REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 60 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD .....APPELLANT

AND

DONALD OCHIENG MIDENY .....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Njoroge, SPM at the Chief Magistrates Court at Kisii in Civil Case No. 720 of 2005 dated 5th July 2017)

JUDGMENT

1. It was not disputed that by a written agreement dated 6th February 1998, the appellant contracted the respondent to grow and sell to it sugarcane on his land parcel being Plot No. 649 in field number 27 in Kakmasia Sublocation measuring 4.4 Hectares. The respondent alleged that the appellant failed to harvest the plant crop when it was mature and ready for harvesting leading to loss and waste. He claimed damages as follows;

a. Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of three crops on 4.4 hectares of land at the rate of 135 tons per hectare and payment of Kshs. 1,730 per tonne for the expected three (3) crops.

2. The appellant denied that respondent's claim but claimed in the alternative that the average cane yield for the area is 60 tonnes per acre and that the price or raw sugar cane per tonne was Kshs. 1553/= and not Kshs. 1730/= per ton as claimed by the respondent. The appellant did not call any evidence to support the averments in its defence. The matter therefore proceeded ex-parte.

3. At the hearing the respondent reiterated his claim and relied on the appellant's sugarcane productivity report which showed that the yields for Kakmasia Sub-location for 1996/97 were 148.8, 173.5 and 153.3 tonnes per hectare respectively. The trial magistrate awarded and entered judgment for the respondent against the appellant for Kshs. 1,479,720.00 made up as follows:

4.4 X 1730 X 100 Kshs. 761,200/-

Less harvest charges 440 X 210 Kshs. 92,400/-

Less transport charges 440 X 399 Kshs. 175,560/-

Total Kshs. 493,240

Total Amount of for 3 cycles Kshs. 493,240 X 3 = Kshs. 1,479,720/=

4. It is this judgment that had precipitated this appeal. As this is the first appeal, I am alive to the responsibility of the court. This court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123** and ***Kiruga v Kiruga & Another*** **[1988] KLR 348**). This mandate was succinctly summarised in ***Peters v Sunday Post Ltd*** **[1958] EA 424** as follows;

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide…

5. In the memorandum of appeal dated 28th July 2017, the appellant raised the following grounds of appeal;

1. The Learned Trial Magistrate erred in both law and in fact when he awarded damages for breach of contract in the sum of Kshs. 1,479,720/= which was an amount which had neither been pleaded nor proved at the trial.

2. The Learned Trial Magistrate erred in both law and in fact when he failed to take into account the proven scientific fact that sugarcane crop decreased in yield from the plant crop which yields more to the second ratoon which yield less and therefore erred where in the circumstances, he ordered the appellant to pay to the respondent compensation on the basis of alleged equal loss on yield in respect of each of the crop circles.

3. The Learned Trial Magistrate erred in both law and in facts when without evidence and without finding he held that the Respondent's lost sugarcane in respect of each circle of crop when in actual fact only the plant crop which had been developed, had been claimed by the Respondent.

4. The Learned Trial Magistrate erred in both law and in fact when he failed to appreciate and give due regard to the fact that the Respondent only developed the plant crop with assistance of the Appellant who provided inputs and carried out essential services and therefore erred in law by giving an award in respect of circles which never existed and were not even claimed by the Respondent in his pleadings.

5. The Learned Trial Magistrate erred in both law and in fact when he awarded global compensation to the Respondent in respect of the crop circles which were never developed by the Respondent and therefore never existed at all, thereby failing to take into account a relevant fact and circumstance that the Respondent was under a duty to mitigate his/her losses and in failing to apply the principle of mitigating losses.

6. The Learned Trial Magistrate erred in both law and in fact when assessing damages in his judgment and awarding compensation on the basis of his assessment, he ordered that interest on the amounts which he awarded were to be calculated from the date of such assessment, thereby ending up awarding interest in an amount which was more than the award.

7. The Learned Trial Magistrate in the circumstances therefore, and on the main decided the case against the weight of evidence, contrary to the law and known legal principles, thereby exercised his discretion wrongly when he failed to dismiss the Respondent's suit in the case below with costs.

6. I have taken the trouble to set out the entirety of the appellant's memorandum of appeal which basically reiterates what was in effect the appellants defence before the trial court. In order to resolve the issue raised, it is necessary to appreciate the effect of the appellant's failure to call evidence to support its defence. In ***CMC Aviation Ltd v Crusair Ltd (No. 1)*** **[1987] KLR 103,** Madan JA stated that:

The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of

them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.

7. In ***Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau*** **NRB CA Civil Appeal No. 87 of 2014 [2016] eKLR** the Court of Appeal cited with approval the decision of the Supreme Court of Uganda in ***Departed Asians Property Custodian Board v Issa Bukenya t/a New Mars Ware House, CA No 26 of 1992*** where *Platt, JSC* stated thus:

I should, however, draw attention to the duty of the Court when conducting ex-parte proceedings. If allegations are made in the plaint so that the facts alleged support the prayers asked for, and when the prayers called for are legally justified, then all that is necessary is for the trial Court to hear evidence which proves the facts and hear submissions of law that the remedies are justified ... It must be understood that the evidence led is such, that without contradiction by the Defendant, it is sufficient to prove the claim. It is not necessary that the facts alleged should be queried, but the facts alleged must be full and accurate enough to support the plaint. A Judge may assist the Plaintiff in pointing out that the evidence so far adduced is not sufficiently full and accurate, and that other evidence, documentary or oral, may be needed to support the claim. What cannot be done is that remedies are granted as prayed, which are not supported by the pleadings... In this case the learned Judge should have observed that the pleadings did not support the remedies wanted..." (Emphasis added).

8. The reason I have taken trouble to show the legal effect of failure to controvert the respondent's claims by the appellant is that a perusal of some of the grounds of appeal are questions of fact which would have required further exploration or counter evidence. In this case the respondent was not cross-examined thus leaving his evidence uncontested. In this case, the respondent case was not controverted and the trial magistrate was satisfied the that case was provided on the balance of probabilities. It is against this background that I shall now consider the issues raised by the appellant.

9. Counsel for the appellant, Mr Odero, reiterated the grounds set out in the memorandum of appeal and submitted that the respondent's claim could not be supported by the pleadings as the appellant only failed to harvest one crop yet the respondent was compensated for the three cycles. Counsel contended that the trial court erred in relying on the appellant sugarcane productivity report and thus came to the wrong conclusion. He further condemned the decision of the trial magistrate adopting identical crop yields for the several cycles when it was clear that the yield declines after each cycle. He maintained that the respondent was only entitled to nominal damages as the plant crop was not harvested and went to waste.

10. Mr Oduk, counsel for the respondent, supported the trial court's judgment and urged that the respondent proved his claim as he proved the expected yield but the trial magistrate instead awarded 100 tons which was a lower figure than that set out in the appellant productivity report. He noted that the claim was uncontested as the appellant did not controvert the respondent's evidence. He submitted that the appellant was in breach of the agreement and was thus entitled to compensation.

11. The respondent's claim was for the failure to harvest the plant crop. This was not controverted. According to Clause 1, the contract between the appellant and respondent was to remain in force for a period of 5 years or until one plant and two ratoon crops of sugar cane are harvested. It is thus clear, that the appellant breached the contract by failing to harvest the plant crop. As to the consequence of breach, I reiterate what I stated in ***Consolata Anyango Auma v South Nyanza Sugar Company Limited*** **MGR HCCA 53 of 2015 [2015]eKLR** that:

[15] The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see **Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR**, **Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR**). The measure of damages is in accordance with the rule established in the case of **Hadley v Baxendale (1854) 9. Exch. 341** that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see **Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR**). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see ***Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others***, ***NRB CA Civil Appeal No. 192 of 92 (UR)*** *and* ***Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)***).

12. In addition to the aforesaid broad principle, the respondent had a duty to mitigate damage. Viscount Haldane, LC., in ***British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Company of London Limited*** **[1912] AC 673** summarised the principle as follows:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of the damage which is due to his neglect to take such steps.

13. As I have shown at the introductory paragraph of this judgment, the respondent pleaded the essential elements of the claim which enabled to appellant to meet and defend its case as is confirmed by the appellant setting out alternative contentions on the yield. Although the appellant contended that trial magistrate ought not have relied on the appellant's productivity report, this was the only uncontroverted evidence available and the trial magistrate was correct to reach that conclusion not only on the yield per hectare but also in the price per ton. Although the appellant's productivity report showed the crop yield reduced per cycle reduced, the trial magistrate used 100 tons per Ha for each cycle which was below all what the report showed. The respondent did not cross-appeal against this finding and I will not disturb it.

14. As to whether the respondent was entitled to the three crop cycles, I would reiterate what Mrima J., held in ***South Nyanza Sugar Company Limited v Joseph O. Onyango*** **MGR HCCA No. 10 of 2016 [2017]eKLR** that;

[21] I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.

15. Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (see ***African Highland Produce Limited v Kisorio*** **[1999] LLR 1461 (CAK)**). Since the appellant did contest the respondent's claim, it did not show how the respondent could mitigate the loss.

16. The appellant's arguments in support of the appeal were attractive but at the end of the day the respondent's case before the trial court was not contested and for this reason, , I dismiss the appeal. I award the respondent costs of **Kshs. 50,000/-** exclusive of court fees.

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

D.S. MAJANJA

JUDGE

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

Mr Oduk instructed by Oduk and Company for the respondent.