



REPUBLIC OF KENYA



**Otieno v Sukari Industries Co Limited (Civil Appeal 17 of 2019)
[2023] KEHC 2248 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 17 OF 2019
KW KIARIE, J
MARCH 21, 2023**

BETWEEN

PATRICK OUKO OTIENO APPELLANT

AND

SUKARI INDUSTRIES CO LIMITED RESPONDENT

*(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's
SRMCC No. 410 of 2017 by Hon. S.K Arome –Senior Resident Magistrate)*

JUDGMENT

1. Patrick Ouko Otieno, the appellant herein was the plaintiff in Ndhiwa Senior Resident Magistrate's SRMCC No 410 of 2017. He had sued the respondent for compensation for three crops on allegations of breach of contract. The learned trial magistrate delivered judgment dated December 14, 2018 in which the claim was dismissed.
2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Kerario Marwa & Company Advocates. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and in fact when he dismissed the appellant's case on grounds that there was no evidence of dried cane.
 - b. The learned magistrate erred in law and in fact in finding that the appellant failed to notify the defendant of breach by way of writing yet the appellant gave verbal notice.
 - c. The learned magistrate erred in law and in fact when he held that the appellant failed to enforce an arbitration clause referring the matter to a non-existing arbitration committee.



3. The respondent was represented by the firm of Ogejo, Olendo & Company, Advocates who contended that the appellant did not prove his case.
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] EA 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. The learned trial magistrate had two main issues to address his mind to. These were whether there was a valid contract between the parties and whether he (appellant) invoked the arbitration clause before he came to the court.
6. I have perused the record and agree with the finding of the learned trial magistrate that there was a valid contract between the parties.
7. The Cane Farming and Supply Contract at clause 6 provided for arbitration in case of a dispute or disagreement between the parties. This ought to have been raised at the earliest opportunity before the commencement of the trial before the learned trial magistrate. The parties did not do so. The parties therefore submitted themselves to the jurisdiction of the trial court. The appeal will not turn on this issue.
8. The appellant did not give notice to the respondent as envisaged in clause 3 of their agreement. The clause states:

Should either party commit a breach of this agreement and fail to remedy such breach within thirty (30) days after receipt of a notice in writing to that effect from the other party serving such a notice, the party not in breach may, by further notice in writing shall be at liberty to terminate this agreement from the date of completion of delivery of cane from the next ensuing harvest.
9. Having failed to give the said notice, and having not notified the respondent that the cane was ready for harvesting, I must uphold the trial magistrate's court decision.
10. The upshot of the foregoing analysis of the evidence is that the appeal lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

