



**Ongaga v Sukari Industries Limited (Civil Appeal 119 of 2021)
[2023] KEHC 1995 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1995 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 119 OF 2021**

KW KIARIE, J

MARCH 9, 2023

BETWEEN

SIMON SINGORI ONGAGA APPELLANT

AND

SUKARI INDUSTRIES LIMITED RESPONDENT

*(Being an Appeal from the judgment in Ndhiwa Principal Magistrate's
PMCC No. E004 of 2021 by Hon. Mary A.Ochieng –Principal Magistrate)*

JUDGMENT

1. Simon Singori Ongaga, the appellant herein was the plaintiff in Ndhiwa Principal Magistrate's Court PMCC no E004 of 2021. He had sued the respondent for compensation for three crops on allegations of breach of contract. The learned trial magistrate delivered judgment dated 17th November, 2021 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 Moerwa Omwoyo & Company Advocates. He raised grounds of appeal as follows:
 - a. The learned magistrate erred in law and in fact in failing to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before here and thus arrived at an erroneous conclusion.
 - b. That the learned magistrate erred both in law and fact in giving weight to unfounded allegations made by the respondent that there was no existing contract between the appellant and the respondent despite the appellant proving this through documentation.
 - c. That the learned magistrate erred both in law and fact in holding that the appellant herein did not adduce sufficient evidence in relation to the existence of a valid contract between the appellant and the respondent herein despite the trial magistrate being persuaded by the exhibits



produced before the court by the plaintiff that the plaintiff is a cane farmer who does cane farming business with the defendant.

- d. That the learned magistrate erred both in law and fact in holding that the appellant had no legal capacity under the law of contract despite the respondent having in place and advancing as evidence before the honorable court a Growers Cane Farming and Supply contract for the company development cane that is contract number 7162.
 - e. That the learned magistrate erred both in law and fact that in failing to consider that the appellant had tendered evidence to the extent that he supplied the seed canes to the respondent *vide* contract no 71462 and that after harvesting the sugarcane, the respondents removed the first harvest and deducted their expenses of Kenya Shillings Forty Three Thousand (ksh 43,000/-).
 - f. That the learned magistrate erred in law and fact in failing to appreciate the evidence tendered by the appellant by way of exhibit to support the fact that the respondent transported the sugarcane that was left rotting in the farm after a demand letter was written to the respondent on the 17th September, 2020 which prompted the respondent to pay the appellant using a different Growers Cane Farming and Supply contract number 139702 wherein the respondent harvested four contractors and paid Kenya Shillings Eighty Nine Thousand Five Hundred (ksh 89,500/-) to the appellants' account.
 - g. That the learned magistrate erred in law and in finding that the appellant had not adequately dispensed of the burden of proof as required under that law despite the appellant providing evidence of payment of Kenya Shillings Two Hundred Thousand paid by the respondents in respect of the sugarcane that was harvested from the leased portion of land.
 - h. That the learned magistrate erred both in law and fact in failing to consider the appellants' evidence particularly the valuation report by an Agricultural Officer produced as an exhibit before honorable court quantifying the sugarcane yields for the damaged sugarcane as Kenya Shillings Three Million Three Hundred Thousand and Seventy Six Eight Hundred and Eighty (ksh 3,376,880/-) and damages for the affected ratoons as Kenya Shillings Five Hundred Thousand One Hundred and Sixty Nine (ksh 500,169/-).
 - i. That the learned magistrate erred in law and fact by extraneously indicating and/or introducing a new party who had not formerly participated in the proceedings as part of the respondents' evidence while rendering judgment and thereby arriving at an erroneous decision and condemning and/or exposing the appellant to unfairness.
 - j. That the learned magistrate erred both in law and fact in that the judgment of the trial magistrate in failed to capture all the issues relevant for determination.
 - k. That the learned magistrate erred both in law and fact in that the judgment and decision of the trial magistrate was contrary to and/or at variance with the weight of evidence tendered and/or on record consequently, the judgment of the honorable court is legally untenable.
 - l. That the learned magistrate failed to consider all the material and submissions place before her and arrived at an erroneous conclusion.
3. The respondent was represented by the firm of Olendo, Orare & Samba Advocates who contended that:
- a. There was no contract with the appellant.



- b. The appeal lacks merit.
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 v 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 appellant herein pleaded and testified of a contract between himself and the respondent. This was denied in the pleadings by the respondent. Section 109 of the *Evidence Act* provides:
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
6. Since the appellant did not produce in the trial court a copy of the said contract, then he did not satisfy the court of the existence of such a contract. His case was therefore not proved. The appeal has no merits and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

