



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CIVIL APPEAL NO. 110 OF 2019**

**SUKARI INDUSTRIES LIMITED.....APPELLANT**

**-VERSUS-**

**EZRA ODODI ADERO.....RESPONDENT**

*(Being an appeal from the Ruling by Hon. R.K Langat, Senior Resident Magistrate*

*in Rongo Senior Magistrate's Civil Suit No. 32 of 2017 delivered on 12/09/2019)*

**JUDGMENT**

**Background:**

1. The Respondent herein, *Ezra Ododi Adero*, instituted *Rongo Senior Principal Magistrate's Court Civil Suit No. 32 of 2017* (hereinafter referred to as "**the suit**") against *Sukari Industries Limited*, the Appellant herein.
2. The claim was premised on a contract dated 03/11/2011 (hereinafter referred to as "**the contract**"). According to the contract the Respondent was to grow sugarcane at his parcel of land known as Plot No. 198 in East Kakmasia Sub-Location within Migori County (hereinafter referred to as '**the farm**') and sell it to the Appellant at maturity. The size of the farm was 0.3 Hectares.
3. The Respondent pleaded that the contract was to remain in force for a period of five years or until one plant crop and two ratoon crops were harvested whichever event happened first. He further pleaded that he exercised good crop husbandry on the plant crop until maturity but the Appellant failed to harvest the plant crop thereby compromising the development of the ratoon cane crops. As a result, he suffered loss of income. He sought compensation for the loss of the three crop cycles at Kshs. 303,750/= together with costs and interest at court rates.
4. The Appellant contested the suit. It entered appearance and filed a Statement of Defence. The Appellant denied existence of the contract and breach thereof. It placed the Respondent on strict proof.
5. Parties thereafter complied with the pre-trial procedures. However, before the suit could be set down for hearing, the Appellant filed a Preliminary Objection dated 30/07/2019 on 1/08/2019. The Appellant contested the trial court's jurisdiction on three grounds. Firstly, that **Sections 5 and 38** of the **Crops Act 2013**, (hereinafter referred to as "**the Crops Act**") ousted the court's jurisdiction. Secondly, that the court's jurisdiction was subsumed by the *Arbitration Clause* in the contract. Thirdly, that the suit was instituted in a wrong geographical court.
6. The objection was heard *inter partes*. It was however disallowed in a ruling rendered on 12/09/2019.

**The Appeal:**

7. The foregone finding precipitated the appeal subject of this judgment. The Appellant filed a Memorandum of Appeal dated 19/09/2019 on 22/09/2019. It raised two grounds of appeal as follows: -

*1. The learned Magistrate erred in both law and fact in finding that the subordinate court had jurisdiction to hear this matter on clear contravention of section 38 of the Crops Act.*

2. *The learned Magistrate failed to take into account the matters he ought to have taken into account and as such fell into error in evaluating and analysing the evidence and/or submissions made before him by the appellant.*

8. Directions were taken and the appeal was disposed of by way of written submissions with liberty to highlighting. Both parties duly complied. The Respondent exercised the right to highlight on the submissions. Counsel for the Respondent did so virtually from Nairobi.

9. The Appellant submitted that the trial court did not have jurisdiction to entertain the suit in light of **Section 38** of the **Crops Act**. Relying on **Mukisa Biscuit Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** as well as **Owners of Motor Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd (1989) eKLR**, the Appellant demonstrated the centrality of jurisdiction to a court.

10. Counsel further submitted that **Section 5** of the **Crops Act** named sugarcane as one of the scheduled crops. As such, **Section 38** thereof created an avenue of dispute resolution by way petitioning the High Court.

11. It was submitted further that **Section 2** of the **Crops Act** defined the term "*dealing in crop*" to mean collecting, transporting, buying, storing or selling crops or crop products but in the case of food crops, excludes any non-commercial activity hence the contract was within the **Crops Act**.

12. A persuasive decision in **Homa Bay High Court Civil Appeal No. 60 of 2017 Sukari Industries Limited -vs- Jeremiah Otieno Madara (2019) eKLR** was relied on in asking this Court to make a like finding. In that case the Court held: -

*14. ...the subject contract related to the sugarcane crop which is classified as a scheduled crop in the first schedule of the Crops Act 2013 which replaced the Sugar Act, 2001, among other statutes. With that replacement the contract fell within the ambit of the Crops Act 2013 in so far as it involved dealing in the Sugarcane crop by its production by one party (respondent)*

*If a breach or attempted breach occurred in the process, the aggrieved party was expected to Petition the High Court for necessary orders under Section 38 of the Crops Act and more so, where a Cabinet Secretary has failed or neglected to make rules under Section 41 of the Act to provide for the creation of a Tribunal to deal with such disputes.*

13. Counsel buttressed the supremacy of the law on jurisdiction over common law principles of contract. He referred to the Court of Appeal in **Nairobi Civil Appeal 76 of 2014 David Sironga Ole Tukai -vs- Francis Arap Muge & 2 Others (2014) eKLR** where it was held that:

*...section 3(1) (Judicature Act) therefore embodies what has been called the hierarchy of norms and provides for how the jurisdiction of the Courts in Kenya shall be exercised. The section creates a deliberate and hierarchical sequence of laws, starting with the constitution followed by Statutes and next the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 12/08/1897.*

*....it does not require too much imagination to see that under section 3(1) the application of substance of the common law and the doctrines of equity is subject first to the Constitution and the Statutes. Indeed, to emphasize that the substance of the substance of common law and the doctrines of equity cannot override the provisions of the Statute, section 3(1) (c) makes it clear that the substance of common law and the doctrines of equity apply only in so far as the statute does not apply. (emphasis added). In other words, the Judicature Act does not allow a court of law to ignore an express statutory provision under the guise of applying the doctrines of equity.*

14. This Court was asked to allow the appeal, set aside the impugned ruling and dismiss the Respondent's case with costs.

15. The Respondent opposed the appeal. He relied on both his written submissions dated 22/06/2020 and filed in Court on 30/06/2020 and the supplementary submissions dated 29/06/2020.

16. Counsel for the Respondent submitted from the onset that the appeal was incompetent and ought to be dismissed. He argued that the Order appealed from was not incorporated into the record of appeal. To that end, he relied on this Court's decision in **Migori High Court Civil Appeal No. 49 of 2017 Pamela Atieno -vs- South Nyanza Sugar Co. Ltd** (unreported) and the provisions of **Order 43 Rule 3** and **4** of the **Civil Procedure Rules**.

17. Counsel further argued that the appeal was also incompetent as the Appellant did not seek leave to appeal under **Section 75** of the **Civil Procedure Act**.

18. On the main appeal, Counsel submitted on various issues. One of them was the issue of *arbitration*. The Respondent submitted that the Appellant waived its right of having the matter referred to arbitration when it filed its defence.

19. Counsel relied on **High Court Civil Case No. 2 of 2017 Ganuni Construction Co. Ltd -vs- County Government of Garissa & Another** which decision referred the Court of Appeal in **Lofty -vs- Bedouin Enterprises Ltd (2005) 2 EA** and the High Court in **Diocese of Marsabit Registered Trustees -vs- Technotrade Pavilion Ltd (2014) eKLR** where it was respectively observed as follows: -

*...the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration, if the application is not made at the time of entering an appearance or if no appearance is entered, at the time of filing pleadings or at the time of taking any step in the proceedings.*

*...by these provisions (Article 159(2)(d) of the Constitution and section 6(1) Arbitration Act) and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such as section 6(1) of the Arbitration Act forfeits its right to apply to have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court.*

20. Counsel also relied on the Nairobi HCCC No. 440 of 2005 Tradesettlers Tyres Limited -vs- Elite Earth Movers Ltd (2007) eKLR where the Court held that: -

*.... The Defendant herein filed a defence after entering appearance in the instant case. Consequently, he waived his right to rely on the arbitration clause as he took a step in the proceedings by filling these two documents. The Respondent/Defendant cannot therefore raise the arbitration clause at this stage of the proceedings as he is estopped from relying or invoking it. The grounds of opposition have therefore no merit and are dismissed.*

21. The Respondent also submitted on the issue of *jurisdiction*. In agreeing with the trial court's finding on jurisdiction, the learned Counsel submitted that the provisions of **Section 42** of the **Crops Act** did not save the operation of the Sugar Arbitration Tribunal. He however submitted that **Section 23(3)** of **The Interpretation and General Provisions Act, Cap 2** of the Laws of Kenya saved the privileges and liabilities under the *repealed Sugar Act* and as such the issue of arbitration remained. Counsel therefore argued that the forum of resolution of any dispute could not therefore be the High Court but the forums provided for under the *Sugar Act*.

22. The Respondent's Counsel further submitted that there is a presumption in law that Municipal Courts have jurisdiction in cases where the Tribunal is not in force. That, there was no express ouster on the application of the Magistrates Courts by the **Crops Act**. Reliance was placed on Migori High Court Civil Appeal No. 85 of 2018 Clement Ondoro Onchoke -vs- Transmara Sugar Company Ltd where it was held.

*..... it is true that no other entity was created in place of the Tribunal. That is the reason why all sugar cases which were pending before the Tribunal have found their way to the mainstream courts. In this case I have demonstrated that the Arbitration Committee is validly in place despite the change in legal regime. The Tribunal now only comes up as an appellate entity.*

23. The Respondent also submitted on the purport of **Section 38** of the **Crops Act**. He stated that the Crops Act does not apply to matters of commerce and mercantile trade. He argued that the provision only addressed administrative issues and not issues of contract. Counsel pointed out that even the remedies provided for in the said provision were public law remedies of injunction and *mandamus* and not compensatory damages and as such the provision offers no redress to the aggrieved party in claims of breach of contract. It was submitted that a party relying on **Section 38** must point out the exact section of the law allegedly infringed.

24. Counsel also submitted that the contract was made with the background of the *Sugar Act*. On the other hand, the **Crops Act** was not retrospective in nature and that it was not enacted with the *Sugar Act* in mind.

25. Buttressing the issue of jurisdiction in contracts made before enactment of law, Counsel referred to Migori High Court Civil Appeal No. 81 of 2017, South Nyanza Sugar Company Ltd. -vs- Ezekiel Oduk where the Court stated thus: -

*... the starting point must be the issue of jurisdiction. As raised, jurisdiction is two-fold. The first limb is whether the conventional High Court had the jurisdiction at the filing of the suit. The contract was contended to have been entered sometimes in 10/10/1994. By then the Act was not in place. However, the Act was in place when the suit was filed on 14/07/2005. The question is therefore whether the Respondent was to comply with the provisions of the Act and instead file the suit before the tribunal and not the High Court... Since it is contended that the contract between the parties herein was entered in 1994, then the Tribunal had no role to play into the dispute herein as the parties did not contract under the Act.*

26. Counsel for the Respondent took issue with this Court's decision in Migori High Court Civil Appeal No. 252 of Transmara Sugar Co. Ltd -vs- Alexander Moseti Orangi on the issues of arbitration and jurisdiction. It was submitted that there are two types of laws regulating arbitration processes namely **Section 59** of the **Civil Procedure Act** (hereinafter referred to as "**the CPA**") and **Order 46** of the **Civil Procedure Rules** (hereinafter referred to as "**the Rules**") on one hand and the **Arbitration Act** on the other hand.

27. Counsel submitted that the arbitration in this case was as a result of the consent of the parties. To that end, it was further submitted that the provision of **Section 59** of the **CPA** applied and that the High Court was not the contemplated forum for adjudication but the magistracy.

28. It was submitted that even the Magistrates Courts have power to enforce awards under the **Rules**. Reference was made to the Court of Appeal in Khayadi -vs- Aganda (1998) KLR 204 where Court's *ratio decidendi* was that the residual jurisdiction of the magistracy remained during arbitration processes.

29. On jurisdiction, Counsel further submitted that the decision in Transmara Sugar Ltd --vs- Alexander Moseti Orangi (supra) split the jurisdiction of the court in arbitration in two depending on whether the conditions set out in **Section 6(a)** and **(b)** of the **Arbitration Act** are met. It was argued that the decision gave rise to the situation where the issue of jurisdiction was a surrender to Respondents.

30. The Respondent prayed that the appeal be dismissed and the finding by the Magistrates Court on jurisdiction be affirmed.

#### **Issues for determination:**

31. I have carefully perused and understood the contents of the pleadings, proceedings, the ruling, grounds of appeal, submissions and the

decisions referred to by the parties.

32. I hereby frame the following issues for determination in this matter: -

- (a) Whether the appeal is competent;**
- (b) The place of arbitration in this matter; and**
- (c) Whether the trial court had jurisdiction in light of Section 38 of the Crops Act.**

**Analysis and Determination:**

33. I will deal with each issue separately.

**(a) The competency of the appeal:**

34. The Respondent took issue with the competency of the appeal before Court. He fronted a two-thronged approach. The first salvo was that the Appellant did not seek and obtain leave of the Court to institute the appeal. Secondly, it was argued that even if the leave was sought and obtained still the appeal was incompetent as the order appealed against was not extracted and filed as part of the record of appeal.

35. I will begin with the issue of leave to appeal. The appeal before this Court is on a preliminary objection which was filed and argued before the magistracy. The objection was overruled on 12/09/2019. As a result, the appeal subject of this decision was preferred by the filing of the Memorandum of Appeal on 23/09/2019. It was hence an appeal on an interlocutory matter.

36. From the record, the Appellant did not seek or obtain the leave of the court to appeal. The inevitable question which comes to the fore is therefore whether leave ought to have been sought for and obtained in this matter.

37. Appeals from orders are provided for under **Section 75** of the **CPA** and **Order 43** of the **Rules**.

38. **Section 75** of the **CPA** provides as follows: -

**1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act-**

- a) Order 1 (parties to suits);**
- b) Order 2 (pleadings generally);**
- c) Order 3 (frame and institution of suit)**
- d) Order 4, rule 9 (return of plaint);**
- e) Order 7, rule 12 (exclusion of counterclaim);**
- f) Order 8 (amendment of pleadings)**
- g) Order 10, rule 11 (setting aside judgments in default of appearance).**
- h) Order 12, rule 7 (setting aside judgments or dismissal for non-attendance);**
- i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);**
- j) Order 19 (affidavits);**
- k) Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);**
- l) Order 23, rule 7 (trial of claim of third person in attachment of debts);**
- m) Order 24, rules 5, 6, and 7 (legal representative);**
- n) Order 25, rule 5 (compromise of a suit);**
- o) Order 26, rules 1 and 5(2) security for costs);**
- p) Oder 27, rules 3 and 10 (payment into court and tender)**

- q) Order 28, rule 4 (orders in proceedings against the Government);
- r) Order 34 (interpleader);
- s) Order 36, rules 5, 7 and 10 (summary procedure)
- t) Order 39, rule 2, 4 and 6(furnishing security);
- u) Order 40, rules 1, 2, 3 7 and 11 (temporary injunctions);
- v) Order 41, rules 1 and 4 (receivers);
- w) Order 42, rules 3, 14, 21, 23 and 35 (appeals)
- x) Order 45, rule 3 (application for review)
- y) Order 50, rule 6 (enlargement of time);
- z) Order 52rules 4, 5, 6 and 7 (advocate)
- (aa) Order 53 (judicial review orders)

**2. An appeal shall lie with the leave of the court from any other order made under these Rules.**

39. I will also reproduce **Order 43 Rules 1, 2, 3 and 4** of the **Rules** hereunder: -

**1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act-**

- a) Order 1 (parties to suits);
- b) Order 2 (pleadings generally);
- c) Order 3 (frame and institution of suit)
- d) Order 4, rule 9 (return of plaint);
- e) Order 7, rule 12 (exclusion of counterclaim);
- f) Order 8 (amendment of pleadings)
- g) Order 10, rule 11 (setting aside judgments in default of appearance).
- h) Order 12, rule 7 (setting aside judgments or dismissal for non-attendance);
- i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- j) Order 19 (affidavits);
- k) Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);
- l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- m) Order 24, rules 5, 6, and 7 (legal representative);
- n) Order 25, rule 5 (compromise of a suit);
- o) Order 26, rules 1 and 5(2) security for costs);
- p) Oder 27, rules 3 and 10 (payment into court and tender)
- q) Order 28, rule 4 (orders in proceedings against the Government);
- r) Order 34 (interpleader);

- s) Order 36, rules 5, 7 and 10 (summary procedure)
- t) Order 39, rule 2, 4 and 6(furnishing security);
- u) Order 40, rules 1, 2, 3 7 and 11 (temporary injunctions);
- v) Order 41, rules 1 and 4 (receivers);
- w) Order 42, rules 3, 14, 21, 23 and 35 (appeals)
- x) Order 45, rule 3 (application for review)
- y) Order 50, rule 6 (enlargement of time);
- z) Order 52rules 4, 5, 6 and 7 (advocate)
- (aa) Order 53 (judicial review orders)

2. An appeal shall lie with the leave of the court from any other order made under these Rules.

3. An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

4. Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refreshing such relief.

40. From the foregone, the appeal from the ruling of the magistrate’s court delivered on 12/09/2019 to this Court did not fall within the appeals which could be preferred *as of right* under **Section 75(1)** of the CPA or **Order 43 Rule 1** of the Rules.

41. The ruling on jurisdiction appealed against was hence caught up by **Section 75(2)** of the CPA and **Order 43 Rule 2** of the Rules. The twin provisions are tailored in mandatory terms by the use of the word ‘*shall*’. It was hence incumbent upon the Appellant to seek and obtain leave of the court to appeal prior to filing the Memorandum of Appeal.

42. *What is therefore the implication of filing an appeal without first seeking and obtaining leave of the Court as required under the CPA and Rules?*

43. The Supreme Court in **Civil Application No. 20 of 2014 Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2014) eKLR** referred to its earlier finding in **Law Society of Kenya vs Centre for Human Rights and Democracy & Others, Supreme Court Petition No. 14 of 2013** where it had held as follows: -

*[36] The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.*

44. Recently, the Court of Appeal at Kisumu in **Civil Appeal 96 of 2016 Rayleigh W. Wanyama v Lorna Mukhwana Wanyama & 3 Others [2020] eKLR** had the following to say on the issue of leave to appeal: -

*.... It is common ground that this appeal did not lie as of right. As such, it was trite that the appellant obtained leave of court before he could lodge it. Leave is a prerequisite to the assumption of jurisdiction by this Court. In the case of Kenya Commercial Bank Limited v Esipeya [2015] eKLR, this Court held that:*

*...having chosen to raise the limitation point by way of a preliminary objection under no particular Order under the Civil Procedure Rules, an appeal lay to this court only with the leave of the Superior Court which was neither sought nor obtained.*

45. As to whether such failure could be cured by the application of **Article 159** of the Constitution, the Court stated as follows: -

*.. As to whether Article 159 of the Constitution can cure the failure by the appellant to obtain leave, we find instructive the observations of this Court in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** that:*

*The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2) (d) of the Constitution. We do not consider Article 159 (2)(d) of the Constitution to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation”.*

*Similarly, in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012** this Court rendered itself thus:*

*In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1B of the Civil Procedure Act Cap 21 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases.*

46. The Court of Appeal in Nyeri Civil Appeal 17 of 2017 Lucy Wanjiku Nyaga v James Mwaniki Munyi & Another [2018] eKLR added its voice to the issue as follows: -

*It is common ground that the appellant never sought or obtained leave to appeal against the rejection of the preliminary objection raised on points of law. That was a blatant breach of substantive law which section 75 is, not simply a procedural lapse. All the seven grounds of appeal laid before us relate to the decision on the Preliminary Objection. Only an order could have arisen from the decision of the ELC on such objection and it required leave of that court or of this Court, if sought, to confer the jurisdiction to hear the appeal. We agree with the respondents that the appeal is a non-starter and must be declared a nullity ab initio. We so find.*

47. I will now deal with the aspect of the extracted order of the ruling appealed against. Whereas the impugned ruling was part of the record of appeal, the order pursuant to that ruling was not. I carefully perused and checked the lower court record and confirmed that the order was never extracted.

48. The contents of the Record of Appeal are provided for in **Order 42 Rule 13(4)** of the **Rules** as follows: -

**Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party that is to say:**

**(a) the memorandum of appeal;**

**(b) the pleadings**

**(c) the notes of the trial magistrate made at the hearing;**

**(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

**(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**

**(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;**

**Provided that-**

**(i) a translation into English shall be provided of any document not in that language;**

**(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**

49. The Supreme Court in Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (supra) held as follows: -

*[38] The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.*

*[39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine 'the appeal' on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.*

50. The Court of Appeal in Malindi Civil Application Nos. 48 & 62 of 2015, Salama Beach Hotel Ltd & 4 Others –vs- Kenyariri & Associates Advocates & 4 Others (2016) eKLR cited with approval its previous decision in Mombasa Civil Appeal Nos 145 & 146 of 2012 (consolidated) Floris Pierro & Another –vs- Glancario Falasconi (as the administrator) of the Estate of Santuzza Billion alias Santuzza (2014) eKLR and observed as follows: -

*...a cursory perusal of the record of appeal shows that the order impugned in the memorandum of appeal is indeed missing in the record. The same appears not to have been extracted and included in the record. The consequences of this can be found in the decision of Chege v Suleiman [1988] eKLR, which echoed the traditional position that failure to extract an impugned order renders the appeal fatally defective, with the only remedy being to strike it out. Counsel for the respondents has invited this Court to exercise leniency and discretion and find that the documents were proper, having been perused and approved by this Court's Deputy Registrar before they wound up before us. With respect, no legal provision allows for the exercise of this Court's discretion in such a manner. Besides, the fate of an appeal anchored on a non-extracted order has not changed, not even with the advent of the new liberal approach afforded by the overriding objective and the Constitution; which encourages dispensation of justice without undue regard to procedural technicalities. As held in Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billiotti alias Mei Santuzza) [2014] eKLR; an appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out, as the order or*

**decree appealed from is a primary document in terms of Rule 87(1)(h) of this Court's Rules and must form part and parcel of the record of appeal. In that case, the Court delivered itself thus: -**

*...The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree.*

*Accordingly, failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out. In any event an appeal can only be against a decree or an order and not against a judgment or ruling.*

51. In **Nairobi Court of Appeal Civil Appeal 12 of 1987 Chege v Suleiman [1988] eKLR** the appeal had been lodged but did not contain the formal order of the Court appealed from as at the time the record of appeal was filed. Despite the order having been filed in a Supplementary Record of Appeal, the Learned Judges struck out the appeal and held as follows: -

***But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.***

52. In **Alibai v Raichura 20 EACA 24** the predecessor of the now Court of Appeal held as follows: -

***An order is a formal expression of any decision of a civil court which is not a decree. An appeal does not lie from such decision where no formal expression of the decision has been filed.***

53. The foregone analysis therefore yields a finding that the appeal against the ruling rendered on 12/09/2019 is in breach of the law and is rendered incurably incompetent on account of failure to obtain leave to appeal and failure to extract a formal order of the ruling appealed against.

54. That finding is sufficient to dispose of this appeal. Nevertheless, I will consider the other issues raised in this appeal just for completeness of the record.

**(b) The issue of arbitration:**

55. Arbitration is one of the alternative forms of dispute resolution processes provided for under **Article 159(2)(c)** of the **Constitution**. Although this mode of dispute resolution was formally included in the highest law of the land in 2010, arbitration had been in place well before. There were statutes which variously provided for it. They were the **Arbitration Act, No. 4 of 1995** and the **CPA** and the **Rules** made thereunder.

56. Courts have also over time dealt with the subject of arbitration.

57. There are principally two modes of arbitration. These modes are informed by the two statutes; the **Arbitration Act** and the **CPA**. I will briefly run through the said statutes.

58. Arbitration under the **CPA** is provided for in **Section 59** and **Order 46** of the **Rules**.

59. **Rule 1** of the **Rules** provide as follows: -

***Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.***

60. In this mode of arbitration, there must first be a suit before Court. If all the parties to the suit agree on an issue(s) in dispute to be referred for arbitration, the parties then formally apply to the Court. The Court in allowing the request will reserve residual powers in the suit. The parties will then be guided by the **Rules** on *inter alia* the appointment of the arbitrator(s) or umpire(s) as the case may be, the arbitral proceedings, the making and filing of the award among other issues.

61. Once the award is delivered to the parties, the Court on request of the parties may enter judgment according to the award. The Court also has powers to set aside the award.

62. This mode of arbitration was intended to apply in instances where the parties to the dispute did not have any *pre-suit agreements* on the dispute. A common example of such suits may be compensatory suits arising from injuries sustained in road traffic accidents say by a passenger travelling in a public service vehicle.

63. One of the key aspects in this mode of arbitration is that the Court remains firmly in control of the processes and may readily intervene when called to do so. A Court may even intervene *sue moto* in instances where justice so demands.

64. The arbitration under the **Arbitration Act** is however different from the one under the **CPA**. This mode of dispute resolution is mainly

pre-meditated by the parties long before the dispute arises. There are however instances where the parties may agree to deal with a dispute under the **Arbitration Act** after the dispute arises. This mode of arbitration is mostly in written contracts.

65. Proceedings under this mode are considered highly private to the parties and any Court's intervention is strictly limited to the provisions of the **Arbitration Act**. In **Nairobi High Court Civil Case 571 of 2011 Bellevue Development Company Limited v Vinayak Builders Limited & Another [2014] eKLR** the Court referred to the scholarly works of *Dr. Kariuki Muigai* on the Privacy of Arbitration as follows:

*... Scholars in Arbitration Law and Courts have underscored the essence of Arbitration as a private mode of dispute resolution with which there should be very limited court interference or intervention, if at all. Dr. Kariuki Muigai FCI Arb, PhD and current Chairman of the Chartered Institute of Arbitrators, Kenya Branch in his book, Settling Dispute through Arbitration in Kenya (2012) 2<sup>nd</sup> Ed. Glenwood at page 91 illuminatingly states: -*

The fundamental principle, embodied in the Arbitration Act, 1995 (the Act), is that where there is a valid arbitration clause, all issues falling within the jurisdiction of the arbitrator should be decided by the tribunal, and the court should not intervene. This proposition was well captured in the case of *Shamji v. Treasury Registrar Ministry of Finance* the court stated that it was a well settled proposition that where a dispute between the parties has been referred to the decision of a tribunal of their choice, the Court should direct that the parties go before the specified tribunal other than interfere with the party's choice of that forum.

66. The foregoing is expressly stated in **Section 10** of the **Arbitration Act** as follows: -

**Except as provided in this Act, no court shall intervene in matters governed by this Act.**

67. This mode was intended to deal with disputes between parties without the involvement of Courts or so minimally if need be. The **Arbitration Act** therefore provides in great details for the appointment of arbitrators, substitution, withdrawal and termination of mandates of arbitrators, jurisdiction and powers of the arbitral tribunal, conduct of the arbitral proceedings, the award, termination of the proceedings, setting aside the award, enforcement of the award among other issues.

68. There are times where suits are filed in Court which are subject of an arbitration agreement. In such a case the Court has *two* options. The first option is for the Court to disregard the arbitral agreement and proceed to deal with the dispute. That happens when a Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. (See **Section 6(1)** of the **Arbitration Act**).

69. A Court may also disregard an arbitration agreement on the conduct of the parties in waiving their right to arbitration. It is settled that when a Defendant simultaneously enters appearance and files a defence in a suit subject of an arbitration agreement then such a party waives the right to arbitration.

70. In **Corporate Insurance Co. vs. Wachira [1995-1998] EA 21**, the Court of Appeal held as follows: -

*The arbitration clause was in the nature of Scott v Avery clause, which provides that all disputes shall be referred to arbitration. .... a scott v avery can provide a defence to a claim but the party relying on it cannot circumvent the statutory requirement to apply for a stay of proceedings. If the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading. By filing a defence, the appellant had lost the right to rely on the clause....*

71. The Court of Appeal in **Nairobi Civil Appeal No. 253 of 2003 Charles Njogu Lofty -vs- Bedouin Enterprises Ltd (2005) eKLR** further dealt with the issue and held as under: -

*We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings.*

72. Further, the Court of Appeal in **Niazsons (K) Ltd vs China Road & Bridge Corporation Kenya [2001] eKLR** stated that: -

*All that that an applicant for stay of proceedings under section 6(1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The Court will be obliged to consider three things: whether the applicant has taken any steps in the proceedings other than the steps allowed by the section; whether there is any legal impediments on the validity, operation or performance of the arbitration agreements and whether the suit indeed concerned a matter agreed to be referred to arbitration.*

73. The other option for the Court is to uphold the arbitration agreement. If a Court finds that there is a valid arbitration agreement and that the parties have not waived their rights to arbitration in any manner, the Court will stay the proceedings and refer the matter to arbitration.

74. **Section 6(2)** of the **Arbitration Act** states as follows: -

**Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remain undetermined.**

(emphasis added).

75. The purport of **Section 6(2)** of the **Arbitration Act** is to restrain the Court from dealing with the matter further during the pendency of the arbitration proceedings. The Court must therefore wait for the determination of the arbitration proceedings.

76. When the award is finally availed to the Court, the Court must satisfy itself of the jurisdiction. If the award is within its jurisdiction, then the Court will enforce that award. However, if the award is beyond the jurisdiction say of the Magistracy then the Magistrates Court cannot purport to transfer the matter to the High Court. The lower court will down its tools and strike out the matter. The parties will have to pursue enforcement of the award in the High Court under the **Arbitration Act**.

77. The Court of Appeal in **Nairobi Civil Appeal 244 of 2010 Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** dealt with the issue of transfer of cases as follows: -

19. We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction.

78. In **Mombasa Court of Appeal Civil Appeal 13 of 2016 Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** the Court observed thus: -

*In numerous decided cases, Courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.*

79. I have consciously taken the position that the lower court ought to strike out the suit filed without jurisdiction since disputes like the one in this matter are largely special damage claims. A claimant is therefore able to ascertain the expected award way before filing the claim. That definitely determines the appropriate forum for filing.

80. Having said so, there are two important issues which breed more clarity on the subject. I will look at them. The first one is that a Court takes full control of a matter once filed before it. Even in instances where the Court has no jurisdiction still the matter remains in Court until an appropriate order to that effect is made. Therefore, whether a matter before Court is referred to arbitration under the **CPA** and the **Rules** or under **Section 6(1)** of the **Arbitration Act**, the Court still has residual powers over such a matter. Subject to the law, the Court reserves the power to deal with some interlocutory issues pending the determination of the arbitration proceedings.

81. The second issue is that the two modes of arbitration, that is under the **CPA** and the **Rules** and under the **Arbitration Act**, practically merge once a matter is seized of by a Court and is referred to arbitration. The law has no clear cut boundary on how the two modes shall continue to apply separately. To me, the modes are like two roads meeting to form a single continuous one. For instance, a party in a matter referred to arbitration under **Section 6(1)** of the **Arbitration Act** can still invoke the provisions of the **CPA** and the **Rules** for some reliefs including enforcement and/or setting aside of the arbitral award.

82. As I come to the end of this discussion I must state that Courts must generally be slow to decline jurisdiction in civil processes. A Court should do so in the clearest of instances since mostly Courts are usually the last points of call for disputants. Indeed, that is the import of **Article 48** of the **Constitution** which provides for the right of access to justice.

83. I have carefully considered the issue of arbitration in this matter in light of my previous findings in other decisions. I have also considered the submissions and decisions put forth by the parties and the need to ensure unnecessary impediment to the right of access to justice as enshrined under the **Constitution**. I have further looked at the issue with the lenses in **Article 159** of the **Constitution** and I have come to the conclusion that I must depart from my earlier findings that once a dispute in the Magistracy is referred to arbitration under an arbitration agreement then the suit must be struck out. The position should be that the suit awaits the award. It is the nature of the award that will determine whether the suit will be struck out or the Court will enforce it.

#### **(c) Section 38 of the Crops Act:**

84. The next issue is the effect of **Section 38** of the **Crops Act** on suits for breach of sugarcane contracts between farmers and millers. The provision states as follows: -

#### **38. Restraint of breaches of this Act**

**Any person who has a 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 other lawful remedy.

85. One may only clearly understand the import of the above provision on knowledge of what the **Crops Act** is all about. Briefly, the **Crops Act** is an Act of Parliament which consolidated and repealed various statutes relating to agricultural crops. It also provided for the growth and development of agricultural crops and for connected purposes. A total of 14 written laws were repealed by the enactment of the **Crops Act**. Among them were the *Sugar Act* (No. 10 of 2001), the *Coffee Act* (No. 9 of 2001), the *Tea Act*, Cap. 343, the *Coconut Preservation Act*, Cap. 332, the *Cotton Act*, Cap. 335 among others.

86. On the repeal of the various statutes, the **Crops Act** became the sole law on crops. The concerned crops were named in the First Schedule thereof. They were so many crops and included sugarcane. I will collectively refer to the said crops as '**the scheduled crops**'.

87. The **Crops Act** then provided for the registration and development of all the scheduled crops, licensing, the roles of the National and County Governments, further role of the Agriculture, Fisheries and Food Authority (AFFA) as established under the *Agriculture, Fisheries and Food Authority Act, No. 13 of 2013*, the creation of the Commodities Fund, identification of agricultural land suitable for the scheduled crops, management of small scale farmers, growers' associations, dealers, appointment of County Officers and Crop Inspectors and the general administration of the Act.

88. As one runs through the **Crops Act** it comes out that the Cabinet Secretary for the time being responsible for matters relating to agriculture was bestowed with so many responsibilities. Infact, the Cabinet Secretary was placed at the heart of the operationalization and application of the **Crops Act**.

89. With such a humongous task on one individual, being a public servant appointed through a political process, serious checks and balances had to be put in place. It must as well be understood that apart from the said Cabinet Secretary there are many other public servants and institutions referred to in the **Crops Act**. One of the possible interventions on checks and balances was **Section 38**. The manner in which **Section 38** of the **Crops Act** was tailored left no doubt that it was aimed at protecting the **Crops Act** *per se* from breach.

90. I say so for several reasons. **One**, the provision restrains any person from breaching the **Crops Act**. The contemplated violations whose remedies may be sought for under that section must be limited to specific provisions of the **Crops Act**. A party relying on **Section 38** to sustain a suit must state with clarity the section of the **Crops Act** and how that section was infringed or is threatened with infringement.

91. I have carefully considered the pleadings on record. I have not come across any allegation of violation or intended infringement of any part of the **Crops Act**. Parties in civil proceedings are bound by their pleadings. It is not the business of the Court to transcend beyond the pleadings. That position was clearly emphasized by the Court of Appeal in **Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Sylvester Umaru Onu, JSC stated that: -

*.... It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it....*

*It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.*

92. **Two**, the contract was entered into before the enactment of the **Crops Act**. The **Crops Act** became operational on 01/08/2014. The contract was entered into sometimes in November 2011.

93. **Section 42** of the **Crops Act** did not save the Sugar Arbitration Tribunal which the parties to the contract had settled for as an appellate organ. In that case **Section 23(3)** of the **Interpretation and General Provisions Act, Cap. 2** of the Laws of Kenya came into play. The provision states as follows: -

*(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not –*

*(a) revive anything not in force or existing at the time at which the repeal takes effect; or*

*(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or*

*(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed;*

94. Since the parties had agreed on arbitration as a mode of dispute resolution, then that right was saved by the application of **Section 23(3)** of the **Interpretation and General Provisions Act**.

95. The import of **Section 23(3)** of the **Interpretation and General Provisions Act** is to safeguard those rights and liabilities that accrued during the subsistence of a repealed law. In other words, it is to guard new enactments from being applied retrospectively. (See **Migori High Court Civil Appeal 89 of 2018 Charles Onyango Omwomo -vs- Trans Mara Sugar Co. Ltd [2019] eKLR.**)

96. In this case therefore **Section 38** of the **Crops Act** cannot be used to adversely affect the contract which had been entered into and rights settled under the *Sugar Act* and long before the **Crops Act** was enacted. In other words, **Section 38** of the **Crops Act** cannot apply retrospectively.

97. **Three**, the remedies provided under **Section 38** of the **Crops Act** are largely public law remedies. It is a long standing legal position that one cannot recover damages in respect of loss caused by an administrative action, even where that act is unlawful, according to public law principles. An individual who wishes to recover damages must establish the existence of a cause of action in private law. The only exception in Kenya is in constitutional petitions where a Petitioner may recover compensation.

98. A cursory look at the contract reveals that the parties thereto were transacting business. Each party had specific obligations to discharge under the contract. In the end of the business deal the Appellant was to get raw materials for its sugar milling factory from the Respondent's farm and the Respondent was to be paid the value of the cane supplied to the Appellant. Remedies for disputes arising under such a relationship were not specifically provided for under **Section 38** of the **Crops Act**.

99. **Four**, under **Section 40** of the **Crops Act** the Cabinet Secretary was mandated to *make regulations* to provide for *inter alia* the relationship between farmers and other dealers in crops and the regulation of standard industry agreements. It has however not been demonstrated how the relationship between farmers and other dealers in crops or the regulation of standard industry agreements come under **Section 38** of the **Crops Act**.

100. **Five**, **Section 41** of the **Crops Act** provided for dispute resolution between farmers and other crop dealers to be by way of arbitration. It states as follows: -

**For purposes of ensuring expeditious resolutions of disputes arising between farmers and other crop dealers, the cabinet secretary shall make rules to provide the procedures for arbitration of such disputes.**

101. **Article 159(2)(c)** of the **Constitution** provides arbitration as one of the alternative forms of dispute resolution to be applied towards expeditious resolution of disputes. The Cabinet Secretary cannot therefore formulate rules against this constitutional underpinning. Put in another way, the Cabinet Secretary cannot make rules effectively taking disputes between farmers and other crop dealers to Courts.

102. **Six**, **Section 38** of the **Crops Act** does not oust the jurisdiction of the Magistrate Courts. One may argue that the dispute at hand may as well be remedied under the limb of '*any other lawful remedy*' in the impugned provision. For argument sake, even if such a position is upheld, which is not, still the Magistrates Courts will have jurisdiction since the wording of the provision is not in mandatory terms. The provision has it that an aggrieved party '*may petition the High Court.....*'. The use of the word '*may*' connotes discretion on the parties.

103. A careful consideration of the **Crops Act** brings forth the fact that disputes between farmers and other crop dealers do not therefore fall within the application and 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 no legal vacuum. In such a scenario the Courts, subject to jurisdiction, must adjudicate on the disputes. For clarity purposes, it is worth stating that until such a time when the rules on the arbitration of disputes between farmers and other crop dealers are put in place such disputes ought to be filed and determined in Courts. Needless to say, Courts reserve their right to refer matters to arbitration or other forms of alternative dispute resolution mechanisms even without the contemplated arbitration rules under the **Crops Act**.

104. I hence find and hold that **Section 38** of the **Crops Act** was not aimed at ousting the jurisdiction of the Magistrates Courts over all disputes under the **Crops Act**. Likewise, the provision was not intended to deal with matters in the realm of private law such as matters of mercantile trade and commerce between farmers and other crop dealers, but was restricted to matters whose remedies are in the domain of public law. Instead, the provision was largely aimed at protecting any infringement or likely infringement of the **Crops Act** itself. The provision also called for accountability and transparency on all those on whom public duties were bestowed upon under the **Crops Act**.

105. It is therefore this Court's position that the Magistrate Courts have jurisdiction to deal with sugarcane disputes on breach of contract subject to settled jurisdictional limitations in law for instance the pecuniary jurisdiction of Courts.

106. Respectfully, I must, as I hereby do, break ranks with my senior learned brother Judge in his finding on **Section 38** of the **Crops Act** in **Homa Bay High Court Civil Appeal No. 60 of 2017 Sukari Industries Limited vs. Jeremiah Otieno Madara (2019) eKLR.**

#### **Conclusion:**

107. Having dealt with all the issues in this appeal, I find that none is in favour of the Appellant. Despite the incompetency of the appeal, the same is not successful even on merit.

108. The decision of the trial court dismissing the preliminary objection is hereby affirmed.

109. The upshot is that the appeal is dismissed with costs.

110. In view of the order made on 01/07/2020 this judgment shall hereby apply *mutatis mutandis* to **Migori High Court Civil Appeal Nos. 106, 107, 108, 109, 111 and 102** all of 2019.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 06<sup>th</sup> day of August 2020.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered electronically through: -**

1. [Ogejoolendoadvocates@gmail.com](mailto:Ogejoolendoadvocates@gmail.com) for the firm of Messrs. Ogejo Olendo & Company Advocates for the Appellant.
2. [odukeze@gmail.com](mailto:odukeze@gmail.com) for the firm of Messrs. Oduk & Company Advocates for the Respondent.
3. Parties are at liberty to obtain hard copies of the Judgment from the Registry upon payment of the requisite charges

**A. C. MRIMA**

**JUDGE**