



REPUBLIC OF KENYA



KENYA LAW
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**Transmara Sugar Company Limited v Obaga (Civil Appeal
106 of 2022) [2023] KEHC 19481 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 19481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 106 OF 2022
RPV WENDOH, J
MAY 25, 2023**

BETWEEN

TRANSMARA SUGAR COMPANY LIMITED APPELLANT

AND

MOFFAT OMWANDO OBAGA RESPONDENT

*(An Appeal from the Judgement and Decree of Hon. Munguti Senior Principal
Magistrate (SPM) dated and delivered on 27/7/2022 in Migori CMCC No. 1413 of 2016)*

JUDGMENT

1. This is an appeal by Transmara Sugar Company Limited against the judgement and decree of the Hon. Munguti (SPM) dated and delivered on 27/7/2022. The appellant is represented by the firm of Oyagi, Ong’uti, Magiya & Co. Advocates while the respondent is represented by the firm of Odingo & Co. Advocates.
2. By a plaint dated 14/4/2016, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for general damages of the three (3) cycles of cane, costs of the suit, interest and any other relief. The respondent pleaded that on 23/5/2011, he entered into a written agreement with the appellant to harvest and purchase the existing sugarcane in his Plot measuring 0.2 hectares situated at Ruma Area, Nyabera sub - location. Otendo Location, South Gucha District within Kisii County.
3. It was also pleaded that the respondent became a member of Transmara Out Growers Co. Ltd (TOCOL) upon signing the requisite membership forms for the purposes of growing the sugarcane on his land and selling the same to the appellant. It was the respondent’s case that at the time of the agreement, there was already existing sugarcane on the plot; that the respondent self - developed the sugarcane without the appellant’s assistance; that the appellant without any reasons refused and/or ignored to harvest the 2nd ratoon which affected the preparation of the ratoon; that 2 months after the sugarcane matured, the respondent notified the appellant and in vain demand to know why it could



- not harvest and transport the contractual sugar cane on the said plots; that the actions of the appellant amounted to a breach of contract hence the respondent suffered damage.
4. Further to the foregoing, it was the respondent's case that pursuant to the Kenya Sugar Cane Research Foundation report, his sugarcane on the said plot measuring 0.2 hectares could weigh an average of 19.2 tonnes and the price per tonne by the time the sugar cane matured was Kshs. 4,300/=; that the appellant was in breach of contract hence the respondent claimed general damages. It was also averred that the respondent tried to initiate arbitration proceedings but it was in vain.
 5. The appellant filed a statement of defence dated 10/1/2017. The record of appeal (pages 105 - 111) introduces an amended statement of defence dated 7/9/2020. I have carefully perused the lower court original file and in particular the proceedings before the Hon. Munguti. On 30/10/2019, Mr. Omwenga Counsel for the appellant applied for an adjournment to amend the statement. The court granted the adjournment and directed that hearing of the application to amend the defence was to be on 27/11/2019. On 27/11/2019, the court record is silent on what proceedings took place.
 6. The amended statement of defence before this court and in the record of appeal, does not form part of the documents which were produced before the trial court. It is even more puzzling that the alleged application to amend the defence was not filed before the trial court. It is not possible for this court to now rely on documents which were not produced before the trial court. The amended statement of defence dated 7/9/2020 is hereby struck out from the record of appeal.
 7. The above scenario begs the question if the appeal is competent. order 42 rule 13 (4) outlines all the documents which should form part of the record of appeal. Rule 4 (b) provides for "pleadings." The only pleading which ought to have been in the record of appeal is the defence dated 10/1/2017. order 42 rule 13 (4) (ii) provides:-
 - "(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."
 8. The documents specified under paragraphs (a), (b), and (f) which the court cannot dispense with are the memorandum of appeal, the pleadings, the judgement, order and decree appealed from. This court having not dispensed with any of the documents, finds that in the absence of the statement of defence dated 10/1/2017, the record of appeal is incompetent.
 9. The Supreme Court in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR held that where documents are omitted from the record of appeal bundle, the appeal is incomplete, defective for failing to meet the requirements of the law and the court is therefore not seized with jurisdiction. It is the finding of this court that there is no competent appeal before it for consideration for failure to properly adduce the documents relied on in the trial court and introducing strange documents at the appellate stage. The appeal is incompetent and defective for failure to comply with the law.
 10. Another observation is the undated amended memorandum of appeal at pages 7a - 7d in the record of appeal. Order 42 rules 3 (1) and (2) provides:-
 - "The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.
 - After the time limited by subrule (1) the court may, on application, permit the appellant to amend his memorandum of appeal."



11. The law allows a party to amend its memorandum of appeal before the court gives its directions under Rule 13. Rule 13 provides for directions before hearing as follows: -

“On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.”

12. Therefore, a party can only be allowed to amend its memorandum of appeal prior to the court giving its directions on the hearing. After the directions on the hearing have been given, a party who wishes to amend its memorandum of appeal, can only do so with leave of the court. The directions on the hearing of this appeal were given on 19/1/2023. The undated amended memorandum of appeal does not have a “receiving stamp” of the High Court registry on its face. The undated memorandum of appeal is also not one of the documents in the parent file of this court. It is therefore difficult to tell if the undated amended memorandum of appeal was filed within the timelines envisaged under Order 42 Rules (1) and (2) of the Civil Procedure Rules. As matters stand, it cannot be said that the undated memorandum of appeal is competent before this court. The document which the court can rely on is the memorandum of appeal dated 25/8/2022 and filed on 26/8/2022.

13. Flowing from the above, without even delving into the submissions made by either party, and due to the incompetence of the appeal, the same is hereby struck out with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 25TH DAY OF MAY, 2023

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Ms. Akoya for the Appellant.

Mr. Odero holding brief Mr. Odingo for the Respondent.

Emma/Phelix Court Assistant.

