REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.5 OF 2019

BETWEEN

JOSEPH ONYANGO ONYANGO.....APPELLANT

AND

SUKARI INDUSTRIES CO. LIMITED.....RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's SRMCC No. 492 of 2016 by Hon. S.K Arome –Senior Resident Magistrate).

JUDGMENT

1. The appellant herein was the plaintiff in Ndhiwa Senior Resident Magistrate's SRMCC No. 492 of 2016. The learned trial magistrate delivered judgment dated 14th December 2018 on 6th February 2019 and dismissed the appellant's case.

2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by the firm of Tom Mboya & Company Advocates. The appellant raised the following grounds of appeal:

> a) That the learned trial magistrate having rightly found that the sugarcane farming contract was valid, hence this dispute was a civil one on contract, erred in law and in fact to proceed to misapply wrong principles of standard of proof by raising the same against the appellant case from within the balance of probability to a higher standard of beyond reasonable doubt that is only applicable in criminal cases by making strange demand of the so called independent witnesses such as the chief while even the respondent herein never rebut the appellant evidence that they failed to harvest the sugarcane.
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> b) That the learned trial magistrate erred in and in fact by misapprehending the obligations of the parties to the contract by placing undue importance on notice to terminate the contract instead of considering the appellant had actually planted sugarcane based on that valid contract but the respondent had breached same by not harvesting and naturally leading to the crops wasting on the farm and a demand notice for compensation was on record duly served on respondent.
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> c) That the honourable learned magistrate erred in law and in fact by dismissing the appellant's original case for want of arbitration yet same was not in issue and a statute law had already placed jurisdiction of all disputes between the farmer (read the appellant) and the miller (read the respondent) in the magistrate's courts where this matter was duly filed at Ndhiwa SRM court. In the alternative, instead of dismissing the case for want of arbitration, he ought to have referred same to such arbitration and found a resultant report.

3. The respondent was represented by the firm of Ogejo, Olendo & Company, Advocates who did not respond to the appeal nor file any submissions.

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. Before I delve into the analysis of evidence I wish to point out that the grounds of appeal were too verbose and inarticulate. In **William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR** the Court of Appeal said:

> **We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better. Out of the many grounds, we are able to extract the appellant's main grievances against the judgment to be the following, decanting the rest;**

I will therefore do the best I can to extract what would appear as the reasons for dissatisfaction with the judgment by the trial court.

6. These grounds are as follows:

a) That the trial court erred in raising to standard of proof to the one expected in criminal cases.

b) That the learned trial magistrate did not appreciate the obligation of each party to the contract.

c) That the learned trial magistrate erred in dismissing the case for want of arbitration.

7. The dispute between the appellant and the respondent revolve around the formal contract the two entered.

8. By reading of the contract between the parties, I find that the miller had no obligation to harvest the sugar cane. The obligation to do so was by the grower. Clause 7.2 of the agreement provides the obligation in the following terms:

> **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 cane field and no other using Miller's transport or the Grower's appointed transporter approved in advance by the Miller.**

The appellant cannot be heard to claim that the respondent failed to harvest his cane.

9. It erroneous to claim that the trial court used the criminal law standard of proof.

10. The learned trial magistrate appreciated the role of each party contrary to the contention by the appellant.

11. According to the parties' agreement in clause 6, in case of a dispute between the parties, the first stop was at the doorsteps of an arbitrator. This is couched in mandatory terms. Since this is not the only reason the suit was dismissed, the appeal will not turn on this point.

12. From the foregoing analysis of the evidence on record I find that the appeal lacks merit and the same is dismissed with costs.

DELIVERED and SIGNED at HOMA BAY this 19th day of May, 2021

KIARIE WAWERU KIARIE

JUDGE