

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.32 OF 2019

BETWEEN

GEORGE OMOLO OGAI.....APPELLANT

AND

SUKARI INDUSTRIES CO. LIMITED.....RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's SRMCC No. 341 of 2016 by Hon. S.K Arome –Senior Resident Magistrate).

JUDGMENT

1. George Omolo Ogai, the appellant herein was the plaintiff in Ndhiwa Senior Resident Magistrate's SRMCC No. 341 of 2016. He had sued the respondent for compensation for three crops on allegations of breach of contract. The learned trial magistrate delivered judgment dated 14th December, 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 Nelson Jura & Company Advocates. He raised two grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and in fact when he failed to award the appellant as had been pleaded and proved.
 - b) That the learned trial magistrate erred in and in fact when he delivered judgment that was against the weight of pleadings, evidence and the submissions made by the parties.
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] 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 the appellant proved that his sugar cane dried in the farm 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 the appellant did not adduce evidence to prove that his cane dried on the farm.
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 brought themselves under the jurisdiction of the trial court. It was erroneous therefore for the learned trial magistrate to make this one of the reasons for the dismissal of the appellant's suit. The appeal will however not turn on this issue.
8. 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 7TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE