Case Number:	Civil Appeal 246 of 2006
Date Delivered:	24 Jan 2019
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Rose Edwina Atieno Ougo
Citation:	William O. Opiyo v South Nyanza Sugar Co. Ltd [2019] eKLR
Advocates:	Mr. Nyagwencha h/b Mr. Oduk For the Appellant Mr. Kimaiyo h/b For the Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kisii
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 246 OF 2006

WILLIAM O. OPIYO.....APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree of the Resident Magistrate A.A Ingutia dated 16th August, 2006 in CMCC No. 1481 of 2004 Kisii)

JUDGMENT

1. The appellant filed suit against the respondent for breach of an Out grower's Cane Agreement dated 20th February, 1996. It was his case that the respondent agreed to purchase sugarcane from his local parcel being plot number 176 A measuring 0.6 hectares in field number 12 North Sakwa Location in Migori District. The contract was to remain in force for a period of 5 years or until the plant crop and two ratoon crops of sugarcane were harvested whichever period was less. The respondent failed to harvest all three crop cycles prompting the appellant to file suit in the Chief Magistrate's Court.

2. The trial court heard the matter and dismissed it stating:

"The agreement provides for arbitration in the event of a dispute. That is entailed in clause 13 thereof....

That being the case, this suit is premature.

In any event, the plaintiff did not in the plaint particularise his claim which is in the nature of special damages. His claim as it stands is not capable of being awarded...."

3. Being aggrieved by that decision, the appellant preferred this appeal which counsel for the appellant condensed into two issues. First, he submitted that the matter should have been referred to arbitration but the respondent had waived its right by participating in the trial. Secondly, he submitted that the trial court erred in finding that the claim was not properly framed. He relied on the case of ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010*** in support of his argument that the appellant's pleading were a special damages claim. On quantum, he submitted that there was sufficient evidence that the farm was developed. The appellant's farm had been visited and a report prepared. The respondent's witness had also admitted that the appellant's farm could yield 65 tonnes and the trial court should have gone on to assess damages. Counsel asked the court to allow the appeal with costs. Parties filed written submissions which they relied on.

4. The respondent's counsel submitted in support of the trial court's decision stating that there had existed the sugar tribunal which was mandated to hear disputes relating to sugar. She further submitted that the appellant's claim had been framed as a claim for general damages. He should have framed his claim as a special damages claim which in any case he had not been proved as there was no proof of the acreage of the plot or proof that the plot could produce 135 tonnes as claimed.

5. A first appellate court is required to *"reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect." (See **Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126**)*

6. At the hearing of this matter before the trial court, the appellant called one witness and testified in support of his case. PW1 testified that the appellant took him to his farm on 27th August, 2001 complaining that his cane had not been harvested. When PW1 visited the farm, he found the plant crop, which should have been harvested in 1998, still on the farm. The1st ratoon crop and 2nd

ratoon crop had not been developed. He stated that the acreage for the plot was 0.6 hectares and the cost of cane per tonne was Kshs. 1,730/=. He valued the appellant's total loss at Kshs. 285,450/= made up as follows; plant crop at Kshs. 103,000/=; the1st ratoon crop at Kshs. 93,000/= and the 2nd ratoon crop Kshs. 88,230. He produced his report which indicated that his assessment value was based on a documentary research at the respondent's agriculture department, the optimal production levels from the Ministry of Agriculture and the appellant's contract book.

7. The appellant testified that the respondent had contracted him to grow cane in 1996. The agreement was for 5 years thus 3 harvests. He planted the cane and was issued a job completion certificate. The cane grew and matured but was not harvested. He stated that the plant crop should have matured at 21 months and the ratoon crops at 18 months. One tonne was going for Kshs. 1,730/= and he estimated that the farm would have produced 135 tonnes per hectare.

8. The respondent's sole witness Francis Abong'o (DW1), a senior agricultural supervisor for the respondent, denied that the appellant was a farmer with the respondent. He pointed out that there had been alterations on the contract book and that the job completion certificate tendered as evidence by the appellant did not tally with the information in his contract book. He testified that the best yield for a farm, such as the appellant's, in the Kadera Kwoyo area, was between 65 to 75 tonnes per hectare. DW1 also stated that the contract did not indicate the measurements of the appellant's farm and that it was not possible to give the value for crop where the acreage of the farm was unknown.

9. On cross examination he admitted that the contract had been signed by the respondent's officers but stated that there had been an alteration in signature. He denied that the respondent had contracted the farmer and stated that he did not know where the contract book came from or why the respondent's manager had signed it.

10. One of the reasons the trial court dismissed the appellant's case was a failure to refer the matter to arbitration in accordance with the contract. Clause 13 of the contract provided that any dispute arising between the parties was to be referred to the decision of a single arbitrator to be agreed upon by the parties. This clause was applicable subject to the Arbitration Act.

11. The Court of Appeal in ***Kisumuwalla Oil Industries vs PAN Asiatic Commodities 1995-1998 IEA 153*** stated as follows pertaining to arbitration clauses:

"According to s.6 (1) (b) of the Arbitration Act in order to take advantage of the arbitration clause, the party applying has to satisfy the court that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. There was nothing in the Corporate case to indicate that the appellant either at the time the legal proceedings were commenced or at any time thereafter indicated that it wished to take the advantage of the arbitration clause and desired the matter to be referred to arbitration.

....

The parties can of course expressly agree to ignore or disregard the clause. They may also do so by conduct. Once the parties have submitted to the jurisdiction of the court they cannot blow hot and cold and subsequently without consent of each other rely upon the condition precedent in the arbitration clause."

12. The demand letter produced by the appellant as exhibit 4 shows that he invited the respondent to resolve the matter through arbitration before commencing suit. Evidently, the respondent did not take up the offer. An evaluation of the pleadings filed by the parties also shows that none of them referred to the arbitration clause. The trial court therefore erroneously went beyond the scope of what had been placed before it for determination. The court was required to hear and determine the issues raised by the parties on merit as they had conceded to the trial court's jurisdiction by their conduct.

13. The next question that then arises is whether the appellant was entitled to compensation as sought. The respondent disputed the existence of a contract between the parties. The import of the DW1's testimony was that the appellant had acquired his contract book by fraudulent means. These were serious allegations which should have been proved by the respondent to the required standard. The Court of Appeal in ***Central Bank of Kenya ltd vs Trust Bank ltd & 4 Others Civil Appeal No. 215 of 1996*** set out the standard of proof for allegations of fraud as follows:

"Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in

this case than in an ordinary civil case."

14. I find that the respondent's allegations of fraud were not sufficiently proved. In spite his denial that the appellant had been contracted by the respondent, DW1 admitted that the contract book produced by the appellant had been signed by its manager. This court finds that evidence leans in favour of there being a valid contract between the parties dated on 20th February, 1996 for the development of sugarcane on the appellant's plot.

15. The contract was to run for a period of five years or until one plant and two ratoon crops of sugar cane were harvested on the farm whichever period would be less. The appellant testified that he carried out his part of the contract by developing the plant crop. PW1 visited the appellant's field on 27th August 2001 and found the plant crop still on the field. The burden of proving the steps the appellant should have taken to mitigate his loss in such circumstances fell upon the respondent. *(see **African Highland Produce Limited v John Kisorio Civil Appeal No. 264 of 1999 [2001]eKLR)***Given that the appellant had been contracted to grow and sell sugarcane to the respondent for a period of 5 years, the respondent's failure to harvest the plant crop as agreed occasioned the appellant loss of his expected earnings for all three crop cycles.

16. The respondent also contended that the appellant had not properly pleaded his claim. The appellant particularized his claim under paragraph 11 of the plaint based on the acreage of 0.6 Hectares, an expected yield of 135 tonnes of cane per hectare and the price of Kshs. 1,730/= per tonne. The trial court erred when it dismissed the suit for the reason that the appellant had not specifically pleaded his claim. In the case of ***John Richard Okuku Oloo(supra)*** the Court of Appeal held that since the appellant had set out in his pleadings the average cane yield he expected per acre and had pleaded the rate each tonne would have sold for, the pleadings on special damages suffered by the appellant was clear and sufficient enough.

17. Having pleaded his claim as special damages, the appellant was obligated to prove his claim. He claimed his expected proceeds from all three crop cycles. He testified that the acreage for his field was 0.6 hectares and the price per tonne at the time was Kshs. 1,730/=. This was corroborated by the evidence of PW1. On the expected yield, the appellant testified that he expected a produce of 135 tonnes per hectare. The respondent's witness strenuously opposed the appellant's estimate and stated that the best yield for the area in which the appellant's field was located was 65 to 75 tonnes. On the other hand, PW1, in his report, estimated the tonnage for the plant crop as 100 tonnes per hectare, the 1st ratoon crop at 90 tonnes per hectare and the 2nd ratoon crop at 85 tonnes per hectare. According to his report, these estimates were based on the respondent's agricultural department and the Ministry of Agriculture optimal production levels hence; I find PW1's estimate the most applicable.

18. Consequently, I compute the appellant's loss as Kshs. 285,450/= made up as follows:

a. Plant crop *Kshs. 1,730 x 100 tonnes x 0.6 hectares = Kshs. 103,800/=*

b. 1st ratoon crop *Kshs. 1,730 x 90 tonnes x 0.6 hectares = Kshs. 93,420/=*

c. Amount for the 2nd ratoon crop *Kshs. 1,730 x 85 tonnes x o.6 hectares = Kshs. 88,230/=*

19. I allow the appeal, set aside the judgment and decree of the subordinate court and substitute the same with judgment for Kshs. 285,450/=. As this appeal was filed on 11th October, 2006 and only heard on 29th October 2018, the respondent should not be penalized for the appellant's delay in having the appeal heard on time . I award interest at court rates from the date of filing suit that is 23rd November 2004 to the date the memorandum of appeal was filed that is 11th October, 2006. Interest shall then accrue from the date of this judgment until payment in full. The appellant shall have costs for this appeal at Kshs. 15,000/= and costs for the subordinate court.

Dated, signed and delivered at Kisii this **24th**day of **January 2019.**

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyagwencha h/b Mr. Oduk For the Appellant

Mr. Kimaiyo h/b For the Respondent

Rael Court clerk