Case Number:	Civil Appeal 252 of 2006
Date Delivered:	21 Dec 2018
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	David Amilcar Shikomera Majanja
Citation:	Michael Sonye Aoro v South Nyanza Sugar Company Ltd [2018] eKLR
Advocates:	Mr Oduk instructed by Oduk and Company for the appellant. Mr Odero instructed by Okong'o, Wandago and Company Advocates for the respondent.
Case Summary:	-
Court Division:	Civil
History Magistrates:	A.A. Ingutia, SRM
County:	Kisii
Docket Number:	-
History Docket Number:	Civil Case 990 of 2003
Case Outcome:	Appeal awarded
History County:	Kisii
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 252 OF 2006

BETWEEN

MICHAEL SONYE AORO .....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD .....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A.A. Ingutia, SRM at the Chief Magistrates Court at Kisii in Civil Case No. 990 of 2003 dated 16th August 2006)

JUDGMENT

1. The appellant's case was dismissed on account of the fact that the appellant did not refer the matter to arbitration as required by clause 12 of the agreement between the parties dated 11th January 1993. I can, without hesitation, hold that the trial magistrate erred in declining jurisdiction after he had heard the entire case for two reasons. First, the respondent at paragraph 10 of the defence admitted the jurisdiction of the court. Second, the matter having proceeded for hearing, the respondent is deemed to have waived it objection to any jurisdiction (see ***Kisumuwalla Oil Industries v PAN Asiatic Commodities*** **[1995 – 1998] EA 153**).

2. I now turn to the substantive case. The appellant case is that he was contracted by the respondent to grow and sell sugarcane on his land parcel being Plot No. 357 in filed No. 68B Kakmasia Sublocation measuring 0.7 Ha. The appellant alleged that the respondent failed to harvest the plant crop when the same was mature for harvesting and the case started deteriorating and was harvested after 32 months. He tended to the 1st ratoon crop and when it was about 42 months old, it caught fire. The appellant alleged that the respondent represented that it would harvest the cane but failed to do so hence he sought the following relief:

a. Damages for breach of contract and payment for cane damaged on 0.7 hectares of land at the rate of Kshs. 1550/- per tonne at the estimated yield of 135 tonnes per hectare as the estimated yield for the two (2) ratoon yields.

3. The respondent admitted that there was an agreement but denied the appellant's allegations.

4. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see ***Selle and Another v Associated Motor Boat Company Ltd*** **[1968]EA 123**).

5. The appellant (PW 1) testified that after the agreement, the respondent harvested the plant crop in 1995 and paid Kshs. 109,113.80. Thereafter he developed the 1st ratoon crop which was not harvested. He testified that it got burnt on 6th October 1998 when it was 42 months old. He asked the respondent to cut the cane but he was told to do so himself. He told the court that he was claiming damages for the 1st and 2nd ratoon.

6. The respondent's Senior Agricultural Supervisor, Francis Abongo (DW 1) confirmed that the plant crop was harvested but the plant crop got burnt as a result of which the 2nd ratoon was not developed. He told the court that respondent communicated that to PW 1 that under Clause 10(1) of the agreement, the company is prohibited from cutting burnt cane.

7. The trial magistrate after considering the evidence and submission held as follows:

With regard to the first ratoon crop, my attention is drawn to clause 10(i) of the agreement which provided that the defendant is not bound to harvest cane that is burnt. Since there is no limit action in the agreement as to when cane should be harvested or relating to when cane matures, I find that the defendant cannot be faulted in respect of the first ratoon.

8. I have considered the evidence and it is not disputed that the plant crop was harvested on 18th January 1995 at 24 months while the 1st ratoon was to be harvested at 16 – 18 months in accordance with Clause 1 of the contract which provides that:

[1] This agreement shall come into force on and from the 11th day of January 1993 and shall unless previously determined in accordance with the provision hereof remain inforce 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 less.

9. The 1st ratoon crop was not harvests within the 16 – 18 months and it got burnt on 9th October 1998 long after the agreement had expired on 5th January 1998. By that time the respondent had already breached the contract and it could not rely on provisions that of the expired agreement. If anything, the appellant only tended to the 1st ratoon crop in order to mitigate its damage. I find that the trial magistrate erred in applying the provisions of the agreement that had already expired.

10. Since the respondent was already in breach, the appellant is entitled to damages for the 1st and 2nd ratoon. The appellant's claim was that the he was expecting 135 tonnes of cane per Hectare but the plant crop only yield 70 tonnes. The respondent did not present any counter evidence. I therefore award the appellant damages for two crop cycles made up as follows: 0.7 Ha X 1553 X 70 X 2 = Kshs. 152,194/=.

11. I allow the appeal, 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. 152,194/-.

12. Since the appellants claim is for special damages, I award the appellant interest at court rates from the date of filing suit until the date of judgment before the trial court. I note that the appeal was lodged in 2006 but the appellant only managed to have this appeal heard 12 years after prodding by the court. In my view, the respondent should not be punished for the appellant's tardiness in prosecution the suit and appeal (see **Kengeta Beer Distributors Limited v Kubai Kiringo and 2 Others MRU HCCA No. 4 of 2008 [2018]eKLR** and ***Peter M. Kariuki v Attorney General*** **NRB CA Civil Appeal No. 79 of 2012 [2014]eKLR).** I will therefore award the appellant interest of the judgment for one year only after the judgment in the trial court. Interest shall thereafter accrue at court rates on this judgment from the date hereof until payment in full.

13. 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.