Nyawade v Sukari Industries Co Limited (Civil Appeal 19 of 2019)
[2023] KEHC 21487 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21487 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL 19 OF 2019

KW KIARIE, J

JULY 31, 2023

BETWEEN

THOMAS OTIENO NYAWADE ..... APPELLANT

AND

SUKARI INDUSTRIES CO LIMITED ..... RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's SRMCC No. 408 of 2016 by Hon. S.K Arome –Senior Resident Magistrate)

JUDGMENT

1. Thomas Otieno Nyawade, the appellant herein was the plaintiff in Ndhiwa Senior Resident Magistrate's SRMCC No. 408 of 2016. He had sued the respondent for compensation for three crops on allegations of breach of contract. The learned trial magistrate delivered judgment dated December 6, 2019 in 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 the ground that the lot number was not shown on the contract, and yet there were other features on the contract, which could validate and establish the intentions of the parties.

    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 the 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 vs. Associated Motor Boat Co. Ltd*. [1965] E.A. 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 two main issues to address his mind to. These were whether there was a valid contract between the parties and whether there was breach of contract.

6. I have perused the record and agree with the finding of the learned trial magistrate that there was a valid contract between the parties.

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. The appeal will not turn on this issue.

8. In his testimony, the appellant did not testify that he gave notice to the respondent as envisaged in clause 3 of their agreement. The clause 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. The appellant having not testified that he gave the said notice, and having not testified as to why he did not issue the notice in writing to the effect that he intended to terminate the contract, the learned trial magistrate was alive to the legal position as pronounced in the case of *William Kazungu Karisa v Cosmus Angore Chanzera* [2006] eKLR where 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