South Nyanza Sugar Company Limited v Oreko (Civil Appeal 138 of 2017) [2022] KECA 570 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 570 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 138 OF 2017

F TUIYOTT, PO KIAGE & M NGUGI, JJA

JUNE 24, 2022

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED .... APPELLANT

AND

AWINO OREKO .... RESPONDENT

(Being an appeal from the judgment & decree of the High Court of Kenya at Migori(?) (Hellen Omondi, J) dated and delivered on 25th November, 2015 in Migori Hcca No. 18 of 2015 (Formerly Hcca NO. 62 of 2014)

JUDGMENT

JUDGMENT OF TUIYOTT, JA

1. In this second appeal, two issues of law arise for our consideration: the nature and quantum of damages that ought to be awarded to the respondent and the date when interest on the damages ought to accrue.

2. Awino Oreko (the respondent) is a sugar cane farmer in Kongudi sub location, Migori. The appellant, South Nyanza Sugar Company Ltd. (Sony), is a sugar mill. The two entered into a written agreement dated 19th September, 2003 in which Sony contracted the respondent to grow and to sell its sugarcane on his land parcel being plot number 48a in field number 10 in Kongudi sub location measuring 1.0 hectares.

3. The respondent complained of breach of that agreement and took out proceedings for breach of contract against Sony in Rongo PMCC No. 108 of 2012 (Awino Oreko –vs- South Nyanza Sugar Co. Ltd.). In a judgment dated 30th April, 2014 and delivered on 29th May, 2014, the trial court found that the respondent had maintained the sugar crop to maturity but that Sony acted in breach of contract by failing to harvest it on time. The aspect of liability is now agreed and is not challenged in the appeal before us.

4. On damages the learned trial magistrate, Hon. Z. J. Nyakundi PM, (as he then was) entered judgment for the respondent in the sum of Kshs. 343,119.00 less expenses for services. The court also made an award on interest but did not specify at what rates and the date from which it would accrue.

5. Dissatisfied with that judgment, Sony escalated the matter to the High Court in Kisii Civil Appeal No. 62 of 2014 South Nyanza Sugar Company Limited –vs- Awino Okero later designated Migori Civil Appeal No. 18 of 2015.

6. Concerning damages and interest which are the only two aspects that are the subject of this appeal, Hon. Hellen Omondi, J (as she then was) made various findings; that it made legal and moral sense to award damages on the 1st crop as that was planted, tended but not harvested; that to award damages for crops that were never planted amounted to unfair enrichment; that given a restrictive clause in the contract, it was not possible for the respondent to take any reasonable steps to mitigate his loss; respecting the 1st and 2nd ratoon, an award of exemplary damages was deserved and; on interest, the learned judge held that it ought to run from the date of filing of the suit and it would be at court rates.

7. In the end, the learned judge made the following orders: -

   (a) The damages awarded with regard to the 1st crop are set aside and substituted with the sum of Kshs. 75,300.00.

   (b) The Respondent is also awarded Kshs. 100,000.00 as exemplary damages for breach of contract resulting from opportunity to realize the 1st and 2nd ratoon.

   (c) Interest is awarded on the sums above at court rates from date of filing suit.

   (d) The Appellant shall bear ½ the costs of this appeal."

8. Both sides are unhappy with certain aspects of the decision. Looking at the memorandum of appeal and the cross appeal, the issues raised for our consideration are: -

   i. Whether the respondent had properly pleaded special damages.

   ii. Did the learned judge err in law in substituting the special damages awarded in respect to the 1st and 2nd ratoon for an award of exemplary damages.

   iii. What was the proper order to make as regards the date when interest is to accrue.

   iv. Who should bear the cost of the second appeal and of the first appeal.

   All these issues are matters of law as contemplated of a second appeal.

9. I begin by observing that counsel for both the appellant and the respondent are agreed that the High Court was at fault in making an award of exemplary damages. There is little to say in this respect but perhaps only to add that counsel are correct also for the reason that exemplary damages being different from ordinary damages, which are usually compensatory in nature, ought to be specifically pleaded. It is common ground that the respondent did not bespeak or seek exemplary damages and so they could not be available to him.

10. Counsel for the appellant argues that the respondent had pleaded for damages for breach of contract which is at odds with the hallowed principle of law that only special damages lie for breach of contract and those damages must be quantified and pleaded specifically in the plaint and then proved at trial. Counsel contends the respondent had only prayed for damages for breach of contract at prayer (a) of the plaint and that no specific sum had been claimed in the plaint and/or eventually proved by way of evidence. Counsel adds that the respondent never paid court filing fees for a quantified claim.

11. The respondent's answer is short. He claimed a sum of Kshs. 816,075.00 as particularized in paragraph 7 of the plaint and on account of breach of contract the relief he prayed for was damages.

12. It has never been in doubt that the ordinary damages awardable for breach of contract are special damages. Equally agreed is that special damages are not awardable unless specifically pleaded and strictly proved. The root of the debate here as to whether the claim for special damages was adequately pleaded is the manner in which the plaint was drawn.

13. In paragraph 7 of the plaint, the respondent pleads;

    7. In breach of the agreement, the defendant failed to harvest the plant crop when the same was mature and ready for harvesting 22-24 months of age and the cane started deteriorating.

    Particulars of loss and damage:

    The plaintiff's plot was capable of producing an average of 135 tonnes per hectare for the plant crop and 135 tonnes per hectare for the ratoon crop and the rate of payment then applicable per tonne was Kshs. 2,015 and the plaintiff claims damages for three (3) crop cycle as particularized:

    a) Expected yield for plant crop 135 tonnes × 1 ha × 2,015

       272,025

    b) Expected crop yield for 1st 135 tonnes × 1 ha × 2,015 ratoon crop 272,025

    c) Expected crop yield for 2nd 135 tonnes × 1 ha × 2,015 ratoon crop 272,025

       TOTAL 816,075

14. The pleading in my view is as specific as can be. It gives the estimate yield per acre, the rate of payment for the crop per tonne and the three cycles for which the claim is made and the loss is quantified at a specific figure, Kshs. 816,075.00. The trouble however is in the manner in which the prayer for damages was framed. Prayer (a) is framed thus:

    a) Damages for breach of contract."

15. I think that there is merit in the observation by counsel for Sony that at the time of filing of the plaint, court fees would not have been paid on the sum of Kshs. 816,075.00 as that figure appears in the body of the plaint and not at the prayers. I will not speculate on why the respondent drew the plaint as he did but I expect the court registry to be sufficiently vigilant in collecting the correct amount of fees due which is so clearly the amount spelt in paragraph 7 of the plaint. For now, the concern of this Court is whether the plaint as drawn meets the threshold of a specific pleading on special damages, it being remembered that an underlying purpose of a pleading is that it is a notice from the pleader to the adversary of the nature of the case that he/she is required to meet. If the adversary chooses to resist the claim, then a clear pleading gives him/her fair opportunity to prepare an answer. Regarding special damages, the requirement that it be specifically pleaded is borne from the fact that the person responding to the claim must be given a clear, unambiguous and full view of all the aspects of the claim so as to either concede to it or adequately prepare a defence. Bearing this objective in mind, I take the view that paragraph 7 of the respondent's plaint passes the test. The respondent's claim was for Kshs. 816,075.00 and how it is arrived at is specifically worked out. And I must add that the appellant did not take up this matter at trial and approached and answered the claim as one of special damages.

16. Counsel for the appellant submitted that the High Court correctly held that ratoon 1 and 2 crops never existed and there could be no loss suffered by the respondents as regards non-existing crops. It

was argued before us that the plant crop is the only crop which existed and loss of Kshs. 75,300.00 found as deserving by the High Court was the only loss suffered by the respondent.

17. For the respondent, it is argued that the parties contracted for three (3) crop cycles of cane, the performance and realization of which had to be commenced and concluded at or within 5 years. It is contended that when Sony failed to harvest the plant crop, it rotted and wasted away and no ratoons could be realized.

18. The out growers cane agreement of 19th September, 2003 was the contract between the two parties. Clause 1 provides;

> 1. "This agreement shall come into force from the 19th day of September 2003 and shall (unless previously determined in accordance with the provision hereof) remain in force for a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the Plot aforesaid whichever period shall be the less."

19. At trial, the testimony of the respondent was that:

> " When there is no development of crop one cannot expect any yield, 1st ratoon and 2nd ratoon were not developed.
>
> The ratoon could not be developed because the plant crop was not harvested. The crop in the field dried up. It dried hence I could not develop ratoons."

20. The trial court held that the contract covered both the plant crop and the two ratoons, and made an award for the plant crop and the two ratoons.

21. The High Court took a different view and held:

> "40. Indeed I am alive to the sentiments expressed in the case of *Martin Akama Lango v South Nyanza Sugar Co Ltd* HCCA No 20 of 2000 (KSM) that :-
>
> > "The contract must be interpreted in the spirit that it was made, and that is .... it was meant to benefit both parties unconditionally and for the appellant to maximize his profits, the more harvests he makes the more profits he would make. I think the trial magistrate interpreted the provision of clause 1 of the said agreement narrowing and she applied the literal interpretation.
> >
> > .... The clause says the agreement remains in force for a period of five years or until one plant and two ratoon crops are harvested on the plot.... To my mind what that means is that one plant and two ratoon crops must be harvested in fulfillment of the obligation of the parties of the agreement. When the Respondent failed to do the harvesting.... The respondent was in breach of contract and liable to pay damages."
>
> 41. I agree totally with the view expressed by P. K. Birech (Commissioner of Assize) in the afore cited case BUT is payment of damages to be worked out compensatorily on what was not planted or would it be payment of damages for breach of contract.
>
> 42. I agree with Mr. Oduk that the Appellant did not plead that the Respondent failed to re-develop the ratoon crops BUT is also a fact admitted by both parties that the ratoons were not developed."

22. On my part, the approach to take must be one which does not derogate from the objective of granting damages for breach of contract which is to ensure that the victim of breach is placed in as much as possible the same position as if the breach did not happen. Never losing sight, of course, of the duty of the victim of breach to mitigate the loss.

23. The contract itself was for a period of five years or until one plant crop and two ratoons were harvested on the plot, whichever period would be less. The evidence accepted by both courts below, and which has not been challenged before us, is that Sony was guilty of breach by failing to harvest the plant crop. Once the plant crop was not harvested, it dried and the ratoon crops could not grow. This was a natural consequence of the breach. It is therefore reasonably foreseeable that failure to harvest the plant crop would imperil the subsequent ratoon crop and naturally, so too, the 2nd ratoon crop. In this way a loss of the plant crop was also a loss of the two ratoon crops.

24. While it was argued by Sony before the High Court that the respondent was obliged to mitigate the 2nd loss, the learned judge held that a restrictive clause constrained the respondent on how to deal with the crop and it was not possible for him to take steps outside the clause to mitigate the loss. This finding by the judge has not been impugned before us, perhaps because Sony cannot successfully fault it. In any event, it was not pleaded at trial and could not properly be part of the defence. See *African Highland Produce Limited v John Kisorio* [2001] eKLR where this Court held: -

> "The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See Halsbury's Laws of England Vol 11, Page 289, 3rd Edn 1955"

25. There was a consequence in the finding that the respondent could not be blamed for not failing to take any steps that could save the two ratoons. It seems to me, therefore, that the correct conclusion to draw from the circumstances of this case is that reached by the trial court that the respondent would be entitled to recover the loss in respect to the plant crop and the two (2) ratoons.

26. From the evidence, it is common ground that the yields for the ratoon crops are less than that of the plant crop. The witness for Sony told court that the yields for the plant crop was about 61.65 tonnes and 48.77 tonnes for the ratoons. These were the yields applied by the trial court in working out the damages, and Sony cannot be heard to complain about it. The finding of a gross sum of Kshs. 343,119.00 for the three crops cannot therefore be impeached. Further, the trial court appreciated that what was due to the respondent should be that amount less expenses. This is what the trial court ultimately held;

> "I therefore enter judgment for the plaintiff against the defendant in sum of kshs. 343,119.00 less expenses for services proved plus costs and interest."

27. The trial court, however, took an easy way out and avoided working out the expenses although there was adequate evidence for him to do so. That work has been done by the High Court which found the expenses to be at Kshs. 48,000.00 for the plant crop. There would have to be similar expenses for the two ratoons and so a fair compensation to the respondent would be Kshs. 343,119.00 – 144,000.00 (3 x 48,000.00) = Kshs. 199,119.00.

28. I now turn to the issue of interest.

29. The appellant proposes that because breach of the contract did not take place on the date of the contract, interest ought to accrue from the date of the judgment and not earlier. The appellant's counsel submits that the basis of awarding interest on general damages from the date of judgment is premised on the rationale that a plaintiff will not have been kept away from his monies because none would have been ascertainable at the time of institution of the suit.

30. In addition, it is argued that making an order for interest to run from the date of filing suit works an injustice against the appellant who has to bear the interest charge for the period it takes for the suit to be prosecuted, a delay which cannot be attributed to the appellant.

31. The respondent answers that the purpose of an award of interest is to "console" a party for having been kept away from his money and that although the award is discretionary the tradition has been that interest on special damages is to be charged from the date of filing suit.

32. In the absence of a contractual obligation to pay interest, the statutory basis on which a court awards interest is to be found in section 26 of the *Civil Procedure Act*. The provisions reads:

 26. Interests

 (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.

33. The objective for awarding interest is to ameliorate the loss suffered by a party who has been kept out of use of money that would otherwise be due to him. Although, by dint of the words of Section 26, the grant of interest is discretionary, it is a discretion to be exercised judiciously. One way of proper exercise of this discretion is to make an award that is in consonance with the underlying objective for which an order of interest is made. The indubitable outcome is that interest on special damages will be from the date of filing of suit as the money would have been due to the claimant at the very least on that date. General damages, which is the product of an assessment process by the court, is due on the date when the assessment is made which is in the judgment date.

34. I have found that the damages due to the respondent are special in nature and I see no reason to depart from what is almost conventional that interest on such damages ought to run from the date of filing suit as the money will have been due to the respondent from that date. This result is also in consonance with the spirit of statutory law that governed the contract between the respondent and the appellant at that material time. The contract was then subject to the provisions of the repealed *Sugar Act* (repealed

on 1st August 2014 by the *Crops Act*). The effect of paragraph 9(1)(e) as read together with 9(2) of the Second Schedule of the Act was that a miller who failed to pay an out-grower institution within thirty days of sugar cane delivery was liable to pay interest. The spirit is to compensate the farmer by way of interest for late payment. I see no reason why the same principle should not be extended to where there is breach by the miller, like here.

35. The argument of the appellant that the delay in hearing and finalizing the litigation has placed on it an onerous burden of interest when it is not to blame for the slow speed of the wheels of justice can also be said of the loss suffered by the respondent who has been kept out of money for a long period due to the delay in completing the trial, a current feature of our court system. There is no reason why the respondent should be the one to get the short end of the stick. The solution may lie in the party which may eventually find itself at fault putting away some contingency funds to cover the interest it may be liable to pay. Whatever the solution it is not in denying interest to the victim of breach.

36. I would reach a decision in which the respondent has succeeded in the cross appeal. I would propose that the decision of the High Court be set aside and judgment be entered for the respondent in special damages of Kshs. 199,119/= with interest thereon at court rates from the date the suit was filed. I further propose that costs of the cross appeal and costs at the High Court should be to the respondent. Finally, each party to meet its own costs on the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

F. TUIYOTT

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA

I have read in draft the judgment of my learned brother Tuiyott, JA. with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

P. O. KIAGE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

JUDGMENT OF MUMBI, JA

I have read in draft the judgment of my learned brother Tuiyott, JA. with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2022.

MUMBI NGUGI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR