Sukari Industries Limited v Otieno (Civil Appeal 59 of 2019)
[2024] KEHC 2380 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2380 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL 59 OF 2019

KW KIARIE, J

MARCH 7, 2024

BETWEEN

SUKARI INDUSTRIES LIMITED ..... APPELLANT

AND

ODUONG MARK OTIENO ..... RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Principal Magistrate's SRMCC No.307 of 2016 by Hon. Mary A. Ochieng –Principal Magistrate)

JUDGMENT

1. In Ndhiwa Principal Magistrate's Court civil case No. 307 of 2016, Sukari Industries Company Limited was the defendant in a lawsuit filed by the respondent for a breach of contract claim. The respondent sought compensation for three unharvested crops. On the 22nd day of May 2019, Hon. Mary A. Ochieng delivered the judgment in favour of the respondent and ordered the appellant to pay Kshs.214, 000.00.

2. The appellant was aggrieved by the judgment and filed this appeal. The firm of Olendo, Orare & Samba Advocates LLP represented the appellant. He raised the following grounds of appeal:

    a. The learned trial magistrate erred in law and fact in treating the evidence and submissions before her superficially and 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 by ignoring the defence's pleadings and submissions.

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 evidentiary value.

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

3. The firm of Odhiambo Kanyangi & Company Advocates represented the respondent. The respondent opposed the appeal and contended that:

a. The appeal lacks merit.

b. The respondent be awarded Kshs. 3,534, 000.00

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] EA 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. In his submissions, the respondent implored the court to exercise its powers under section 78 of the *Civil Procedure Act* and award him Kshs. 3,534, 000.00. The section provides:

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

6. This provision applies if the respondent has filed a cross-appeal. He cannot ambush the appellant during submissions.

7. The trial court considered two issues: whether there was a contract between the parties and if it existed, whether there was a breach.

8. In the statement of defence, the appellant denied the existence of a contract between the parties. However, the Cane Farming and Supply Contract No. 26524 contradicted this denial. Both parties signed the contract, and Nyamburi V., the assistant chief of the Kakmasia sub-location, witnessed it.

9. The learned trial magistrate's determination that the contract presented in court and signed by both parties was valid is sound.

10. Parties are bound by their pleadings. The Court of Appeal in *David Sironga Ole Tukai v Francis arap Muge & Others*, Ca No. 76 of 2014, expressed itself as follows:

> It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

11. 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.

12. From the provisions of the clause, 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 obligation. He testified that the cane was ready for harvesting orally.

13. The respondent was obliged to give the appellant written notice. He did not. Had he issued such a notice, it would have been evidence that he had orally informed the appellant that the cane was ready for harvesting. The respondent did not fulfil his obligation as indicated in the contract. Therefore, he did not prove that the appellant was in breach of contract.

14. Therefore, I set aside the trial magistrate's finding 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 7TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE