



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.13 OF 2019**

**BETWEEN**

**SUKARI INDUSTRIES CO. LIMITED.....APPELLANT**

**AND**

**ANDREW ALILA ATULA.....RESPONDENT**

*(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's*

*SRMCC No. 417 of 2016 by Hon. S.K Arome –Senior Resident Magistrate).*

**JUDGMENT**

1. Sukari Industries Co. Limited, the appellant herein was the defendant in Ndhiwa Senior Resident Magistrate's SRMCC No. 417 of 2016. The Company had been sued for compensation for three crops on allegations of breach of contract. The learned trial magistrate delivered judgment dated 6<sup>th</sup> February, 2019 in favour of the respondent. The appellant was ordered to pay Kshs.433, 200.00.

2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by the firm of Ogenjo, Olendo & Company Advocates. The appellant raised the following grounds of appeal:

- a) That the learned trial magistrate erred in law and in fact in treating the evidence and submissions before him superficially and consequently coming to the wrong conclusion on the same.
- b) That the learned trial magistrate erred in and in fact in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
- c) That the honourable learned magistrate erred in law and in fact in finding that the respondent had proved his case on a balance of probabilities.
- d) That the honourable learned magistrate erred in law and in fact in ignoring the pleadings and submissions of the defence.
- e) That the honourable learned magistrate erred in law and in fact in failing to appreciate sufficiently or at all the evidence tendered in favour of the appellant controverted and rebutted the respondent's evidence thus lowering the respondent's probative evidentially value.

3. The respondent was represented by the firm of Kerario Marwa & Company, Advocates who raised the following grounds:

- a) That the contract in issue was under the Sugar Act, 2001 which governed harvesting of the sugar cane under 2<sup>nd</sup> schedule part 2 paragraph 6.
- b) That the respondent proved his case to the required standards.

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] E.A. 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 contract between the two parties

and if so whether there was a breach of the same.

6. The respondent in his statement that was adopted as evidence stated that in the year 2011 he entered into a Cane Farming and Supply Contract with the appellant. The contract was governed by the Sugar Act, 2001. He produced the copy of agreement. This was denied in the pleadings by the appellant.

7. The learned trial magistrate made a finding that the two parties entered into a valid contract. His finding was based on the copy of contract that was filed in court. The two parties had signed the same. His finding cannot be impugned.

8. Parties are bound by their pleadings. This was emphasized by the Court of Appeal in the case of **Global Vehicles Kenya Limited vs. Lenana Road Motors [2015] eKLR** where it stated:

**Pleadings serve several fundamental purposes. Firstly, they define the nature and contours of the dispute that the parties have submitted to the court for resolution. Secondly it is through pleadings that the fair hearing that is promised by Article 50(1) of the Constitution is actualized. That provision guarantees every person who has a dispute that can be resolved by the application of the law, the right to have it decided in a fair and public hearing by a court or independent and impartial tribunal or body. That right to a fair hearing comes alive in pleadings, which make known to each party the exact case it has to prove or rebut.**

**Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.**

*Jessel M. R. articulated this view very well in THORP V. HOLDSWORTH, (1876) 3 Ch. D, 637 at 639, as follows:*

*The whole object of pleadings is to bring the parties to an issue and the meaning of the*

*rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.*

In her pleading, the appellant denied any existence of the contract between the two parties but was proved wrong by the production of the agreement.

9. 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.**

10. The respondent testified that he informed the appellant when the sugar cane was ready but they failed to go and take delivery. Since there was no agreed format of informing the appellant, am Satisfied that the respondent did so albeit orally.

11. In the evidence on behalf of the appellant, William Kangwana (DW1) raised the issue of the legality of the contract. This was too late in the day. The company ought to have done so before signing the same with the respondent. This was a non-issue.

12. The appellant in their submission contended that the respondent did not make the sugar cane deliverable. Submissions cannot take the place of the evidence. They are meant to assist the court to see the issues and the law which have been testified to. When the respondent stated that he informed the appellant about the sugar cane, this evidence went unchallenged. The appellant cannot introduce evidence through submissions. This is not acceptable.

13. An appellate court will not disturb an award of damages unless it be shown that the trial court proceeded on wrong principles or that he misapprehended the evidence in some material respect thus arriving at an erroneous award. in **Butt vs. Khan [1981] KLR 349** at page 356 Law J.A. Said:

**...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.**

14. When the appellant failed to honour their obligation in respect of the first cycle, the respondent was to give notice under clause 3 of the agreement. The notice is required to be in writing. No such notice was produced by the respondent. He cannot therefore claim damages in respect of two cycles when it was obvious to him that the appellant was in breach of the contract. Since the calculation of the first crop was not disputed this is what the respondent is entitled to.

15. I therefore set aside the award by the trial magistrate and substitute it with an award of Kshs.266, 000/=. Since the appeal is partially

successful, the appellant will be entitled to half costs in this court and in the trial court.

**DELIVERED AND SIGNED AT HOMA BAY THIS 21<sup>ST</sup> DAY OF JULY, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**