



**Ojwang v Sukari Industries Limited (Civil Appeal 10 of 2020)
[2022] KEHC 14465 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14465 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 10 OF 2020
RPV WENDOH, J
OCTOBER 27, 2022**

BETWEEN

GORDON ONYANGO OJWANG APPELLANT

AND

SUKARI INDUSTRIES LIMITED RESPONDENT

*(Being an appeal from the Ruling of the Senior Resident Magistrate,
Rongo dated 5/2/2020 by Hon. Kamau C.M. in PMCC No. 133 of 2018)*

JUDGMENT

1. The appellant herein, Gordon Onyango Ojwang, commenced this appeal via a memorandum of appeal dated 2/3/2020. The appellant is represented by the firm of Oduk & Co. Advocates.
2. The appeal is against the ruling of Hon. Kamau C.M. dated and delivered on 5/2/2020 in PMCC No. 133 of 2018. The ruling was in relation to a Notice of Preliminary Objection dated 28/1/2020 filed by the respondent (“objection”).
3. The respondent raised an objection that the trial court did not have jurisdiction to hear and determine the suit before it for the following reasons:-
 - a. By dint of Section 38 of the *Crops Act* as the jurisdiction of the suit under the said provisions rests with the High Court.
 - b. In view of the judgement and/or ruling by Justice Karanja in Homabay High Court Civil Appeal No. 60 of 2017, Sukari Industries Limited vs Jeremiah Otieno Madara.
4. The trial Magistrate on 5/2/2020, allowed the preliminary objection and dismissed the suit. The said ruling precipitated the instant appeal on the following grounds:



- a. That the learned trial Magistrate erred in law and in fact in entertaining and upholding the preliminary objection when the same had neither been served on the appellant and without giving the appellant the opportunity to be heard on the same, which offended Article 50 (1) of *the Constitution* of Kenya, 2010.
 - b. The learned trial Magistrate erred in law in upholding that it had no jurisdiction to entertain the suit as per the preliminary objection hence violating the provision of Section 7 of the *Magistrates Court Act* and the common law.
 - c. The learned trial Magistrate erred in law by failing to find that the preliminary objection raised by the respondent was incompetent and bad in law and was based on a misunderstanding and wrong interpretation of the provisions of Section 38 of the *Crop Act*.
5. The appellant prayed:-
- a. The ruling of the trial court dated 5/2/2020 be set aside.
 - b. The court do remove the suit in PMCC No. 133 of 2018 for trial before another magistrate.
 - c. The costs of the subordinate court and of the appeal be borne by the respondent.
 - d. There be an award of interest as prayed in the plaint.
6. The appeal was canvassed by way of written submissions. The appellant filed his undated submissions on 28/6/2021. It was submitted that the preliminary objection was filed on 5/2/2020 but was never served on the appellant and was entertained by the court which ended up dismissing the suit; that the exercise of jurisdiction was irregular and the appellant was not afforded an opportunity to respond to the preliminary objection; that it was unfair and went against the basic tenets of fair play and fair hearing that Article 50 (1) of *the Constitution* requires for party disputants.
7. The appellant further submitted that the Magistrate not only abandoned jurisdiction but failed to notice that the objection was unsound in law; that the authority which the respondent annexed was not only doubtful in law but also wrongly decided and has since been overruled by the Court of Appeal. The appellant asked this court to allow the appeal with costs to the preliminary objection, this appeal and the suit to proceed before any other Magistrate other than C.M. Kamau.
8. The respondent through the firm of Olendo, Orare & Samba LLP Advocates filed written submissions dated 14/3/2022 on 8/6/2022. The respondent mainly submitted on the issue of jurisdiction. It was submitted that the alleged breached contract was entered into on 8/4/2011 and the *Crops Act* commenced on 1/8/2014 which would mean that the contract was therefore not governed by the Act but the repealed *Sugar Act*; that however Section 42 of the Act proffers a remedy which makes the Act applicable to the contract under Section 41 (1) and 2 (a) of Act and also in the findings of *Sukari Industries Limited vs Jeremiah Otieno Madara* (2019) eKLR.
9. The respondent further submitted that by dint of Sections 38, 5, 2 and Part 1 of the 1st Schedule, the subject matter of the alleged contract between the plaintiff and the defendant falls under the Act as was held in the case of *Sukari Industries Limited vs Jeremiah Otieno* (*supra*).
10. On the recourse for a breach of contract under the Act, it was submitted that it lies to a person as per Section 38 of the Act; that the Court of Appeal in *Jeremiah Otieno Madara vs Sukari Industries Limited* (2021) eKLR erroneously attempted to clothe the Magistrate's court with jurisdiction to entertain such a dispute as between the appellant and the respondent.



11. Further, the respondent submitted that a reading of Section 40 of the Act will show that the Court of Appeal fell into error. The respondent relied on Part III of the 2020 *Regulations* and in particular 17 and 20 (2) and submitted that the appellant chose the wrong forum seeking redress.
12. In conclusion, it was submitted that the principles of common law cannot supersede the Act and Section 40 of the Act and Regulations 2020 clearly set out the term, rights and liabilities of the farmer and miller through a standard form contract which cannot be varied either by inclusion of any implied term by the common law. The respondent asked this court to find that the trial court had no jurisdiction to entertain the matter.
13. I have considered the grounds of appeal, the entire record of appeal and the rival submissions. The main issues for determination are:-
 - i. Whether the appellant was afforded an opportunity to be heard on the preliminary objection dated 28/1/2020.
 - ii. Whether the subordinate court has jurisdiction to determine the suit before it.
14. This being the first appellate court, it has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another vs Associated Motorboat Co. Ltd* (1968) EA 123.
15. Before addressing my mind to the first issue, I wish make an observation on the manner in which the ruling being appealed against was delivered. The court record indicates that the ruling was delivered on 5/2/2020. Both parties in this suit were not present. As I was perusing the court file, I tried to look for the actual ruling which was delivered. Ordinarily, it should contain a summary of the objection, reasoning and the conclusion or finding of the Magistrate. Surprisingly, the ruling was a one-line sentence which actually formed part of the court proceedings of 5/2/2020. I found that practice irregular, at least to me. The ruling read:-

“Court: Preliminary objection hereby upheld. Suit dismissed with costs.”
16. Going back to the first issue, the appellant alleged that he was never served with the objection and he has never seen it and was not afforded an opportunity to be heard on the objection and therefore his right to fair hearing under Article 50 (1) of *the Constitution* was infringed. The respondent has not addressed itself to these allegations.
17. I have carefully considered the entire trial court record and original file. The suit was scheduled for hearing on 9/12/2019, a date taken in the presence of Counsel for the appellant in court. On 28/1/2020, the respondent filed the objection. There is no indication that directions on hearing of the objection were taken. The next time the matter came up was on 5/2/2020 and in the absence of all the parties, the trial Magistrate delivered a ruling upholding the objection and dismissing the suit.
18. Even without belabouring the issue, there is no doubt that the appellant was not afforded an opportunity to be heard. There is no evidence that the objection was never served upon the appellant. The right to be heard is the cornerstone of any judicial proceedings. The right to be heard is non derogable. The right to hearing ensures proper administration of justice.



19. In *Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another* (2018) eKLR, the court had the following to say on Article 50 of *the Constitution* with respect to fair trial principles: -

“... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.”

20. On whether the appellant was afforded an opportunity to be heard on the objection dated 28/1/2020, the answer is in the negative.

21. On the second issue for determination, the locus classicus case on jurisdiction is the case of *Owners of the Motor Vessel “Lillian S” -Vs- Caltex Oil (Kenya) Ltd* (1989) KLR 1, where Nyarangi J, held that at the earliest opportunity, the issue of jurisdiction ought to be raised and the court seized of the matter should make a decision on the issue right away. Jurisdiction is everything and without it, a court should not make another step.

22. Jurisdiction is conferred upon a court, tribunal, person or authority either by *the constitution* or statute. It is trite law that once that jurisdiction is conferred, it must be exercised in accordance with the law. In the case of *Samuel Kamau Macharia & Another -Vs- Kenya Commercial Bank Limited & 2 others* (2012) eKLR, the Supreme Court stated that: -

“...A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

23. The respondent raised an objection that the lower court is bereft of jurisdiction to hear and determine the suit before it, in view of the judgment and ruling by Karanja J in Homabay HCCA No. 60 of 2017, *Sukari Industries Limited vs Jeremiah Otieno Madara*. (*supra*). It was also submitted that according to Section 38 of the *Crops Act*, 2013 recourse for breach of contract lies with the High Court.

24. The appellant submitted that the decision relied on by the respondent Sukari Industries Limited vs Jeremiah Otieno (*supra*) was wrongly decided and the Court of Appeal has since overruled that decision.

25. The contentious provision under the *Crops Act* is Section 38 which provides as follows:-

“Any person who has reason to believe that the provisions of this Act have been, are being, or are about to be violated, may petition the High Court for:-

- a. A declaration that the provisions of this Act are being, have been, are about to be contravened;
- b. An injunction, restraining any specified person from carrying out the contravention;
- c. A writ of mandamus against an officer or a person who has failed to perform a duty imposed by or under this Act; or
- d. Any lawful remedy.”



26. Mrima J in *Sukari Industries vs Ezra Ododi Abero* HCCA No. 110 of 2019 a persuasive decision to this court, discussed extensively. Section 38 of the *Crops Act*. On the said provision, the court observed that the section does not oust the jurisdiction of the Magistrate Courts. The court went ahead to find that even if the position is that one can find a remedy under limb of “any other lawful remedy” it does not oust the Magistrate’s jurisdiction since the wordings of the provision uses the word “may petition to the High Court.” The word “may” connotes discretion on the parties.

The court further held that:-

“A careful consideration of the *Crops Act* brings forth the fact that disputes between the farmers and other crop dealers do not therefore fall within the application and the domain of Section 38 of the *Crops Act*. Such disputes were to be dealt with by way of arbitration. However, the rules governing the intended arbitration are yet to be put in place. even with such a void there can never be a legal vacuum. In such a scenario the courts, subject to jurisdiction, must adjudicate on the disputes...I hence find and hold that Section 38 of the *Crops Act* was not aimed at ousting the jurisdiction of the Magistrates’ Court over all disputes under the *Crops Act*.”

27. The Court of Appeal in the case of Jeremiah Otieno Madara (*supra*) considered the question of whether the *Crops Act* in stating the forum for disputes in the event of a violation of the Act, makes it obligatory to utilize that forum and ousts the jurisdiction of other courts. The learned Judges observed that in the dispute before them, the statute which created the rights and obligations of growers and millers pertaining to sugar agreements, created a special forum (Sugar Tribunal) to adjudicate disputes arising from cane farming and supply contracts. The Appellate Court further stated that the appellant before them had the right to elect to pursue either a common law remedy or the remedy provided under statute.

It was further held:-

“A perusal of the *Crops Act* clearly shows that it does not create any rights, liabilities or specific requirements directly to growers and millers concerning sugar agreements. More importantly, this court has not been directed to the substantive provisions under this Act that have been breached which would initiate proceedings under Section 38. In our view, the appellant’s cause of action must be found in the substantive provisions of the statute in question. The forum under Section 38 is obligatory only where it provides an exclusive method of determining questions which relate to breaches of the provisions in the Act and only then can they deprive other courts jurisdiction which they ordinarily possess. It is trite law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. Under Section 5 of the *Civil Procedure Act*, courts have jurisdiction to try all suits of a civil nature except suits of which its cognizance is either expressly or impliedly barred. It seems to us that, courts with competent jurisdiction are not specifically barred from entertaining claims relating to scheduled crops except where it is shown that substantive provisions of an Act have been breached and where a liability not existing at Common Law is created by a statute which gives a special and particular remedy for enforcing it.”



28. This court in its recent decision in HCCA No. 54 of 2021 *Eunice Atieno Aran vs Sukari Industries Limited* (2021) eKLR pronounced itself as follows, which position it still holds:-

“...the provisions of Section 38 of the *Sugar Act* particularly provided for remedies a party may seek to the High Court if substantive provisions of the *Sugar Act* have been violated. The provision does not provide that disputes arising out of contractual obligations have to be handled by the High Court in the place of the Magistrate’s Court. The remedies which an aggrieved party would be seeking under Section 38 of the *Sugar Act* are public law in nature; the likes of injunctions and judicial review writs like mandamus. In commercial contracts disputes like the one before the trial court, it is not conceivable for the court to issue public law remedies in private commercial matters.”

29. It is this court’s finding that the Magistrate’s Court has jurisdiction to hear and determine the suit before it.

30. The respondent faulted the Court of Appeal’s decision in the Jeremiah Otieno Madara (*supra*) contending that the Appellate Court judges fell into error when it clothed the Magistrate’s courts with jurisdiction. Essentially, what the respondent is asking this court to do, is to critique the decision of the Court of Appeal and depart from it. While it is true that the High Court has original and exclusive jurisdiction to determine any or all questions in law, it cannot sit as an appellate court over a Court of Appeal’s decision.

31. The doctrine of stare decisis binds this court to the findings of the Court of Appeal and the Supreme Court. The objective of adherence to the doctrine is: certainty, clarity, predictability and legitimacy within the law when deciding on similar issues.

32. The importance of this doctrine was enumerated in the case of *Dodhia v National & Grindlays Bank Limited and Another* (1970) EA 195, Duffus, V.P. expounded on the principle of stare decisis by holding that;

“There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law..”

33. The Supreme Court of Kenya in Supreme Court Petition No. 4 of 2012 (2013) eKLR *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others* stated:-

“Adherence to precedent should be the rule and not the exception; the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

34. The Supreme Court in *Geoffrey M. Asanyo & 3 others v Attorney-General* (2020) eKLR referred to the Canadian decision in *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2008), 244 O.A.C. 151 (CA);2008 ONCA 703, where Judge Laskin, J.A. held:-

“[t]he values underlying...*stare decisis* are well known: consistency, certainty, predictability, and sound judicial administration. Adherence to precedent promotes these values... Adherence to precedent also enhances the legitimacy and acceptability of judge-made law



and by so doing enhances the appearance of justice. Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case.”

35. The High Court can however, depart from a Court of Appeal’s decision where the facts or circumstances differ.
36. Guided by the above decisions, I do fault the decision of the Court of Appeal. The respondent can move the Supreme Court appropriately to consider the decision of the Court of Appeal as the next appellate court.
37. The appellant asked this court to direct the suit be heard by a different Magistrate other than Hon. C. M. Kamau. At the time of delivering this judgement, Hon. C.M. Kamau is no longer stationed at the Rongo Law Courts. The file will be mentioned before the Hon. R.K. Langat for further directions.

In the end, I make the following orders:-

- a. The appeal is merited and is hereby allowed.
- b. The Ruling and Order of 5/2/2020 is hereby set aside.
- c. The Notice of Preliminary Objection dated 28/1/2020 is hereby dismissed.
- d. The file shall be mentioned within 30 days before Hon. R.K. Langat for further directions on the hearing of the suit.
- e. The appellant will have costs of this appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 27TH DAY OF OCTOBER, 2022.

R. WENDOH

JUDGE

Judgment delivered in presence of:-

No appearance for Appellant

No appearance for Respondent

Nyauke - Court Assistant

