 171 of 2019) [2024] KECA 694 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 694 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 171 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JUNE 21, 2024

BETWEEN

SOUTH NYANZA SUGAR CO. LTD ..... APPELLANT

AND

MARY ANYANGO ..... RESPONDENT

(SUING AS THE ADMINISTRATRIX OF THE ESTATE OF JARED ONYANGO ONGUKA)

(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. 24 of 2017)

JUDGMENT

1. This appeal arises from the judgment of the High Court of Kenya at Migori (Mrima, J.) dated 9th April, 2019. The suit was first filed by respondent herein in 2005, against the appellant herein. The suit was Kehancha Principal Magistrate's Court Case No. 137 of 2004. In her Amended Plaint dated 6th July, 2005, the respondent sought judgment for breach of contract by the appellant and prayed for:

    a. A declaration that the defendant is in breach of the Cane Contract with the plaintiff.

    b. The value of unharvested sugarcane at the rate of Kshs. 1,730/= per ton.

    c. Cost of the suit.

    d. Interest on a, b and c above at court rates.

2. The respondent's case was that in 1994, Jared Onyango Onguka (deceased) who died in 1999, entered into a contract known as "Outgrowers Cane Agreement" with the appellant, whereby he was to cultivate sugarcane and the appellant was to purchase/harvest and transport sugarcane to the factory

upon its maturity and pay the deceased the value thereof. Pursuant to the said contract, the deceased cultivated the sugarcane on a plot measuring 0.5Ha which the appellant was to harvest/purchase three times, that is, the plant crop and the first and second ratoons. Further, as per the contract, the appellant was to assist the deceased to develop the sugarcane by providing input and services. The costs were recovered from the proceeds of the plant crop.

3. The respondent averred that the appellant, in breach of the contract and contrary to public policy and common practice, only harvested the plant crop and failed to harvest the first ratoon upon its maturity, thereby compromising the development of the second ratoon. As a result, the sugarcane got abandoned, damaged and dried up on the farm; thereby causing great loss to the deceased at the rate of Kshs. 1,730.00/= per ton as at the time that the same was due for harvest.

4. In her statement, the respondent said that she expected a yield of 50 tonnes from each cycle. Therefore, the total tonnage loss was 100 tonnes. In addition, the respondent stated that she was aware that the harvesting and transport charges were deductible from the proceeds of the two cycles. For this reason, she did not mind that amount being deducted from any award that the Court may give.

5. On its part, the appellant filed a Statement of Defence dated 2nd November, 2004. The appellant admitted, through one, Richard Muok (a Field Supervisor at the appellant's company), that there was indeed a contract between itself and the deceased which was to last for a period of five (5) years or until the plant crop and two ratoons were harvested, whichever period was shorter as per the contract. Further, the appellant averred that it harvested the plant crop and paid the deceased. The appellant insisted that afterwards, the deceased never developed the first and second ratoons.

6. In this regard, the appellant alleged that it was the specific duty and obligation of the deceased to plant, tend and avail to it cane that could achieve satisfactory yield when milled. However, no such cane was cultivated by the deceased in a manner that could have achieved a satisfactory yield. Thus, the deceased was in total breach and complete disregard of the provisions of the contract; and hence no liability accrued to the appellant against the respondent.

7. Second, the appellant denied the respondent's allegation that it was bound to purchase any cane or at all. According to the appellant, it was only bound to harvest cane from plots that had been well maintained and contained satisfactory cane yield that could reasonably be expected to be achieved. In addition, the appellant averred that the deceased failed, in breach of the contract, to develop cane as is customary even after it provided the necessary inputs and services at reasonable rates. The appellant also averred that the deceased never availed any cane which could be economically harvested and milled and whose value it could pay to the deceased.

   Therefore, the appellant averred that no loss or damage as alleged was suffered by the deceased.

8. Third, the appellant averred that the deceased solely caused/occasioned the abandonment, damage or drying up of his plot which led to the alleged loss. According to the appellant, the deceased had a duty to take care of his plot and protect it against waste and damage as per the contract. Thus, the appellant argued, the appellant ought not to be blamed in that respect.

9. Fourth, the appellant denied that the price of raw cane at the time was Kshs. 1,730.00/= per ton. Instead, it averred that the price per ton was Kshs. 1,553.00/= gross and which price was subject to deductions in respect of Sony Outgrowers Company (SOC) levy, presumptive income tax, harvesting charges, transport charges and cess. The appellant further averred that in Kagelo Sub-location, a plot measuring one hectare yields plant crop of 70 tonnes, whereas the first and second ratoon crops both yield 50 tonnes per hectare.

10. Lastly, the appellant averred that the respondent's suit was statute barred and incompetent; and had been filed outside the limitation period without leave. In addition, the appellant also denied the jurisdiction of the court as the cause of action arose in Migori District, outside the local limits of the jurisdiction of the lower court, but within the local limits of the courts either at Migori or Rongo. Although the appellant had threatened to raise a preliminary objection on both scores prior to the hearing of the suit, it never did.

11. The suit, therefore, went to trial. In his judgment, the learned magistrate coined one question for determination, which was:

> whether the respondent proved that she developed the first and second ratoon crops. In this regard, the learned magistrate found that: there was no documentary proof that the ratoon crops were developed; the only proof adduced was that the plant crop was grown and harvested; that it was unlikely that there would be no single document showing that the ratoon crops were developed if they in fact were; and that failure to avail such evidence was suspect and lent credence to the appellant's position that no ratoon crop was developed. For these reasons, the learned magistrate held that the respondent failed to prove the basis of her claim, which was that she developed ratoon crops. Ultimately, he dismissed the suit with costs.

12. The respondent was aggrieved by that decision and lodged an appeal in Migori High Court Civil Appeal No. 24 of 2017. Her 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.

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

14. In a judgment dated 9th April, 2019, 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 deceased or the respondent (as the case may have been), 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:

> " 13. The Appellant testified that the first ratoon crop developed from the harvesting of the plant crop and she took good care thereof until it matured. The Respondent contended otherwise. At this point it must be understood that the first ratoon crop usually develops once the plant crop is harvested. A ratoon crop is not planted like a plant crop but it generates from the previous harvested crop. In such a case it would therefore be incumbent upon the Respondent to prove that the Appellant failed to take good care of the first ratoon crop which automatically regenerated on harvesting of the plant crop.
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> 14. Clause 4 of the Contract provided for breach of the contract and what was to happen in such instances. There is no evidence that the Respondent issued any

notice upon the Appellant's alleged default. The evidence which was before the trial court was hence adequate for the court to find that the Appellant took good care of the first ratoon crop until it matured. The Respondent's contention that the Appellant did not develop the first ratoon crop is hence for rejection. As the Respondent took the forgone position, it is clear that it did not even bother to harvest the first ratoon crop. On a preponderance of probability, the Appellant therefore proved that the Respondent failed to harvest the first ratoon crop at maturity and that the Respondent was in breach of the contract. Having failed to harvest the first ratoon crop, the development of the second ratoon crop was undoubtedly compromised. Respectfully, the learned magistrate's finding must be interfered with.

15. Having found that it is indeed the Respondent who was in breach of the contract, this Court should hence consider the compensation to the Appellant for the two ratoon crops which is in consonance with the contract. Such compensation is always tailored in a fashion as to put the claimant as far as possible in the same position he/she/it would have been in if the breach complained of had not occurred. That principle is encapsulated in the Latin phrase restitution in integrum. In this case, the contract was for a period of five years or until the plant crop and two ratoon crops were harvested, whichever occurred first. Because of the breach, the Appellant lost the first ratoon crop and the contemplated second ratoon crop.

16. According to the guide developed through a study by the now defunct Kenya Sugar Research Foundation, which was succeeded by the now Kenya Agricultural and Livestock Research Authority (KARLO), which institution was mandated to promote, research and investigate all problems related to sugarcane and such other crops, processing into sugar and its by-products, productivity, quality, sustainability of land and such matters ancillary (which guide was part of the Appellant's documents) for the period 1993 to 2001, the average expected cane yields over the whole area forming the Respondent's zone are clearly stated. In this case, since the plant crop was harvested sometimes in April 1996, the first ratoon crop was expected to be harvested around 22 months later; that is around February 1998 and the second ratoon was expected in December 1999. By then the average yield was 106 tonnes per hectare and 78 tonnes per hectare respectively.

17. The price of the cane per tonnage in February 1998 and in December 1998 was the same at Kshs. 1,730/= per ton as per the Price Guide developed by the Respondent which is part of the documents produced by the Appellant.

18. The total expected earnings for the two ratoon crops would then have been Kshs. 159,160/=. That amount would however been subjected to the would be harvesting and transport expenses which the Appellant calculated in her submissions at the lower court at Kshs. 60,000/= for both ratoon crops. The net amount payable to the Appellant is therefore Kshs. 99,160/= for which I hereby enter judgment for the Appellant against the Respondent. This sum shall attract interest from the date of filing of the Plaint.

19. Following the forgone disclosure, the upshot is that the following final orders do hereby issue: -

a. The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;

b. Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 99,160/=;

c. The sum of Kshs. 99,160/= shall attract interest at court rates from the date of filling of the Plaint;

d. The Appellant shall have costs of the suit as well as costs of the appeal.

Orders accordingly."

15. Aggrieved by the decision of the High Court, the appellant filed a Notice of Appeal dated 10th April, 2019, and a Memorandum of Appeal dated 9th August, 2019, in which it raised a whooping (and prolix) eighteen (18) grounds of appeal. These are that the learned Judge:

1. Erred in law when in the circumstance of the appeal as was before him, he failed to restrict himself to the three grounds of appeal as had been contained in the memorandum of appeal which was before him.

2. Erred in law when at the appellate stage, he awarded damages in respect of the appellant's alleged failure to harvest ratoon 1 and ratoon 2 sugarcane which were never developed and which never existed at all.

3. Erred in law when he held that it was incumbent upon the appellant to prove that the Respondent had failed to take good care of the first ratoon crop, thereby shifting the burden of proof to the appellant as opposed to requiring the respondent to prove that the said ratoon crop existed and that there was a failure by the appellant to harvest it.

4. Erred in law when he held without basis that ratoon 1 crop automatically regenerated on harvesting of the plant crop.

5. Erred in law when he held that the appellant did not lead any evidence having issued any notice to the respondent when the issue of such notice was never raised before him thereby violating the appellant's right to a fair hearing.

6. Erred in law when he made an erroneous conclusion without evidence and or basis that the appellant was in breach of the contract.

7. Erred in law when he made an erroneous conclusion that the respondent's testimony was never controverted, when the respondent in fact never led any such testimony before the trial court, and in relying on documents which were never formally produced as exhibits before the trial court to award compensation and in the absence of proof.

8. Erred in law when he held that the alleged ratoon 1 crop matured and was ready for harvest by February 1998, and that the average yield was 106 tonnes per hectare and that the ratoon 2 crop was expected to mature by December 199, with an expected yield of 78 tonnes per hectare when no such evidence was led before the trial court and thus such finding was not supported by the record which was before him.

9. Erred in law when he ordered the appellant to pay 99,160/= on the basis of an alleged expected earnings for two crop circles to the respondent, and in the face of lack of evidence led before the trial court that the respondent had developed the three 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.

10. Erred in law and wrongly exercised his discretion when he held that interest on the speculative amounts he awarded as compensation were only assessed by the court 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.

11. Erred in law when he awarded speculative damages to the respondent as against the appellant based on an alleged estimate of expected yield 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, and disregarding the appellant's direct evidence on yields,

12. 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.

13. Erred in law when he held without evidence that there was loss of yield for the ratoon 1 crop, and that such loss compromised the development of the ratoon 2 crop whose alleged value he subsequently awarded to the respondent.

14. Erred in law when he held that the respondent was entitled to compensation arising from 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.

15. Erred in law when he multiplied the plot size, average yield and cane price and held that the sum of Ksh. 99,160/= 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.

16. 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 to the contract and in effect failed to give effect to the termination clause in the contract between the parties.

17. In having awarded to the respondent compensation in respect of two 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.

18. Decided the case against the weight of the evidence purely on speculation and without proof and in failing to dismiss the respondents appeal as was before him with costs.

16. Consequently, the appellant prayed that: the appeal be allowed with costs, the award of damages be set aside in its entirety and the respondent's appeal in the court below be dismissed with costs.

17. During the virtual hearing of the appeal, learned counsel Mr. Odero appeared for the appellant, whereas learned counsel, Mr. Achola, appeared for the respondent. Both parties filed written submissions and relied entirely on them.

18. The appellant condensed the issues of determination into four (4) points of argument as follows:

    a. Grounds 1, 2, 3, 4, 5 and 6

    b. Ground 7

    c) Grounds 8, 9, 11, 12, 13, 14, 15, 16 and 17

    d) Ground 10

19. On grounds 1, 2, 3, 4, 5 and 6, the appellant argued that the learned judge did not restrict himself to the three grounds of appeal contained in the respondent's Memorandum of Appeal at the High Court, and decried the fact that parties are bound by their pleadings. In this regard, the appellant submitted that the learned judge never determined ground 3 of the respondent's Memorandum of Appeal, which according to it had no lawful basis for the allegation of bias. The appellant also claimed that ground 1 and 2 of the respondent's Memorandum of Appeal did not concern any question as to whether the appellant breached the contract, which was the main issue in that appeal.

20. With regard to ground 1 of the respondent's grounds of appeal at the High Court, the appellant deduced that the question was whether the deceased indeed developed ratoon crops. It relied on the case of 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 of determination framed by the learned judge, which was, "whether the deceased or the appellant, as the case may be, developed the ratoon crops up to maturity and if so, whether the crop was harvested", and his determination on the same as stated in paragraph 13 of the judgment, thus:

> "13. The Appellant testified that the first ratoon crop developed from the harvesting of the plant crop and she took good care thereof until it matured. The Responded contended otherwise. At this point it must be understood that the first ratoon crop usually develops once the plant crop is harvested. A ratoon crop is not planted like a plant crop but it generates from the previous harvested crop. In such a case it would therefore be incumbent upon the Respondent to prove that the Appellant failed to take good care of the first ratoon crop which automatically regenerated on harvesting of the plant crop."

    The appellant complains that the learned judge pronounced himself on unpleaded matters.

21. 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*.

22. Further, the appellant contended that the learned judge erred when he based his conclusions and reasoning on matters of local or general notoriety, which he took judicial notice of under section 56 and 60 of the *Evidence Act*. In this respect, the appellant contended that the respondent was not a party to the contract; the respondent could not have developed sugarcane under the contract; and the respondent never developed any ratoon crop. Therefore, in the circumstances, the learned judge erred in finding and holding to the contrary. In addition, the appellant argued that the there was no evidence that the second ratoon crop was ever developed because of failure to harvest the first ratoon crop, which was the respondent's pleading before the lower court. According to the appellant, there was no justification in the law or in the record of the lower court, for the learned judge to find and hold that the respondent did not harvest two ratoon crops, in breach of the contract between itself and the deceased, as sugarcane never develops itself. For this proposition, the appellant relied on a decision of the High Court in South Nyanza Sugar Company Ltd vs. Francis Aderi Dedege, Migori HCCA No. 47 of 2019 wherein Chitembwe, J. held that the first ratoon crop does not grow automatically after the first harvest; it has to be tended to, and it is incumbent on a farmer to prove that they tended to the first ratoon crop in order to recover on a suit for breach of contract.

23. The appellant also relied on another High Court decision, Jael A. Omolo vs. South Nyanza Sugar Co. Ltd [2019] eKLR, where the court reached similar conclusions in a case of similar nature.

24. Stemming from the above, the appellant contended that the learned judge appeared to have accepted and applied a lesser standard of proof than that of a balance of probabilities, as is applicable to civil cases. It argued that the learned judge adopted the approach that as long as a party shows up in court and says that his/her sugarcane was never harvested, then it must be so, and a breach of contract had occurred; and such a person is supposed to be awarded damages.

25. With respect to ground 7, the appellant contended that the learned judge relied on documents that were not adduced in evidence as exhibits in the proceedings before the lower court. It also submitted that claims for damages are proven and damages awarded on the basis of evidence adduced before the court in proceedings which are wholly compliant with the *Evidence Act*. It was argued that the learned judge relied on documents that were not an evidentiary part of the record of the lower court, in finding and holding that the respondent had proved her claim against the appellant. For this proposition, the appellant relied on the case of James A. Niala vs. South Nyanza Sugar Co. Ltd [2019] eKLR; South Nyanza Sugar Co. Ltd vs. Phoeby Atieno Oduara [2018] eKLR; South Nyanza Co. Ltd vs. Mary A. Mwita & Another [2018] eKLR; Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others [2015] eKLR; and County Government of Homa Bay vs. Oasis Group International & Another [2017] eKLR, wherein the various courts held that it is imperative for documents to be formally identified and produced as an exhibit in court, to enable the court to make a decision based on them. The documents must be tendered/produced in evidence as an exhibit by either party. Thereafter, the court must admit the documents into evidence for the same to become part the judicial record of the case and constitute evidence. Mere admission of a document in evidence does not amount to its proof and mere marking of a document for identification does not dispense with the formal proof thereof. Lastly, the document becomes proved, disproved or not proved when the court applies its judicial mind to determine the relevance and veracity of the content of the document during the hearing of the case. That is to say, when the court is called upon to examine the admissibility of a document, it concentrates only on the document. And when the court is called upon to form an opinion whether a document has been proved, disproved or not proved, the court will not only look at the document alone but take into consideration all facts and evidence on record.

26. As far as grounds 8, 9, 11, 12 13, 14, 15, 16 and 17, are concerned, the appellant submitted to adopting and reiterating its foregoing submissions, for the reason that they were intertwined with the points taken and highlighted in the foregoing paragraphs. Suffice to say, the appellant highlighted that:

    a. The finding on liability was made without jurisdiction, and without hearing the parties as required by law since, in the appellant's view, it was not one of the issues raised in the memorandum of appeal.

    b. The finding on liability for breach of contract was based on no lawful evidence.

    c. The assessment of damages for breach of contract was out of the pleadings and thus, it was an award made without jurisdiction, without hearing the parties as required by law.

    d. The assessment and award of damages was based on no lawful evidence howsoever.

    e. The award of Kshs. 99, 160/= was not pleaded, howsoever, nor proved by evidence.

    f. The learned judge anchored his findings, holdings and award in speculations alone.

27. Lastly, as regards ground 10, the appellant contended that in the circumstances, the award of interest from the date of filing of the suit was unlawful. It argued that it is long settled in law that damages for breach of contract are not damages at large. Rather, based on a pleading which prays for damages, they are special damages which must be pleaded specifically in sufficient detail, then proved strictly before they can be awarded. To buttress its contention, it relied on the case of *South Nyanza Sugar Co. Ltd vs. Oreko (Civil Appeal 138 of 2017*) [2022] KECA 570 (KLR) 24 June 2022) (Judgement); John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd [2013] eKLR; South Nyanza Sugar Co. Ltd vs. John Chora Omolo [2019] eKLR; Henry Wafula Khaemba vs. Nzoia Sugar Company Ltd [2018] eKLR; New Tyres Enterprises Ltd vs. Kenya Alliance Insurance Co. Ltd [1988] eKLR; and South Nyanza Sugar Co. Ltd vs. Samwel Nyandiga Mac'Ondiwa [2021] eKLR, wherein the various courts held that the award of interest is discretionary; the interest should be in consonance with the underlying objective for which order of interest is made; interest on special damages should be from the date of filing the suit as the money would have been due to the claimant at the very least on that date; general damages should be from the date of judgment as that is the date when the loss was quantifiable. In this regard, the appellant argued the character of the Plaint removed the respondent's case from the known classes of special damages and that as this Court will gather from the record, the court fees paid for the respondent's claim was prescribed for claims for suits for general damages. Thus, the learned judge awarded interest without laying a lawful basis for the same.

28. Further, the appellant argued that if interest were to apply from the date of filing the suit, then it goes without saying that such interest will exceed the award. In which case, the appellant should not be blamed for, and thus be condemned to bear the cost of the period of almost a decade during which time the matter was before court, as the interest burden will notably go beyond the principal award. In this regard, the appellant argued while it is sad that the respondent's sugarcane may not have been harvested, an award of interest that goes beyond the principal award would be a punishment to the appellant and if not controlled, the awards from courts in suits of this kind would be financially unbearable for sugar companies like the appellant, which is a public entity.

29. The appellant further urged this Court to consider, in awarding damages, that the contract in issue had a termination clause. It further argued that the principle of restitution in integrum is only applicable to the issue in this appeal where each party had, in the first place performed their contractual obligations optimally, which had not happened here.

30. Opposing the appeal, first, the respondent reminded this Court of its mandate as a second appellate court which has to be restricted to matters that raise points of law only. In this regard, the respondent urged this Court to take judicial notice of the fact that the appellant's Memorandum of Appeal highlights points of fact that were already dealt with by the two lower courts, thereby the same should not be for consideration in this Court.

31. Second, the respondent submitted that having perused the appellant's Memorandum of Appeal and its submissions, the points of law raised therein for consideration are:

    a. Did the High Court restrict itself to the 3 grounds of appeal raised in the Memorandum of Appeal and deal with them exhaustively?

    b. Was there a contractual relationship between the appellant and the respondent?

    c. Was the High Court just in awarding special damages to the respondent?

    d. The question of interest and how it should be awarded.

32. On the first point, the respondent contended that the learned judge exercised his judicial power as the first appellate court by reviewing the evidence that was presented before the lower court; whereby he dealt with the three grounds raised in the appeal in a holistic and exhaustive manner, and left no room for further error.

33. On the second point, the respondent submitted that it is not disputed that there was a legal contract between the parties in this suit, each with their own obligations. It was also submitted that a further clause existed in the contract which restricted the farmer from disposing the cane to third parties in a bid to mitigate his losses in the event that any eventuality should occur to the plants leading to them not being harvested; and the contract further sets out steps to be taken in case of such eventualities. Having established that there was a contract, the ensuing question would be whether there was a breach in the contractual terms; and if so, was the aggrieved person left in a position that they ought to have been should the breach not have been occasioned. In answering this question, the respondent contended that the appellant harvested the plant crop but failed to harvest the first ratoon crop, thereby compromising the development of the second ratoon crop, contrary to the contractual terms that they entered into. The terms of the contract were to the effect that the contract was for a period of five (5) years or for the appellant to harvest the plant crop and two ratoon crops; whichever was shorter. The respondent executed his duties diligently. However, the appellant only harvested the plant crop and refused to harvest the first ratoon which had been developed to maturity. In addition, due to the laxity of the appellant, the second ratoon crop was compromised as it is from the left over cuttings of the preceding crop cycle that the next one would grow and be developed from. To this end, the respondent argued that the learned judge, having a full understanding and appreciation of how sugarcane crops are developed, he held that the first ratoon crop automatically generated upon harvesting of the plant crop.

34. Further, the respondent argued that she could not mitigate losses as the restrictive clause in the contract forbade the disposal to third parties under any circumstances. She relied on Kenya Power and Lighting Company vs. Henry Wafula Masiyabi [2013] eKLR; wherein it was held that while a claimant must always mitigate his losses by taking such reasonable steps as are appropriate in each case to prevent further losses, in the present case, it was not possible for the respondent to take any reasonable steps to mitigate the loss; and as a result of the breach, she moved to court to seek justice.

35. With regard to the third point, the respondent argued that going by the principle of restitution in integrum, the aggrieved party to a breach of contract is entitled to compensation which should seek to put the claimant in as far as possible in the same position he would have been in if the breach

complained of had not occurred. She relied on Martin Akama Lango vs. South Nyanza Sugar Co. Ltd, HCCA No. 20 of 2000, and South Nyanza Sugar Co. Ltd vs. Awino Oreko, Kisumu Court of Appeal CA No. 138 of 2017 for this proposition.

36. Relying on the above authorities, the respondent took the position that the learned judge was just and within the law in deciding that she was entitled to the damages for breach of contract, based on the terms of the contract in issue.

37. Lastly, on the issue of interest and how it should be awarded, the respondent cited section 26(1) of the *Civil Procedure Act* which provides that the court may order interest at such rates as it 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 in the 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 as adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

38. In this regard, the respondent contended that the damages due were special in nature and practice dictated that such special damages accrue interest from the date of filing the suit as the money will have been due to the respondent from that date.

39. 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.

40. 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, four issues of law present themselves for determination in this appeal:

    a. First, whether there was a contract upon which the respondent could mount a claim for breach.

    b. Second, if such a contract existed whether the respondent succeeded in proving its breach.

    c. Third, if breach was successfully proved, whether the learned Judge's assessment of damages for the breach was fair and sound.

    d. Fourth, whether the learned Judge was correct in awarding interests on the assessed damages in the circumstances of the case.

41. The first issue is whether there was a contract between the respondent and the appellant upon which the respondent could mount a claim for breach of contract. The appellant, somewhat obliquely, argues that there was no such contract. In its submissions before us, the appellant contended that the respondent was not a party to the contract and, therefore, she could not have developed the sugarcane under the contract and neither could she have developed any ratoon crop.

42. There are two responses to this line of argument. The first one is that the appellant has raised this issue for the first time before us as a second appellate court. It did not raise it in the trial court (though it had seemingly intended to raise a preliminary objection which was later abandoned). Neither did it raise it on first appeal. It is rather obvious that the issue was not preserved for adjudication at the second appellate level.

43. However, there is a more substantive response to this argument. The record shows that there was a contract between the appellant and the deceased, who was the husband of the respondent. However, since the deceased died in 1999, the respondent sued the appellant in her capacity as the administratrix of the estate of the deceased, as stated on the face of this appeal. In addition, the record shows that the

respondent produced as evidence grant of letters of administration evidencing her capacity to so sue. If the appellant intended to make the argument that the contract was "personal" to the deceased and that it was not transferable to the estate upon his death, that is not, in fact, what it raised; and neither did it offer any evidence that was so. The nature of the contract would militate against such inference anyway. Indeed, in its pleadings before the trial court, the appellant conceded to the existence of the contract and only pleaded that it had not breached the contract. It cannot now run away from its own concession.

44. Having reached the consequential decision that there was a contract capable of breach and capable of supporting a claim for such breach, we will next turn to the question whether breach was, in fact, proved. To answer this question, we have, in turn, to answer four related questions raised by the appellant:

    a. First, did the High Court utilize a standard of proof which is lower than acceptable in civil cases?

    b. Second, did the learned Judge rely on documents which were not produced as evidence?

    c. Third, did the learned Judge decide the appeal on unpleaded and un-appealed issues?

    d. Fourth, was the judge entitled to reverse the findings of the lower court upon re-evaluation of the evidence? In particular, did the learned Judge make unsupportable assumptions to aid the respondent's theory of the case?

45. To answer these questions, it is important to briefly recall how the case unfolded in the magistrate's court. The respondent testified as PW1 on 3rd July, 2005. She produced a copy of the Grant of Letters of Administration to her deceased husband's estate, the Agreement between her husband and the appellant and harvest slips. She testified that she farmed he sugarcane after her husband died; and the appellant harvested 50 tonnes for the first crop. She testified that the price was Kshs. 1730 per tonne. She further testified that as a result of the failure by the appellant to harvest the two ratoon crops, she lost Kshs. 173,000 because she was anticipating at least 100 tones from the two crops. She testified that the appellant refused to harvest the first ratoon crop for no reason. When the respondent completed her testimony, the trial was adjourned to 15th October, 2005.

46. On 25th October, 2005, the two advocates who were present agreed by consent that the evidence of PW2 in Civil Case No. 80 of 2004 would be incorporated by reference to the respondent's case. Later on, the two advocates agreed by consent to mark the plaintiff's case as closed. A date was set for the defence hearing but, for different reasons, the defence hearing did not take off until a new magistrate took over the matter in 2014. Interestingly, on 25th March, 2014, the learned Magistrate directed the parties to "file and exchange witness statements and list of documents within 60 days." Further, on 28th May, 2014, the court extended the order made on 25th March, 2014, and the parties were ordered to comply with the said orders before the next hearing, failure to which the suit would be dismissed. Later on 5th February, 2015, the court noted that both parties had filled submissions, and the defendant (appellant) had filed statements and list of documents. Having noted compliance by both parties, the court stated that if the parties were amenable, the court could proceed and deliver the judgment. To this end, counsels of both parties stated that they were in agreement. Therefore, judgment was later given on notice.

47. In this regard, the record shows that the list of documents for the respondent included: her (Plaintiff's) Statement, the Agreement Book dated 22nd May, 1995; Schedule of Sugarcane Prices; and Yield Assessment Report by the defunct Kenya Sugar Research Foundation. Whereas the list of documents for the appellant included: Defendant's Witness Statement; Outgrowers Cane Contract Book; Debit

Advice Note for harrowing; Survey Report; Debit Note for DAP Supply; Job Completion Certificate; and Farmers Statement.

48. The bottom line is that the respondent testified, and the testimony of PW2 in Civil Case No. 80 of 2004 was incorporated by reference as evidence in the case. The defendant (now appellant) did not offer any evidence during the trial. The parties' advocates also agreed by consent to admit the documents listed in their respective lists of documents. The pertinent question that arises is whether those documents can be said to have been properly admitted as evidence and, consequently, whether the learned Judge was entitled to rely on them.

49. The learned Judge took the view that the all the documents in the list of documents by both parties had been properly admitted as evidence and relied on them in reaching his verdict. This is one of the issues the appellants have complained against. Those documents, they argue, never became evidence. As rehashed above, the appellants cited several authorities for the proposition that listed documents remain just that – and never acquire the status of evidence – unless and until they are admitted into evidence.

50. The appellant is correct. It is true that documents listed for production do not become part of the evidence until they are so admitted. The situation is not rescued where, like here, the advocates for the two parties enter into an "at large" consent to admit all documents in the lists as evidence. Only a witness can properly adduce evidence; advocates cannot. As this Court held in Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR:

> "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."

51. The question that must be answered, then, is whether the respondent can be said to have proved her case of breach of contract; and the damages due to her sans the documents wrongly relied on by the learned Judge.

52. At the trial court, the learned magistrate had concluded that the respondent had not proved breach of contract thus:

> "The question for determination, therefore, is whether the plaintiff proved that she developed the 1st and 2nd ratoon crops. No documentary proof that the crops were developed was adduced. Only [oral?] proof that the crop was grown and harvested was presented. It is unlikely that there would not be a single document showing that the ratoon crops were

developed. Therefore, the failure to avail such evidence is suspect and it lends credence to the defendant's position that no ratoon crop was developed."

53. On his part, the learned Judge analyzed the issue thus:

> " The Appellant testified that the first ratoon crop developed from harvesting of the plant crop and that she took care thereof until it matured. The Respondent contended otherwise. At this point, it must be understood that the first ratoon crop usually develops once the plant crop is harvested. A ratoon crop is not planted like a plant crop but it regenerates from the previous harvested crop. In such a case, it was therefore incumbent upon the Respondent to prove that the Appellant failed to take good care of the first ratoon crop which automatically regenerated on harvesting of the plant crop.
>
> Clause 4 of the Contract provided for breach of the contract and what was to happen in such instances. There is no evidence that the respondent issued any notice upon the appellant's alleged default. The evidence which was before the trial court was hence adequate for the court to find that the appellant took good care of the first ratoon crop until it matured. The respondent's contention that the appellant did not develop the first ratoon crop is hence for rejection. As the respondent took the foregone position it is clear that it did not even bother to harvest the first ratoon crop. On a preponderance of probability, the appellant therefore proved that respondent failed to harvest the first ratoon crop at maturity and that the respondent was in breach of the contract. Having failed to harvest the first ratoon crop, the development of the second ratoon crop was undoubtedly compromised. Respectfully, the learned trial magistrate's finding must be interfered with."

54. What is clear from this consequential excerpt from the learned Judge's decision is that he relied on the evidence adduced in court to reach his verdict. Except for the non-prejudicial error where the learned Judge implies that it was the appellant's obligation to prove

that the ratoon crops were not developed, the learned Judge was eminently correct in his analysis. There was evidence on record where the respondent testified that she developed the ratoon crop to maturity and that the respondent failed to harvest it for no reason. This evidence was uncontroverted. The learned trial magistrate overlooked this evidence by ruling that the respondent had not provided any "documentary proof" that she had developed the ratoon crop. With respect, there is no rule of law or precedential authority that provides that a plaintiff must provide documentary proof in order to prevail in a claim for breach of contract. The rule of law is that a plaintiff is required to prove her claim on a balance of probabilities using any competent and admissible evidence. In this case, the evidence of breach was provided through the oral testimony of the respondent. Nothing bars a finding of breach based on such evidence if it is, in fact, believed by the fact finder.

55. In the present case, the respondent testified on her behalf. She testified that she developed the ratoon crop to maturity. The learned magistrate does not say that he disbelieved her. He merely rules that without documentary proof the claim cannot succeed. The learned magistrate was wrong in that analysis. The learned Judge re- evaluated the evidence as he was obligated to do and reached the conclusion that the oral testimony was sufficient to establish the claim of breach. We agree with that analysis. On the record, the respondent testified that she developed the ratoon crop and the appellant failed to harvest it. There was no contrary evidence; and no reason to disbelieve her testimony. The learned Judge was, therefore, correct to conclude that on a balance of probabilities the respondent had proved her case.

56. It is important to point out that in reaching the finding that the respondent had proved breach, the learned Judge only relied on the existence of the contract and the oral testimony of the respondent. He did not rely on the other documents, which we have ruled above, were not properly entered into evidence. Differently put, the learned Judge's determination that he could rely on those documents has no bearing to the question whether the respondent had succeeded in proving her breach of contract claim.

57. 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:

> " 11. The Outgrower shall:-
>
> .....
>
> h. Permit the Company or its agents or employees to harvest the Outgrowers cane and prepare all such cane for loading and transport and to load and transport such cane from within the plot to the Factory in a manner and at the time to be determined by the Company and to deduct the costs of all these operations from the payment of the said cane.
>
> Provided that in conducting these operations the Company will be responsible for ensuring that the cane is cut close to the ground and the cane is taken to facilitate delivery of the Outgrower's cane to the Factory in accordance with the terms of this Agreement.
>
> (i). At all times, allow the Company to enter upon the Plot together with any vehicles equipment machinery or livestock which the Company in its sole discretion shall require to pass and re-pass thereover as may be necessary: -
>
> i. to inspect the plot and cane growing thereon;
>
> ii. to sample the cane;
>
> iii. to gain access to other Outgrowers' lands including such construction of access as may be required for the transport of cane produced by the Outgrower or other Outgrowers; and
>
> iv. to do anything required to be done by either party in terms hereof
>
> Provided that should the Outgrower fail to facilitate the harvesting of his cane at the appointed time the Company shall be ...to any person of such cane as may be required to provide access to other Outgrowers' plot and n such case the Company will not be liable for any loss or damage suffered by the Outgrower.

Provided also that in exercise of these rights the Company will ensure reasonable care to minimize loss or damage to the Outgrower.

j. Maintain his cane cultivation in a manner which will enable a satisfactory yield to be achieved and for this purpose he shall: -

i. each month over a period of seven months in the case of Plot crop and four months in the case of Ratoon cane remove all weeds or other crop plants from the cane area;

ii. Apply at the recommended time and in the recommended amount the fertilizers and/or other materials recommended by the Company for application;

iii. Undertake the planting and gapping of his cane area as recommended by the Company in order to ensure a high population, and

iv. Apply all services and goods which he may have obtained from the Company solely for the benefit of his sugarcane crop and for no other purpose.

Provided that if the Company so requires the Outgrower shall allow all or any such works to be carried out at his plot by the Company Outgrower.

k. Within seven days of receipt of a written notification from the Company that such operations are necessary to achieve satisfactory yield of cane, the Outgrower shall allow unimpeded access to the Company, its agents, employees and its equipment for the purpose of carrying out any or all operations which the Outgrower has failed to carry out in the opinion of the Company, is likely to fail to carry out.

Provided that such notification shall have either been made to the Outgrower or his representative and acknowledged or have been posted to the Outgrower by registered mail."

58. 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.

59. This, then, takes us to the final sub-issue with regard to whether the learned Judge was entitled to reverse the trial court as he did: whether the learned Judge made a determination on unpleaded and 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.

60. 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.

61. We will next consider whether the learned Judge's assessment of damages for the breach of contract was fair and sound in the circumstances. The principal complaint by the appellant in this regard is that the learned Judge relied on documents which had not been properly produced as evidence. As analyzed above, that complaint is valid: the Schedule of Sugarcane Prices; and Yield Assessment Report by the defunct Kenya Sugar Research Foundation were not properly admitted as evidence and could not, therefore, be relied upon in calculating the damages for the breach of contract occasioned by the appellant.

62. However, we note, as rehashed earlier, the respondent testified that the price of sugarcane was Kshs. 1730 per tonne. She further testified that as a result of the failure by the appellant to harvest the two ratoon crops, she lost Kshs. 173,000 because she was anticipating at least 100 tonnes from the two crops. This evidence was not controverted by the appellant. The trial court and the first appellate court were, therefore, entitled to rely on the figures supplied by the respondent to calculate the damages payable to the respondent.

63. 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 the yield of the first and second ratoon crop to third parties because the contract strictly forbids any such action.

64. 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 is three-fold: first, that the award of interest from the date of filing is inequitable because it would result in an ultimate figure that is higher than the amount originally claimed in the plaint; second, that the award of interest should be limited by the principle of restitution in integrum because the contract had a termination clause; and third, that the award of interest should be limited by the consideration that the appellant is a public company and such an award would be financially unbearable for it and like companies.

65. Payment of interest on decrees for payment of money is governed by section 26 of the *Civil Procedure Act*. The section stipulates 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.

66. 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 would exceed the principal amount claimed: 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 there was a termination clause in the agreement has no bearing on the calculation of interest payable or the rates to be used. It may have a bearing on the calculation of damages in appropriate cases (which, we have found does not apply in the present case) but not on interest payable upon adjudgement of a breach. In short, this ground of appeal fails as well.

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

68. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2024.

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