



REPUBLIC OF KENYA



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**Okech v Sukari Industries Co. Limited (Civil Appeal 27 & 9 of 2019
(Consolidated)) [2023] KEHC 21114 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 27 & 9 OF 2019 (CONSOLIDATED)**

KW KIARIE, J

JULY 31, 2023

BETWEEN

EZEKIEL OHURU OKECH APPELLANT

AND

SUKARI INDUSTRIES CO. LIMITED RESPONDENT

*(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's
SRMCC No. 401 of 2016 by Hon. S.K Arome –Senior Resident Magistrate)*

JUDGMENT

1. Ezekiel Ohuru Okech, the appellant herein was the plaintiff in Ndhiwa Senior Resident Magistrate's SRMCC No. 401 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 6th February, 2019 in which the claim was allowed but was denied costs.
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. The learned trial magistrate erred in fact and in law when he awarded the appellant the compensation for three unharvested cane cycles but failed to award the cost and interest as pleaded by the appellant.
 - b. That the learned trail magistrate erred in law and in fact when he failed to adhere to the provisions of section 27 *Civil Procedure Act* where costs follow the event.
3. The respondent was represented by the firm of Ogejo, Olendo & Company, Advocates who contended that the appellant did not prove his case.



4. In Civil 9 of 2019 the appellant was Sukari Industries Company Limited. The grounds of appeal were as follows:
 - a. That the learned trial magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.
 - b. The learned trial magistrate erred in fact and in law in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
 - c. The learned trial magistrate erred in fact and in law in finding that the respondent had proved his case on a balance of probability.
 - d. The learned trial magistrate erred in fact and in law in ignoring the pleadings and submissions for the defense.
 - e. The learned trial magistrate erred in fact and in law in failing to appreciate sufficient or at all that the evidence tendered in favor of the appellant controverted and rebutted the respondent's evidence thus lowering the respondent's probative evidential value.
 - f. Without prejudice to the foregoing the award of damages in the circumstances was excessive.
5. 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.
6. The learned trial magistrate had the following issues for determination:
 - a. Whether there was a valid contract between the parties,
 - b. Whether failure to enforce the arbitration clause was fatal to the appellant's case; and
 - c. Whether there was breach of contract.
7. Both parties signed a document that was exhibited in respect of Cane Farming and Supply Contract. The respondent cannot claim thereafter that it did not exist.
8. 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.
9. In his testimony, the appellant testified that he informed the respondent that cane was ready for harvesting. The respondent's agents visited the land but did not harvest the cane. He however did not produce anything to show that he made the 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.

10. This clause does not envisage 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 date 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.

11. The learned trial magistrate therefore erred in finding that Sukari Industries Company Limited had breached the contract with Ezekiel Ohuru Okech. I set aside this finding and allow the appeal in Civil Appeal number 9 of 2019 in favour of Sukari Industries Company Limited with costs in this court and in the trial court.
12. The upshot of the foregoing analysis of the evidence is that the cross appeal Civil Appeal number 27 of 2019 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

