Okombo v Sukari Industries Limited (Civil Appeal 58 of 2023)
[2024] KEHC 14874 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14874 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 58 OF 2023

A. ONG'INJO, J

OCTOBER 31, 2024

BETWEEN

PETER OKOTH OKOMBO ..... APPELLANT

AND

SUKARI INDUSTRIES LIMITED ..... RESPONDENT

(Being an Appeal against the whole Judgment of the Resident Magistrate's Court at Rongo (Hon. S. N. Mutava (RM) dated 5 th July 2023 in CMCC No. 73 of 2022)

JUDGMENT

Background

1. By a plaint filed in Court on 24th March, 2023 the appellant sought for the following prayers against the Respondent;

    a. The value of the unharvested sugar cane.

    b. Costs of this suit.

    c. Interest on (b) and (c) above at court's rate.

2. The basis of the claim before the trial court as pleaded by the appellant is that on or about the 20th June, 2011, the Appellant/Plaintiff and the Respondent/Defendant entered into an agreement/contract whereby the Appellant/Plaintiff was to cultivate/develop sugarcane on Plot No.216 and by the terms of the said contract/agreement, the Defendant was to purchase/harvest the sugar cane on maturity and pay the Plaintiff the value thereof.

3. The appellant pleaded that pursuant to the said contract/agreement, the Plaintiff developed sugarcane on the said Plot No. 216 measuring approximately 0.8 Ha and on its maturity asked the Respondent/Defendant to harvest/purchase the said sugarcane as per the agreement, but the

Defendant unreasonably and in breach of the contract refused or failed to harvest Plant Crop, Ratoon 1 and Ratoon 2 thereby occasioning serious losses the Appellant/Plaintiff.

4. The Appellant pleaded particulars of breach as follows;

   a. Failing and/or neglecting to harvest the plant crop, 1st and 2nd ratoons.

   b. Deliberately and recklessly refusing to give consent to the Plaintiff to dispose of the developed sugarcane to 3rd parties or the open market.

5. As a result of the said breach of contract, the Appellant/Plaintiff lost approximately 240 tons for the three crop cycles and he avers that the prevailing price at the time of maturity of the sugar cane was Kshs 3,800/=.

6. The Appellant/plaintiff stated that as a result of the Respondent/Defendant's breach of contract, the Plaintiff suffered loss which he looks upon the Defendant for compensation.

7. In response, the Respondent/Defendant filed its defence dated 27th April, 2022 before the trial court on 28th April, 2022. In the said defence the Respondent denied the contents of the plaint and alleged fraud on the part of the Appellant. The particulars of fraud were set out as follows;

   a. Concocting purported sugarcane farming and supply contract between the plaintiff and the Defendant that never was.

   b. Forging the signature of the alleged Defendant's representative to the purported contract.

   c. Forging and creating the Defendant's rubber stamp and purporting to present it as the original Defendant's stamp by affixing it to the purported contract.

   d. Forging and creating the Kakmasia Assistant Chief's stamp and purporting to present it as original Assistant Chief's stamp by affixing it to the purported contract.

   e. Forging the Chief's and Assistant Chief's signature.

   f. Imputing that the Kamkasia Assistant Chief attested to the Contract when he did not.

   g. Presenting to court forged documents to be awarded damages and monetary gains.

8. The Respondent/Defendant cited Sections 4, 27, 28, 29 and 30 of the *Limitation of Actions Act*, Cap 22 that the court lacked jurisdiction to grant leave to file a suit founded on contract and barred by limitation of time.

9. The Respondent/Defendant asked the trial court to dismiss the Plaintiff's suit with costs.

10. The matter proceeded for hearing on 21st September, 2022. PW1-Augustine Onyango Ayuka in his testimony stated that he is a Farmer and knows Sukari Industries. He entered into an agreement with them in June, 2011. He was to farm sugarcane and planted sugarcane. They were to harvest but did not harvest. He adopted his witness statement dated 24th March 2022 as his evidence in chief. He produced a contract book as exhibit 1, court order dated 23rd March 2020 exhibit 2, schedule of sugarcane prices as exhibit 3, Yield assessment report as exhibit 4 and demand letter dated 7th June 2021 as exhibit 5. The Defendant did not testify in this matter.

11. And therefore they had not exhausted the internal dispute mechanism in the contract and thus the court had no jurisdiction to entertain the matter. The said Arbitration clause provides as follows:-

> " All questions, disputes or difference which at any time hereafter arise between the parties hereto touching or concerning this Agreement on the constructions hereof or as to the rights, duties and obligations of either party hereto as to any other matter shall be referred to a local Arbitration committee of five people compromising: -
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> a) the district office in whose area the land on which the cane supply contract relates is situated;
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> b) One person representing the Kenya Sugar Board;
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> c) One nominee of the miller;
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> d) One nominee of the grower and;
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> e) the Divisional Agricultural officer of the area where the cane in question is situated or in his absence an agricultural officer holding the rank of Divisional Agricultural Officer or above appointed by the area District Agricultural Officer for that purpose.
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> 6.
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> 1 The District Officer shall preside over the meeting of this Arbitration committee
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> 6.
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> 2 The Arbitration Committee shall have powers to receive evidence from any source including summoning witnesses to testify before it and will have all the powers conferred on arbitrations by the *Arbitration Act* or any statutory Legislation thereof for the time being in force in Kenya.
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> 6.
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> 3 Any party not satisfied with the decision of the Arbitration committee may refer the dispute to the Sugar Arbitration Tribunal established under Sugar Act, 2001 whose decision shall be final and binding on all the parties involved."

The Appeal

12. The appellant being dissatisfied with the judgment and decree of the trial court preferred an appeal before this court vide a Memorandum of Appeal dated 31st July 2023 setting forth the following grounds of appeal;

    1. That the learned trial magistrate erred in law and in fact in dismissing the appellant's suit for lack of jurisdiction on account of arbitration clause even after hearing the suit till the end.

    2. That the learned trial magistrate erred in law and in fact in dismissing the appellant's suit for lack of jurisdiction on account of arbitration clause even when the Respondent filed

its memorandum of appearance together with Statement of Defence in which it admitted jurisdiction of the Honourable court.

3. That the learned trial magistrate erred in law and in fact in dismissing the appellant's suit for lack of jurisdiction on account of arbitration clause even when the Respondent waived its right to take recourse to arbitration.

4. That the learned trial magistrate grossly misdirected herself in disregarding the fact that the Arbitration clause was inoperative thus consequently arriving at a wrong conclusion.

5. That the learned trial magistrate grossly misdirected herself in principle on the law regarding arbitration thus consequently coming to a wrong conclusion.

6. That the learned trial magistrate erred in law and in fact regarding the law of arbitration thus consequently coming to a wrong conclusion.

Reasons wherefore the appellant prays for;

a. This Honourable court do set aside the judgment of the Learned Trial Magistrate and allow the appellant's appeal.

b. This Honourable court do look at the main suit in substance.

c. The appellant be awarded the costs of this appeal and of the lower court.

13. On 12th June, 2024, this court issued directions that the appeal be disposed of by way of written submissions. The Appellant complied with the directions and in support of this appeal filed his written submissions dated 13th June, 2024. There are no submissions on record for the Respondent.

Appellant's submissions

14. The appellant submitted that the trial court dismissed the suit on grounds that it lacked jurisdiction since the matter had an Arbitration clause and ought to have been heard by Arbitration. The appellant relied on the case of Owners of the Motor vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1.

15. It was submitted by the appellant that the matter was heard to the end and judgment was delivered. It was a finding of the trial court that there was a valid contract between the parties evidenced by the contract book of serial no. 33177 issued by the respondent and which was produced and relied upon by the appellant.

16. Clause 6 of the contract book provided for the Arbitration clause and it states:

> "All questions, disputes or differences which at any time arise between the parties hereto touching or concerning this agreement or the constructions hereof, or as to the rights, duties and obligations of either party hereto or as to any matter shall be referred to a Local Arbitration Committee".

17. The appellant urge that the intention of the parties was to oust the jurisdiction of the court and have the dispute settled through arbitration. The appellant put reliance on Article 159 (2) (c) of *the Constitution*. The court has jurisdiction to substantially hear and determine a matter that is subject to arbitration if application for reference is not made together with filing conditional memorandum of appearance.

18. It is well settled that the intention of the legislature is that if the agreement is inter alia inoperative, the forum with jurisdiction to hear and determine the matter is the court. The tenor and import of Article 159 (2) (c) of *the Constitution* together with Section 6(1) of the *Arbitration Act* is that where parties

to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement.

19. It was the position of the appellant that in the instant appeal, no such application was made at all. In addition, the Respondent admitted the jurisdiction of the court in its statement of defence. The moment the Respondent filed memorandum of appearance without any protest on jurisdiction, the Arbitration clause became inoperative. The Respondent waived or rendered the arbitration clause breathless.

20. The appellant urges this court to allow this appeal in terms of the prayers sought in the memorandum of appeal.

Analysis and Determination

21. Having considered the grounds of appeal and the written submissions by counsel for the appellant, I find the issue arising for determination in this appeal is whether the appellant's appeal has merit and if so, whether he deserves the orders being sought.

22. This being a first appeal this court has a duty to re-evaluate, re-analyze and re-assess the evidence adduced before the trial court and satisfy itself that the decision was well founded. This duty was set out in Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, as follows:

> " This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

23. It is trite law that an appellate court will not interfere with a finding by the trial court unless it is established that such a finding was arrived at based on no evidence or the trial court acted on wrong legal principles of law in arriving at the decision (see Ephantus Mwangi and Another –vs- Duncan Mwangi Wambugu (1982) – 88) IKAR 278).

24. Accordingly, this court has re-evaluated and re-assessed the evidence adduced before the trial court. The appellant's evidence was that he entered into a contract with the respondent to grow sugarcane and the Respondent would harvest it. The appellant indeed planted sugarcane but the Respondent failed to harvest it and thus occasioning great losses to the appellant.

25. It was the trial court finding that the court had no jurisdiction to entertain the matter due to the existence of an arbitration clause in the contract agreement. The parties having chosen the mode of dispute resolution in their contract agreement, the court had no option but to grant the parties their wishes.

26. The Court of Appeal in the case of Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR held as follows:

> " Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the *Arbitration Act*, No. 4 1995 (the Act) would apply and the courts take a back seat."

27. Further, the Court of Appeal in the case of in the case of Nyutu Agrovet Limited vs Airtel Networks Limited [2015] eKLR, held thus;

> " My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrator's award shall be final, it can be taken that as long as the given award subsists, it is theirs. But in the event, it is set aside as was the case here, that decision of the High Court final remains their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved."

28. Upon considering of the fact that the agreement between the Appellant and the Respondent provided for arbitration at Clause 6 this court finds that the Appellant ought to have shown that internal dispute resolution mechanism had been exhausted before his claim can be entertained in the court. In the circumstances I find no reason to warrant interference with trial courts finding.

The Appeal herein lack merit and the same is dismissed with costs entire evidence that was adduced before the Trial Court.

DELIVERED DATED AND SIGNED AT MIGORI THIS 31ST DAY OF OCTOBER, 2024.

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A. ONG'INJO

JUDGE