



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 11 OF 2019

BETWEEN

SUKARI INDUSTRIES COMPANY LIMITED.....APPELLANT

AND

PAMELA AKELO OKECHA.....RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Senior Resident

Magistrate's SRMCC No. 400 of 2016 by Hon. S.K Arome –Senior Resident Magistrate).

JUDGMENT

1. Sukari Industries Company Limited, the appellant herein was the defendant in Ndhiwa Senior Resident Magistrate's SRMCC No. 400 of 2016. The Company had been sued by the respondent for compensation for three crops on allegations of breach of contract. The learned trial magistrate delivered judgment dated 6th February, 2019 in favour of the respondent and awarded her Kshs. 288, 800/= as compensation for the breach of contract.

2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Ogejo, Olendo & Company Advocates. Six grounds of appeal were raised as follows:

- a) The learned trial magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.
- b) The learned trial magistrate erred in fact and in law 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) The learned trial magistrate erred in fact and in law in finding that the respondent had proved his case on a balance of probability.
- d) The learned trial magistrate erred in fact and in law in ignoring the pleadings and submissions for the defence.
- e) The learned trial magistrate erred in fact and in 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 evidentially value.
- f) Without prejudice to the foregoing, the award of damages in the circumstances was excessive.

3. The respondent was represented by the firm of Kerario Marwa & Company, Advocates who opposed the appeal.

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. Though the appellant pleaded that there was no contract with the respondent, the latter produced a Cane Farming and Supply contract between the two parties. This document was signed on 24th November, 2011. It was signed on behalf of the appellant by the head of agriculture on one part and Okecha Pamela Akelo on the other. The learned trial magistrate was therefore justified to make a finding that both parties had a legally binding contract.

6. Under clause 7.2 of the Cane Farming and Supply contract, the respondent had an obligation to inform the appellant when the cane was ready for harvesting. This is what it provides:

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.

At the trial she did not testify to have discharged this obligation. The appellant could only be held liable for any subsequent loss if they were informed that the cane was ready for harvesting.

7. Parties are bound by the terms of their contract. In the case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, the Court held that:

A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

In the instant case, the parties at clause 6 provided:

All questions, disputes or differences which at any time hereafter arise between the parties hereto touching or concerning this Agreement or the constructions hereof or as to rights, duties and obligations of either party hereto or as to any other matter shall be referred to a Local Arbitration Committee of five people comprising of:-

- a) The District Officer in whose area the land on which the cane supply contract relates is situated;**
- b) One person representing the Kenya Sugar Board;**
- c) One nominee of the Miller;**
- d) One nominee of the Grower; and**
- e) The Divisional Agricultural Officer of the area where the cane in question is situated or in his absence an Agricultural Officer holding the rank of Divisional Agricultural Officer or above appointed by the area Agricultural Officer for that purpose.**

Section 6(1) of the Arbitration Act No. 4 of 1995 provides that:

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—

- (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
- (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**

The appellant though pleaded the court lacked jurisdiction, this issue was not followed up. This appeal will not therefore turn on the issue of jurisdiction due to the failure to invoke the arbitration clause.

8. Since there is no evidence that the respondent informed the appellant that the cane was ready for harvesting, the appeal must succeed, with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 16TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE