

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 67 OF 2010

CONSOLATA ODHIAMBO.....APPELLANT

VERSUS

KIBOS SUGAR & ALLIED INDUSTRIES LTD.....RESPONDENT

J U D G M E N T

The appellant herein supplied her sugarcane worth Kshs. 79,500 to the Respondent sometimes in the year 2008. According to her the respondent refused and or failed to pay compelling her to file the suit at the lower court.

The respondent mounted a defence arguing that the sugarcane it received was from Odiembo Farmers Cooperative Society in which it made payment thereafter. It argued that they did not deal with the appellant directly.

The court dismissed the suit prompting this appeal. The appellant has filed 4 grounds of appeal. Substantially the issues can be summarised as whether or not the appellant dealt with the respondent directly and whether the respondent paid for the sugarcane delivered to the respondent. Although the tonnage and the prices is disputed the respondent acknowledged that it received the sugarcane from Odiembo Farmers Cooperative Society. The delivery documents produced by the appellant shows that the farmers name was New Odiembo Society and the field where the cane was harvested from belonged to the appellant. A cheque was also issued by the respondent date 29-2-2008 for the sum of Kshs. 35,137.55/= to the aforestated society.

The evidence in chief of the appellant is worth reproducing here. She said:

“I was dealing with the society but they were unable to recover so I was suffering I decided to take action. They would send cheques through the society which they failed to do. They sent little money but the more amount remained with the factory....”

Clearly, the appellant admitted that she never received money directly from the respondent but it only came through the society. She however during her testimony admitted receiving Kshs. 18,000/= from the respondent, but there was no evidence to this testimony.

Upon reading the evidence of the respondent witness, namely DW1 and DW2 I am persuaded that the appellant although she supplied the cane to the respondent, she never dealt with them directly but through her society. Any amount paid by the respondent towards any settlement was paid to the society and not the appellant.

Further, the appellant's exhibit 3 was written to the society by the respondent advising that it would only pay once the issue is resolved. My understanding of the letter is that the payment was to be made to the society and not the appellant.

The court found that the failure to join the society in the case was fatal. This position was true since as found above the appellant did not deal with the respondent. If any payment was made then it is the society which ought to be held responsible and not the respondent.

Consequently, I find that the respondent discharged its mandate and further there was no

contractual agreement with the appellant. I shall dismiss this appeal but order that each party meets their own costs.

Dated, signed and delivered at Kisumu this 23rd day of June 2014.

**H.K.
JUDGE**

CHEMITEI