Abuor v Sukari Industries Co. Limited (Civil Appeal 26 of 2019)
[2023] KEHC 21090 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21090 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL 26 OF 2019

KW KIARIE, J

JULY 31, 2023

BETWEEN

OTIENO PETER ABUOR ..... APPELLANT

AND

SUKARI INDUSTRIES CO. LIMITED ..... RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's SRMCC No. 158 of 2017 by Hon. S.K Arome –Senior Resident Magistrate)

JUDGMENT

1. Otieno Peter Abuor, the appellant herein was the plaintiff in Ndhiwa Senior Resident Magistrate's SRMCC No. 158 of 2017. He had sued the respondent for compensation for three crops on allegations of breach of contract. The learned trial magistrate delivered judgment dated February 6, 2019in which the claim was dismissed.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Kerario Marwa & Company Advocates. He raised grounds of appeal as follows:

    a. That the learned magistrate erred in law and fact when he dismissed the appellant's case on grounds that there was no plot number as 1246.

    b. That the learned trial magistrate erred in law and fact when he failed to find and hold that the duty to harvest contracted sugarcane was statutory therefore needing no notice written or verbal.

    c. That the learned magistrate erred in law and in fact when he failed to find and hold that once a defence has been filed the arbitration clause ceases to be operational.

d. That that learned magistrate erred in law and fact when he failed to find that the harvesting age of the contracted sugarcane had been determined in the contract, so the drying of the sugarcane was not an issue to be proved.

e. The learned magistrate erred in law and fact when he determined the case against the weight of evidence.

f. The learned magistrate erred when he disregarded statutory provisions of the Sugar Act, which by then governed the sugarcane industry

3. The respondent was represented by the firm of Ogejo, Olendo & Company, Advocates who contended that the appellant did not prove his case.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd*. [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The learned trial magistrate had four main issues to address his mind to. These were whether plot plot number 1246 existed, whether there was a valid contract between the parties, whether failure to enforce the arbitration clause was fatal to the appellant's case and whether there was breach of contract.

6. Both parties signed a contract in respect of plot number 1246. A copy of the Cane Farming and Supply Contract was exhibited. The respondent cannot claim thereafter that it did not exist. The contradiction of whether the appellant planted sugar cane in plot 1246 or 1355 notwithstanding. This also settled the issue whether the two parties entered into an agreement.

7. The Cane Farming and Supply Contract at clause 6 provided for arbitration in case of a dispute or disagreement between the parties. This ought to have been raised at the earliest opportunity before the commencement of the trial before the learned trial magistrate. The parties did not do so. The parties therefore submitted themselves to the jurisdiction of the trial court, and it would appear they mutually agreed to disregard their arbitration clause. The finding by the trial magistrate on this issue was therefore erroneous.

8. In his testimony, the appellant testified that he did not write to the respondent. He however said he made a verbal report. Clause 3 of their agreement states:

   Should either party commit a breach of this agreement and fail to remedy such breach within thirty (30) days after receipt of a notice in writing to that effect from the other party serving such a notice, the party not in breach may, by further notice in writing shall be at liberty to terminate this agreement from the date of completion of delivery of cane from the next ensuing harvest.

9. This clause does not envisages a situation where either party faced with a breach of contract will sit and fold hands and await to file a suit. The appellant did not testify that he gave the contemplated notice in writing and that he took the necessary steps to terminate the contract and to ameliorate the loss. In the case of *William Kazungu Karisa v Cosmus Angore Chanzera* [2006] eKLR the court (Ouko J. as he then was) stated:

   The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them. For instance, the contract must be performed at the time and place agreed upon. Where no specific period for the performance of the contract is agreed then it must be completed within a reasonable time, which in turn will depend on

the circumstances of the particular situation. However, when a specific dated is mentioned, then time becomes of the essence and completion must be within that date as it becomes a condition which goes to the root of the contract.

10. The upshot of the foregoing analysis of the evidence is that the appeal lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE