Case Number:	Civil Appeal 249 of 2006
Date Delivered:	21 Dec 2018
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	David Amilcar Shikomera Majanja
Citation:	Ezekiel Odondi 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. Ingutya, SRM
County:	Kisii
Docket Number:	-
History Docket Number:	ivil Case No. 496 of 2004
Case Outcome:	-
History County:	Kisii
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 249 OF 2006

BETWEEN

EZEKIEL ODONDI……...…...………………….…...…….….……APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD…….….…….....RESPONDENT

(***Being an appeal from the Judgment and Decree of Hon. A. A. Ingutya, SRM at the Chief Magistrates Court at Kisii in Civil Case No. 496 of 2004 dated 19th September 2006***)

JUDGMENT

1. The appellant's case was dismissed because the matter was not referred to arbitration in accordance with Clause 12 of the agreement dated 4th January 1996. I hold, without hesitation, 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 its statement of 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 substance of the claim. The respondent admitted that it contracted the appellant to grow sugar cane on his land parcel being Plot Number 312B in Field No. 19 North Sakwa Location, Kakmasia Sub-location measuring 0.3 Hectares. The appellant claimed that in breach of the agreement, the respondent failed to harvest the plant crop when the same was mature and ready for harvesting at 22- 24 months of age and the same dried up. He claimed that the lost his bargain and expected profits for three (3) crop yields. He stated that the plot was capable of producing an average of 135 tonnes per hectare and at the rate of payment then applicable per tonne was Kshs. 1,730/-. He therefore claimed follows:

(a) An inquiry as to damages for breach of contract and compensation for loss of sugarcane on 0.3 Hectares for the three lost crop yields.

3. The first appellate court has a duty to re-appraise all the evidence and reach an independent decision bearing in mind that the court neither saw nor heard the witnesses testify so as to be able to make a judgment on the demeanour. Did the appellant prove her claim"

4. I note from the record that appellant called two witnesses, the appellant (PW 1) and Booker Oluoch, the Migori District Agricultural Officer (PW 2). The respondent did not call any witnesses. PW 1 testified that after entering the agreement, he prepared the plant crop and was indeed supplied with inputs. He stated that the respondent failed to harvest the cane and as a consequence it dried up. PW 2 testified that on 6th November 2003, the appellant instructed him to inspect his farm. He visited the farm and found that the plant crop had not been harvested. He prepared a report which he produced in evidence.

5. The appellant's testimony was uncontested and uncontroverted that there was a clear breach of the agreement when the respondent failed to harvest the plant crop which, under the agreement, is to be harvested at 22 – 24 months after planting. I adopt what th court stated in ***Martin Akama Lango v South Nyanza Sugar Company Limited*** **KSM HCCA No. 20 of 2000** that:

[The Contract] 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 especially the last part is that one plant and two ratoon crops must be harvested in fulfillment of the obligation of the parties agreement……….. When the Respondent failed to do the harvesting and waited for until the crop was burnt by arsonists, it was in breach of the terms of the agreement and had the trial magistrate correctly interpreted the provisions of the said agreement, she should have held that the respondent was in breach of the contract and liable to pay damages.

6. It follows that the appellant is entitled to the loss following the breach calculated on the basis of loss of the plant crop, the 1st and 2nd ratoons. The evidence of PW 2 on the nature and extent of loss was unchallenged and was as follows:

Plant Crop 100 tonnes per Ha. X 1730 X 0.3 = Kshs. 51,900.00

1st Ratoon 95 tonnes per Ha X 1730 X 0.3 =Kshs. 49,305.00

2nd Ratoon 90 tonnes per Ha X 1730 X 0.3 = Kshs. 46,710.00

TOTAL Kshs. 147,915.00

7. I find the appellant proved its case on the balance of probabilities. It was the burden of the respondent to prove and justify any inputs and to justify mitigation of damages. 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. 147,915/-.

8. I would award interest from the date of filing suit to the date of judgment before the trial court. However, and as regards interest following this appeal. I note that the appeal was filed in 2006 and was only prosecuted this year. The respondent should not be punished for the respondent's tardiness in disposing of the appeal. I therefore award interest at court rates for one year only from the date of judgment and thereafter from the date of this judgment until payment in full.

9. I award the appellant costs of this appeal assessed 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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