



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ombogo v Sukari Industries Co Limited (Civil Appeal 29 of 2019)
[2023] KEHC 21489 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 29 OF 2019**

**KW KIARIE, J
JULY 31, 2023**

BETWEEN

JOANES OYOYA OMBOGO APPELLANT

AND

SUKARI INDUSTRIES CO LIMITED RESPONDENT

*(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's
SRMCC No. 162 of 2017 by Hon. S.K Arome –Senior Resident Magistrate)*

JUDGMENT

1. Joanes Oyoya Ombogo, the appellant herein was the plaintiff in Ndhiwa Senior Resident Magistrate's SRMCC No 162 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, 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 grounds that there was no plot number on the contract and yet the contract on its face has the plot number as 1367.
 - 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 fact when he failed to find and hold that once a defence has been filed the arbitration clause ceases to be operational.



- d. 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 trial 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 three main issues to address his mind to. These were:
 - 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.
 6. Both parties signed a document of the Cane Farming and Supply Contract dated June 21, 2011. The respondent cannot claim thereafter that it did not exist.
 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. He conceded on cross examination that he did not enforce Clause 3 of their agreement which 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 Cosmos 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.

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

