



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 243 OF 2011

BETWEEN

ANGELINA OTIENO OPIYO.....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. L. Shinyada, SRM at the

Chief Magistrates Court at Kisii in Civil Case No. 283 of 2006 dated 26th October 2011)

JUDGMENT

1. The appellant's case was dismissed for failure to plead and prove her case specifically. This issue is easily disposed of as it has been the subject of the Court of Appeal decision in *John Richard Okuku Oloo v South Nyanza Sugar Company Limited KSM CA No. 278 of 2010 [2013]eKLR*, the Court expressed the view that;

We have in the judgment set out in full this averment by the appellant at paragraph 12 of the plaint where it was pleaded that the average cane yield per acre was 135 tonnes which the appellant claimed at the rate of Kshs. 1,553 per tonne being the average yield unharvested by the respondent.

.....

We have shown that the pleadings on special damages suffered by the appellant were clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standards nor offered sufficient proof.

2. I have looked at the plant and it seeks damages for breach of the temporary non-contracted cane agreement dated 23rd December 2004 where the appellant contracted her land parcel being number 252 Field Number 63, Zone C in Kakmasia Sublocation measuring 0.4 for purposes of sugarcane processing. The agreement which commenced on 23rd December 2004 would remain in force for a period of one mature cane harvest. The appellant alleged that the respondent failed to harvest the cane. She therefore claimed:

(a) Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of the crop on 0.4 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730 per tonne for the expected wasted crop.

3. Did the appellant prove her claim" I note from the record that the respondent did not call any evidence. The respondent's (PW 1) testimony was uncontested and uncontroverted. The trial magistrate found as a fact that, "*I am satisfied that there was a contract between the plaintiff and the defendant. The plaintiff did tell the court that she properly maintained her cane but the defendant failed to harvest the same.*" The trial magistrate then added that had she not dismissed the claim for want of the pleading, she would have awarded Kshs. 93,420/- made up as follows 135 tons X 1730 X 0.4 Ha. There was no cross –appeal against this finding.

4. I therefore set aside the judgment of the trial court, and substitute it with a judgment for the appellant against the respondent for the sum of Kshs. 93,420/-

5. Since the appellant's claim is for special damages, the appellant would have been entitled to interest on that claim from the date of filing suit until payment in full. In this case, however, I note that the suit was filed in 2006 and judgment rendered in 2011. The appeal was lodged in 2011 but the appellant only managed to have this appeal heard 7 years after the court threatened to dismiss it. In my view, the respondent should not be punished for the appellant's tardiness in prosecution of the suit and appeal.

6. In **Kengeta Beer Distributors Limited v Kubai Kiringo and 2 Others MRU HCCA No. 4 of 2008 [2018]eKLR**, I took that view that the court had discretion to award interest under **section 26** of the *Civil Procedure Act (Chapter 26 of the Laws of Kenya)* and may take into account the time it has taken to prosecute the appeal or suit in awarding interest. In *Peter M. Kariuki v Attorney General NRB CA Civil Appeal No. 79 of 2012 [2014]eKLR* the Court of Appeal observed as follows:

Award of interest is in the discretion of the Court, which discretion must be exercised judiciously. See KENINDIA ASSURANCE CO LTD V ALPHA KNITS LTD & ANOTHER, (2003) 2 EA 512 and OMEGA ENTERPRISES KENYA LTD V ELDORET SIRIKWA HOTEL LTD & OTHERS, CA NO. 235 OF 2001 (Unreported). It is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim for interest denied. See METAL BOX CO LTD V CURRY'S LTD, (1988) 1 ALL ER 341 and the decision of this Court in MUMIAS SUGAR CO LTD V NALINKUMAR M SHAH, CA NO. 21 OF 2011, (MSA), (unreported). Due to the appellant's own delay in filing his petition, we shall only award interest from the date of decree of the High Court till payment in full.

7. Taking all factors above into account, I award interest at court rates on the judgment amount from the date of filing suit until the date of judgment before the trial court and thereafter for one year only. Interest shall thereafter accrue at court rates on this judgment from the date hereof until payment in full.

8. I therefore enter judgment for the appellant against the respondent for the sum of Kshs. 93,420/- together with costs of the trial court subject to interest as I have stated above.

9. I award costs of the appeal to the appellant which I assess at Kshs. 15,000/- exclusive of court fees.

DATED and DELIVERED at KISII this 21st day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Oduk instructed by Oduk and Company for the appellant.

Mr Odero instructed by Okong'o, Wandago and Company Advocates for the respondent.



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