Lesiolo Limited v Kenya Seed Company Limited (Civil Appeal 183 of 2017) [2022] KECA 40 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 40 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 183 OF 2017

W KARANJA, J MOHAMMED & S OLE KANTAI, JJA

FEBRUARY 4, 2022

BETWEEN

LESIOLO LIMITED ..... APPELLANT

AND

KENYA SEED COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the Judgment/Decree of the High Court of Kenya at Nakuru (Mulwa, J.) dated 29th September, 2017 in H.C.C.C. No. 72 of 2012)

JUDGMENT

1. This is a first appeal from the Judgment of the High Court of Kenya at Nakuru (Mulwa, J.) delivered on 29th September, 2017. The Judge allowed only part of the appellant's claim. Both parties were dissatisfied with the findings of the Judge leading to this appeal by Lesiolo Limited (the appellant) and a cross-appeal by Kenya Seed Company Limited (the respondent).

2. It was alleged in the plaint that the respondent was engaged in the production and marketing of "certified seed" in the Republic of Kenya; that the appellant was engaged in the business of wheat farming since 1984; that in the 2011 planting season the appellant selected two farming zones in Njoro and Menengai in Nakuru County. That on 3rd February, 2011 the appellant purchased from the respondent certified wheat seed at Ksh.11,200,000 for planting on those farms; planting commenced in April and May, 2011 but that after planting on about 2000 acres in the Njoro farm it was noted that a substantial part of the seed had failed to germinate, only 40% of the farm achieving expected germination; a report was made to the respondent whose officers visited the farm and after establishing that some of the seed was defective those officers took away 921 bags of wheat seed replacing them with a fresh batch of 1000 bags but these were also not good seed. Even a further 200 bags of seed supplied by the respondent were still defective and the appellant was forced to obtain supplies from other sources. That tests carried out by experts – Kenya Agricultural Research Institute (KARI – today called KARO); Kenya Plant Health Inspectorate Services (KEPHIS) and Kenya Maltings

Limited established that the seed supplied to the appellant by the respondent did not meet germination standards required in law. It was stated in the plaint that the respondent had sold goods which were unfit for the intended purpose or were of unmerchantable quality and particulars of breach of contract and particulars of negligence were set out. Particulars of special damages set out related to Ksh.9,980 per acre for replanting exercise – 1039 acres in Njoro and 100 acres in Menengai total Ksh.11,367,220; Ksh.11,900,000 in respect of complete loss on 175 acres in Njoro calculated at 20 bags per acre; Ksh.5,136,976 for drying costs for delayed planting of the crop. The total claim in the plaint was Ksh.28,404,196 and there was a prayer for general damages, costs and interest.

3. The respondent delivered a statement of defence where the claim was denied. It was denied that the appellant had purchased seed from the respondent; it was denied that the appellant had employed best practices in planting the wheat seed; it was denied that only 40% of the planted seed had germinated. The respondent denied that it had failed to supply certification documents to the appellant it being stated that all wheat seed sold by the respondent was of good quality. It was taken as a defence that it was the appellant's negligence, poor crop husbandry and improper farming practices that had caused the seed not to germinate and particulars of negligence were set out in the defence.

4. In testimony taken by the Judge, Frank Tundo, a director and shareholder of the appellant, informed the court that for the 2011 planting season he purchased certified wheat seed from the respondent for Ksh.11,200,000. Upon planting in the Njoro and Menengai farms it was noted that some seed failed to germinate as expected and only 40% germinated. He made a report to the respondent; officers visited and took away 921 bags, replaced with 1000 bags. When he purchased an extra 200 bags it was found that the seed had sprouted which was not good for planting. He delivered some of the bad seed to KEPHIS and KARI (KARO) and results showed that the seed did not meet germination standards. He produced various documents including bank statements in proof that the appellant had paid for purchase of the wheat seed. In cross examination the witness stated that he had not approached the Ministry of Agriculture to prepare a report on the failed crop and the respondent was not represented when tests on the seed were carried out by KARI and KEPHIS. Further,

> "In my plaint I stated that I lost Shs.11,367,220/= on Njoro and Menengai fields. I had to replant the fields at Njoro and Menengai. I do keep records. I spend the money for re-spraying the chemical (sic), hollowing (sic), fertilizer, seed and casual labour. I have documentation to show how the expenditure (sic) but not in court. I have no breakdown...."

He could not remember who supplied him with wheat seed after failure of the seed supplied by the respondent and he did not have a surveyor's report on the replanted acreage.

5. Patrick Kirigia, a quantity technician at Lesiolo Grain Handlers Limited (a sister company to the appellant) received 2 batches of wheat seed from the appellant for testing on germination. He found that the seed was not viable for planting and it did not meet the minimum seed threshold of 85%. His test did not reveal to him why the seed had become unviable.

6. Johnson Kamwala who worked for Kenya Agricultural and Livestock Research Organization – KARO – (formerly KARI) testified that he was approached by the appellant in April, 2011 who had a complaint on wheat seed that had been planted but had failed to germinate. He and a colleague Dr. Natuma visited the Njoro farm and observed that wheat seed which should have germinated within 7 days of planting had failed to germinate. On checking the ground they found that the seed was dead. He attributed that to the health of the seed. The appellant later delivered to him bags of wheat seed for testing and findings were that germination in all the bags was very low, not to the 85% standard required. He confirmed that issues of seed certification were within the mandate of KEPHIS.

7. The last witness called by the appellant was Jacob Chepchirchir Cheptaiwa, an officer who was employed by KEPHIS. At the material time he worked for that organization as a seed tester and manager at its Nakuru office. He testified that he was approached in May, 2011 by an officer of the appellant (Tundo) with an appeal to test wheat seed. At KEPHIS they did a priority test – this was an analysis to confirm that seeds submitted were free from materials that were harmful; a germination test (to confirm that the seed for sale could germinate, also called viability of the seed) and finally, a viability test if the client required it. Upon testing the two seed batches delivered by the appellant he found, on purity, both batches to be 99.8% and 99.9% respectively but on germination the 1st batch or sample was 25% out of 100% while the 2nd sample generated 0%. The seeds were dead. For wheat to be viable for sale a minimum purity standard was required at 99% while on germination it should be 85%. He produced a certificate into evidence. He did not know the origin of the seed he had tested and, in his view, if samples were not properly taken it would affect the result.

8. The respondent called Christopher Banda Odipo, then retired but at the material time he was the respondent's laboratory assistant whose work involved testing, quality analysis and purity and germination test of seeds. He had tested the wheat seed sold to the appellant and had found germination to be above 85% thus good for planting. The same seed had been tested by KEPHIS which had found it good for planting as per certificate he produced into evidence.

9. That marked the close of the case by the parties and upon analysis the Judge reached the findings that we have stated in this Judgment.

10. We have travelled that long journey which we are required to do as Rule 29 of the *Court of Appeal Rules* requires that in an appeal from a decision of the High Court acting in the exercise of its original jurisdiction, we should re-appraise the evidence and draw our own inferences of fact. That mandate has received many juridical pronouncements and the oft-cited one is *Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123* where the following passage appears:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

When the appeal came up for hearing before us on a virtual platform on 30th June, 2021 learned counsel Miss Gloria Nasimiyu held brief for Miss Wanjiru for the appellant while learned counsel Mr. Bisonga Dominic appeared for the respondent. Both parties had filed written submissions which they fully relied on without the need for a highlight of the same. We have perused those submissions and we are grateful to counsel for both parties for the industry employed in support of the rival positions they take in the appeal.

11. There are 6 grounds of appeal taken in the Memorandum of Appeal drawn for the appellant by its lawyers, M/S Mukite Musangi & Company Advocates. The appellant says that the Judge erred in making an award of Ksh.2,578,000 as special damages which the appellant says was much less than what had been pleaded; that there was overwhelming evidence to prove the case; that the Judge erred in law and fact in failing to award general damages; that the Judge should have awarded the appellant 60% of seed which was bad and for all that we should review the Judgment and/or set it aside.

12. In Notice of Cross-Appeal drawn for the respondent by its lawyers M/S Kidiavai & Company Advocates the Judge is faulted in law and fact for awarding the appellant special damages which, to the

respondent, was not specifically prayed for and was not strictly proved; the Judge is faulted for finding that the appellant had proved its case on a balance of probabilities against the respondent and, finally, that the case by the appellant had not been proved and should have been dismissed. It is prayed that we set aside the Judgment; that we hold that the case in the High Court had not been proved, that we dismiss the suit at the High Court and we dismiss this appeal with costs to the respondent.

13. We have considered the whole record, submissions and the law and have come to the following determination of the appeal and cross-appeal which we note we can deal with together as the issues taken by the parties to the appeal are similar.

14. The claim by the appellant at the High Court was titled "particulars of special damages". It was prayed that the appellant had spent Ksh.9,980 per acre for replanting 1039 acres in Njoro and 100 acres in Menengai thus Ksh.11,367,220; loss on 175 acres in Njoro Ksh.11,900,000 and drying costs Ksh.5,136,976 making a grand total of Ksh.28,404,196. The appellant also claimed general damages.

15. This Court in *Macharia Waiguru v Muranga Municipal Council & Another [2014] eKLR* stated:

> " In the case of Siree Limited –v – Lake Turkana El Molo Lodges (2002) 2 E.A. 521 the Court of Appeal stated:
>
> "This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages".
>
> It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.""

This is what this Court stated in the case of F*inmax Community Based Group & 3 Others v Kericho Technical Institute [2021] eKLR*:

> " It is now firmly established that special damages must both be pleaded and proved, before they can be awarded by the court. In Hahn vs. Singh,Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 the Court (Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – as he then was, emphasised that:
>
> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves".

The rationale for requiring a party to plead and prove special damages was given in the persuasive case of *Jackson Mwabili v Peterson Mateli [2020] eKLR*:

> " "....the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to puthim back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing." (Emphasis supplied)"

The Judge found that, though denied, the respondent had sold wheat seed to the appellant. The Judge found on the evidence that 921 bags out of a total of 4000 wheat seed bags purchased by the appellant from the respondent were taken back by the respondent after inspection of the appellant's wheat fields

and replaced on 9th and 11th May, 2011 and another 200 bags on 11th May, 2011. Evidence was placed before the Judge by the appellant that a bank transfer of Ksh.11,200,000 had been made by the appellant to the respondent and a unit price for a bag of wheat seed was Ksh.2,800. The Judge found that the respondent had failed to produce certification certificates to prove that the wheat seed sold for the 2011 planting season met certification requirements. Certificates produced from KEPHIS showed that the seed did not meet the minimum germination requirement of 85%. The Judge found that the appellant had produced evidence which the respondent had not rebutted. In the end the Judge found that of the 4000 bags purchased by the appellant from the respondent 921 bags were taken back but the re-supplied seed was also bad.There was, therefore, a total loss of the 921 bags.

16. It was the appellant's case that after purchasing 4000 bags of wheat seeds from the respondent it planted the same on its farms comprising about 2000 acres. Some of the seed did not germinate and the appellant was forced to replant some of the seed. There was no evidence by an agricultural officer or any other qualified person on what acreage of the planted seed did not germinate. The appellant's evidence was on general percentage acreage of what plant seed did not germinate and as we have seen the appellant's claim was a special damage claim which required to be pleaded and specifically proved. The appellant was able to prove that it had purchased wheat seed from the respondent which it had paid for. There was however no specific proof on what exactly was lost and it was not enough for the appellant to make a general proposition on what it had lost; it required specific proof.

17. The Judge found, and we agree, that the respondent took back 921 bags of wheat seed; re-supplied the same but even this batch was found to be bad seed. The Judge allowed the claim on this 921 bags. The unit price per bag was proved at Ksh.2,800 and the Judge was right to make this award. The other claims were not proved at all and we agree with the Judge in rejecting those claims.

18. The Judge rejected the prayer for general damages for breach of contract finding that there were no special exceptions to the general principle that general damages will not ordinarily be granted for breach of contract.

19. The circumstances of the case before the Judge were that the respondent sold wheat seed to the appellant and when the seed was planted some of it failed to germinate. There was nothing special in the case to warrant an award of damages for breach of contract. This Court in the case of *Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR* stated of that issue:

> "On the second issue, the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the appellant relied on the Nigerian case of *Marine Management Association & Another vs National Maritime Authority* (2012) 18 NWLR 504.
>
> The respondent on the other hand maintained that there cannot be any award of general damages for breach of contract and placed reliance on the following authorities; *Provincial Insurance Company EA Ltd v. Mordekai Mwangi Nandwa* (*supra*), and Joseph Ungadi Kodera vs Ebby Kangisha Kavai, KSM C. A. No. 239 of 1997 (ur). The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent's conduct into the exceptions it alluded to above."

The appellant did not lay any basis to be entitled to an award of damages for breach of contract.

20. We agree with the Judge on all the findings she made.

21. There was sufficient evidence proving loss of 921 bags of wheat and we can see no basis in the cross appeal.

22. The appeal and cross-appeal have no merit and we accordingly dismiss them. Let each party meet its costs of the appeal and cross-appeal. The appellant will have the costs awarded by the Judge in the Judgment delivered on 12th October, 2017.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR