Sukari Industries Limited v Otana (Civil Appeal E062 of 2022)
[2023] KEHC 24334 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24334 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E062 OF 2022

KW KIARIE, J

OCTOBER 26, 2023

BETWEEN

SUKARI INDUSTRIES LIMITED ..... APPELLANT

AND

ODONDI OTANA ..... RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Principal Magistrate's PMCC No. 292 of 2016 by Hon. Mary A. Ochieng –Principal Magistrate)

JUDGMENT

1. In Ndhiwa Principal Magistrate's Court civil case No.292 of 2016, Sukari Industries Co. Limited was the defendant, in a lawsuit filed by the respondent for a claim of breach of contract. The respondent sought compensation for three unharvested cycles. On July 19, 2022, the trial magistrate ruled in favor of the respondent and ordered the appellant to pay Kshs.221, 600.00.
2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by the firm of Olendo, & Samba Advocates LLP. The appellant raised the following grounds of appeal:
    a. The learned trial magistrate erred in fact and in law in treating the evidence and submissions before her superficially and consequently coming to a wrong conclusion on the same.
    b. The learned trial magistrate erred in fact and in law 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 by awarding the respondent exemplary damages, yet in the plaint, the respondent did not plead for the said award.
    d. The learned trial magistrate erred in fact and in law in finding that the respondent had proved his case on a balance of probability.

e. The learned trial magistrate erred in fact and in law in ignoring the pleadings and submissions for the defence.

f. The learned trial magistrate erred in fact and in law in failing to appreciate sufficiently 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 evidentiary value.

g. Without prejudice to the foregoing, the award of damages in the circumstances was excessive.

3. The respondent was represented by the firm of Ochillo & Company Advocates who raised the following grounds:

a. That the respondent did not prove his case;

b. That exemplary damages were awarded erroneously; and

c. That the appeal lacked merit.

4. As the first appellate court, it is my responsibility to carefully review all of the evidence presented and take into consideration that I did not have the opportunity to observe the witnesses testify and their behavior. I will follow the principles outlined in the case of *Selle v Associated Motor Boat Co Ltd*. [1965] EA 123, which states that the first appellate court must examine and assess the evidence that was presented in the trial court, and then come to its own conclusions on the matter.

5. The trial magistrate had two main issues to consider: whether there was a contract between the parties and if there was a breach.

6. In the statement of defence, the appellant denied the existence of a contract between the parties. However, the Cane Farming and Supply Contract No. 0003216 contradicted this denial. On page 6 of the agreement, both parties signed the contract in the presence of Joseph A. Nyingilo, the assistant chief of the Kakmasia sub-location.

7. The trial magistrate determined that the two parties had entered into a valid contract, based on the copy of the contract that was presented in court and signed by both parties. This finding cannot be challenged.

8. The duties of the Grower (respondent) are spelled out in clauses 7.1 to 7.15. Clause 7.2 of the agreement states:

The grower shall offer for delivery on maturity in accordance with clause (1) above and deliver to the miller all such cane as is derived from his contracted field and no other using the Miller's transport or the Grower's appointed transporter approved in advance by the Miller.

9. Based on my interpretation of this clause, the Grower was responsible for informing the Miller when the Sugar Cane was ready for harvesting. The phrase "The Grower shall offer for delivery on maturity" can only mean this. However, the respondent did not mention in his evidence that he notified the appellant about the cane's maturity. I find that the appellant did not breach the contract since the respondent did not fulfill his obligation as envisaged in clause 3 of the agreement to prompt the appellant's expected action.

10. I therefore set aside the finding by the trial magistrate that the appellant was in breach of the contract as well as the award. The appeal is allowed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF OCTOBER 2023

KIARIE WAWERU KIARIE

JUDGE