Sukari Industries Limited v Ndege (Civil Appeal 15 of 2019)
[2024] KEHC 1594 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1594 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL 15 OF 2019

KW KIARIE, J

FEBRUARY 22, 2024

BETWEEN

SUKARI INDUSTRIES LIMITED ..... APPELLANT

AND

MICHAEL OPUDO NDEGE ..... RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's SRMCC No.179 of 2017 by Hon. S.K Arome –Principal Magistrate)

JUDGMENT

1. Sukari Industries Company Limited was the defendant in Ndhiwa Principal Magistrate's Court civil case No.179 of 2017. The respondent filed this lawsuit for a breach of contract claim. The respondent sought compensation for three unharvested cycles. On the 6th day of February 2019, Hon. M.A. Ochieng delivered the judgment on behalf of the trial magistrate. The judgment was in favour of the respondent, who was awarded Kshs. 577, 600.00.

2. The appellant was aggrieved by the judgment and filed this appeal. The firm of Ogenjo, Olendo & Company Advocates represented the appellant. 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 him superficially and consequently coming to a wrong conclusion.

    b. The learned trial magistrate erred in fact and law in ignoring the principles applicable in awarding damages and the relevant authorities on the quantum cited in the written submissions presented and filed by the appellant.

    c. The learned trial magistrate erred in fact and law in finding that the respondent had proved his case on a balance of probability.

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

e. The learned trial magistrate erred in fact and law in failing to appreciate sufficiently or at all that the evidence tendered in favour of the appellant controverted and rebutted the respondent's evidence, thus lowering the respondent's probative evidential value.

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

3. Kerario Marwa & Company Advocates represented the respondent. The respondent did not file any response or submissions.

4. As the first appellate court, it is my responsibility to carefully review all of the evidence presented and consider that I did not have the opportunity to observe the witnesses testify and their demeanour. I will follow the principles outlined in the Selle v Associated Motor Boat Co. Ltd. [1965] E.A. 123, which states that the first appellate court must examine and assess the evidence presented in the trial court and then come to its conclusions.

5. The trial magistrate had to consider two main issues: 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.0000487 contradicted this denial. On page 6 of the agreement, both parties signed the contract. Mark Ongoro, the assistant chief of the Kobita sub-location, witnessed it.

7. The trial magistrate's determination that the contract signed by both parties was valid is sound.

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. After analysing the clause, it is apparent that 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" explicitly states this.The respondent did not adduce evidence to prove that he notified the appellant that the cane was ready for harvesting. He testified of informing them orally. There was nothing to prove that he did so. He also admitted that he did not issue a notice as required in clause 3 of the agreement in case of failure by the appellant to harvest the cane. He, therefore, did not discharge his obligation. Had he discharged his obligation, the loss, if any, could have been mitigated.

10. I find that the respondent did not prove that the appellant was in breach of contract.

11. From the preceding, therefore, I set aside the finding by the trial magistrate that the appellant was in breach of the contract and the award. The appeal is allowed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF FEBRUARY 2024

KIARIE WAWERU KIARIE

JUDGE