**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)**

**CIVIL APPEAL NO. 278 OF 2010**

**BETWEEN**

**JOHN RICHARD OKUKU OLOO ….....APPELLANT**

**AND**

**SOUTH NYANZA SUGAR CO LTD .....RESPONDENT**

***(Appeal from a Judgment of the High Court of Kenya at***

***Kisii (Asike Makhandia, J) dated 30th June, 2010***

**in**

**KISII HCCC No. 209 OF 2001**

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**JUDGEMENT OF THE COURT**

The appellant, John Richard Okuku Oloo, was the plaintiff in the original suit before the subordinate court at Kisii being Chief Magistrates' Civil Suit No. 798 of 1998 where he sued the respondent South Nyanza Sugar Company Limited. It was alleged in the Plaint inter alia that the respondent contracted the appellant to grow and sell to it sugarcane at the appellants' parcel of land being Plot No. 9 L measuring 0.2 hectares in Field No. 83 Kanyimach East in Migori District. It was further alleged that the parties entered an agreement which commenced on 27th April, 1995 and that the agreement was to remain in force for a period of five years or until one plant and two ratoon crops of sugarcane were harvested on the plot, whichever period would be less. The appellant further alleged that the respondent failed to harvest the ready plant crop in time or at all and that on 22nd October, 1997, during the currency of the contract period, an arsonist torched the sugarcane causing it to catch fire and burn. A report was duly made to the respondent and the appellant complied with the respondents' demand for a stack of burnt cane to be delivered to it for sampling and laboratory testing but that even after the burned cane was found to be good for harvesting the respondent failed to harvest it rendering it a total loss in alleged breach of contract. The appellant therefore believed that he was entitled to compensation and the

relevant part of the plaint averred:-

**“12. The average cane proceeds per acre was 135 tonnes and the plaintiffs claim against the defendant is for payment of 135 tonnes of cane at the rate of Kshs. 1,553/= per tonne being the average yield unharvested by the defendant together with punitive damages”.**

The appellant therefore prayed for:-

**“ (a) Payment for 135 tonnes of cane being the average cane yield per hectare for 0.2 hectares.**
**(b) Aggravated /punitive damages**
**(c) Costs of this suit**
**(d) Interest thereon at court rates until payment.”**

The respondent filed a statement of defence where it denied the appellants claim and took as a defence that the contract was frustrated by violent tribal clashes that occurred in the contract area which amounted to an act of “force majeure” entitling the respondent to avoid the contract. The respondent took as a further defence that it was entitled to avoid the contract because a sampling of the cane had found it to have a **“First Expressed juice with apparent purity below 83%.”**

The suit was heard by the learned Senior Resident Magistrate (Owino N) who in a judgement delivered on 22nd July 1999 did not find favour with the appellants case and dismissed it. The appellant was dissatisfied with those findings and filed an appeal at the High Court of Kenya, Kisii, being HCCA No. 209 of 2001. That appeal was heard by Asike – Makhandia, J(as he then was) who, like the learned magistrate, did not find merit and dismissed it in the judgement delivered on 30th June, 2010. The appellant was not done and hence this appeal.

This is therefore a second appeal and our duty in law is to consider only issues of law and not matters of fact which have been considered by the two courts below and factual findings made. This is the effect of Section 72 Civil Procedure Act which provides that:-

**“ (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court on any of the following grounds, namely:-**

**(a) the decision being contrary to law or to some usage having the force of law;**

**(b) the decision having failed to determine some material issue of law or usage having the force of law;**

**(c)a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.**

**(2) An appeal may lie under the section from an appellate decree passed exparte.”**

This point has been considered and confirmed in many decisions of this Court such as **Mary Githanga Mbugua v Mary Waceke Wambugu Civil Appeal No. 294 of 2004 (ur).** The position also obtains in Uganda where their Court of Appeal in the case of **Mutazindwa v Agaba & others [2008] 2EA 265** held that the duty of the second appellate court is not to re-evaluate the evidence but to consider

whether the first appellate court carried out the functions of reappraisal of the evidence. We must therefore establish whether there are issues of law that call for our consideration.

In the Notice of Appeal lodged in the High Court on 13th July, 2010 the appellant gave notice to appeal that part of the judgement that decided that:-

**"(a) Paragraph 12 of the plaint was not a special damage claim,and, was not strictly proved, and,**

**(b) The appellant was not entitled to an award of damages and damages is not in the circumstances awardable."**

There are four grounds taken in the Memorandum of Appeal filed by the appellant. In sum the grounds are that the learned judge erred in holding that paragraph 12 of the plaint as pleaded was not a special damage claim or was not strictly proved; that the learned judge miscomprehended the ratio in **Jivanji v Sanyo Electrical Company Limited [2003] 1 EA 98**; that the learned judge erred in law in stating that damages were not awardable in the circumstances and finally that the learned judge failed to consider the appeal before him and render an independent and reasoned judgement.

When this appeal came up for hearing before us it was urged by learned counsel for the appellant Mr. Ezekiel Oduk while learned counsel Mr. Odhiambo Kanyangi appeared for the respondent. Learned counsel for the appellant submitted that the learned judge had erred in holding that the suit was a special damages suit and that damages had neither been pleaded specifically not strictly proved. Counsel relied on the case of Jivanji (supra) to support his submission that the pleading at paragraph 12 of the plaint was specific enough to enable the court to hold in favour of the plaintiff. Counsel also faulted the judge for finding that the appellant had suffered damages through breach of contract but holding that the appellant was not entitled to compensation through an award of damages.

Learned counsel for the respondent in opposing the appeal submitted that the claim was couched in such a way that made it a special damages claim and wondered why the appellant found difficulty in quantifying the claim. Counsel submitted further that general damages were not awardable for a breach of contract.

Before the trial magistrate the appellant testified on how he acquired the sugar cane farm which already had cane on it and that the respondent delayed in harvesting cane. When the cane was burnt by an arsonist the appellant testified that he immediately reported to the respondent which sent an agronomist who took samples of the burnt cane. The appellant then stated:

**".... he took the cane sample. They said it was fine..."**

And:

**"...I kept asking them to come in vain. The cane dried in the farm.**

**The average ton per cane acre is 80 tons per acre. The prize per a tone (sic) is 1553.53. The area is 0.2 hectares. I do ask to be paid for the same...."**

The witness called in support of the respondents case testified that the cane plant crop matures at 24 months but that the appellants cane burned when it was 27 months in the farm.

The trial magistrate believed and held that the respondent had not breached the contract because there

was insecurity in the relevant area and such insecurity made it impossible for the respondent to engage in any farming activities including harvesting the appellants cane.

In the first appeal the appellant in a Memorandum of Appeal complained that the trial magistrate had erred in failing to properly consider the evidence tendered by the appellant; that the trial magistrate was wrong in not finding that there was breach of contract; that the trial magistrate erred in absolving the respondent of blame and that the trial magistrate erred in not assessing damages payable had the claim succeeded. When the appeal came for hearing before the first appellate court parties agreed to prosecute the appeal through filing written submissions which was duly done and a judgement ensued.

In the course of the judgement the learned judge on first appeal identified as the issue for his determination whether there was a breach of contract and the consequences ensuing therefrom. The learned judge found as a fact that there was a contract between the appellant and the respondent whose terms were binding upon the parties. The learned judge held:

**“It is also common ground that the respondent never lived up to terms and expectations of the contract. Despite the crop having matured and being ready to harvest, the respondent refused to do so reason being that the period of the contract of 5 years had not expired and also due to alleged tribal clashes in the area. The sugarcane was subsequently burnt by unknown arsonist. However in so far as the appellant was concerned, had the respondent adhered to the terms of the contract and harvested the crop within the contract time lines, the crop would not have been burnt and therefore he would not have suffered loss and damage.”**

Later in the judgement the learned judge held that:

**“From the foregoing, it is clear that there was indeed a breach of the contract. The appellant blames the respondent for the breach whereas the respondent blames the appellant for the same. Between the two, who should be believed" From the totality of the evidence on record, I think I would go along with the position taken by the appellant unlike the learned magistrate. The fact that the crop was torched and destroyed by arsonists when it was past time of harvesting was not disputed or discounted at all by the respondent. The contract did not provide that the harvest of the same would be dependent on the period of the contract. The crop should therefor have been harvested when it reached the agreed maturity period. That the respondent did not harvest the same as aforesaid was in clear breach of the terms and conditions of the contract aforesaid. Had the respondent harvested the crop in time, there would have been no crop for the arsonist to burn. Accordingly there would have been no breach of the contract again on that basis.”**

The learned judge proceeded to hold, correctly, we think, that the respondents' defence that the contract was frustrated by tribal clashes could not hold because no evidence had been led in proof of that allegation. The learned judge also held, correctly, again, that since the respondent had not harvested the cane crop when it was ready for harvesting the defence of frustration was not available to the respondent. The learned judge therefore held that the respondent had breached the contract long before the cane was burned. This is what then follows:

**“.... Having held so that the respondent breached the contract, is the appellant entitled to the damages" I do not think so. It is instructive that the appellant in this written submissions categorically and specifically state:-**

**“... The remedy for breach of contract is damages.” Nothing can be further from the truth.**

**Again in the plaint the appellant specifically asked for aggravated as well as punitive damages. It is important to observe that the said plaint was drawn and filed in court by an advocate. Had perhaps the appellant acted in person, different considerations would have arisen. As it is therefore, the appellant was clear in his mind that he wanted aggravated and punitive damages for breach of contract."**

The learned judge then proceeded to cite various authorities to support his finding that special damages had neither been specifically pleaded nor proved to the standard required in law and that the plea in the plaint was speculative, comparative, mere estimation and left to conjecture which was not permissible. The judge therefore reached the conclusion that:

**"In the result I find and hold that the respondent breached its contract with the appellant. However damages are not awardable for the said breach. The appellant should have treated her loss as special damages and pleaded specifically and with particularity. However he failed to do so nor was he able to specifically prove the claim as required in law. The foregoing notwithstanding, this appeal is for dismissal with no orders as to costs. It is so ordered."**

We have in this judgement set out in full the 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. 1553/= per tonne being the average yield unharvested by the respondent.

We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes **Coast Bus Service Limited v Murunga & others Nairobi CA No. 192 of 1992 (ur)** appears in the Jivanji case:

**"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:**

**"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.**

**"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."**

Learned counsel for the respondent in the course of his address to us wondered why the appellant, while armed with all material and information set out at paragraph 12 of the Plaint failed to particularize the claim to a certain degree. But is that so"

In the case of **J. Friedman & others v Njoro Industries [1954] 21 EACA 172** where the respondent successfully claimed damages for deceit before the High Court for the difference in price between the real value of the shares and the price it was induced to pay for certain shares in X Limited as a result of a false statement by the first agreement to the respondent that Y Limited, its one competitor in Kenya, was on the point of purchasing the said shares and that arrangements had been made to complete the sale within the next day or two and where the trial judge proceeded to assess damages it was contended on appeal that the false statement was not actionable misrepresentation and that instead of fixing the damages the trial judge should have ordered an inquiry into the same. It was held on appeal that there is no obligation on a trial judge who is in possession of all the material facts to enable him to make a fair assessment of the damages to order an inquiry in regard thereto.

It was held by the Court of Appeal in England in the case of **Chaplin v Hicks [1911] KB 786** that the existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

The following passage appears in the judgement of **Vaughan Williams, LJ** in the Chaplin case:

**“Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it was possible to apply the doctrine of averages at all. I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however, that damages might be so unassessable that the doctrine of averages would be inapplicable because the necessary figures for working upon would not be forthcoming; there are several decisions, which I need not deal with, to that effect. I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages.”**

Vaughan Williams, LJ goes on to state, and we fully agree, that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.

In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of land which was 0.2 hectare (paragraph 3 of Plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.

The learned judge on first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.

We have shown that the pleading on special damages suffered by the appellant was 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 standard nor offered sufficient proof.

Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we

substitute thereof an order entering judgement for the appellant / plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filing suit. As we note that at paragraph 3 of the Plaint the acreage is pleaded as 0.2 hectares whereas at paragraph 12 of the Plaint proceeds are pleaded in acre thus raising the need to use an acceptable conversion rate of hectare and acre. We refer the calculation of the actual amount to be paid to the appellant by the respondent to the High Court for that purpose.

The Plaintiff was not entitled to aggravated or punitive damages prayed in the Plaint and that part of the claim was properly dismissed.

The appellant shall have the costs of this appeal and costs of the courts below.

***Dated and Delivered at Kisumu this 20th day of December, 2013***

**E. GITHINJI**

**…….**

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

**……**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**…….**

**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**