



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 67 OF 2015**

**BETWEEN**

**GEORGE ODUOR OCHOLA ..... APPELLANT**

**AND**

**SUKARI INDUSTRIES LIMITED ..... RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. B. R. Kipyegon, RM in the Resident Magistrates Court at Ndhwa in Civil Case No. 8 of 2014 dated 29<sup>th</sup> September 2015)***

**JUDGMENT**

1. The appeal in this matter arises from an order dismissing an application made pursuant to **Order 51 rule 1** of the **Civil Procedure Rules** and **Section 1A** and **1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** seeking to, “set aside, the ruling dated the 1<sup>st</sup> day of July 2014 dismissing the .... suit and reinstate the same for hearing interparties.” The Motion was grounded on the fact that the orders dismissing the suit were made on the presumption that the provisions of the **Sugar Act, 2001** were in force and that the court lacked jurisdiction yet the said **Act** had been repealed by the **Crops Act, 2013** hence the subordinate court had jurisdiction to hear the matter.
2. The facts giving rise to this appeal are that on 2<sup>nd</sup> April 2014, the appellant filed a suit against the respondent seeking compensation for failure to harvest sugarcane from his contracted farm. The respondent defended the suit and raised a preliminary objection challenging the jurisdiction of the subordinate court to hear the matter on the ground that the Sugar Arbitration Tribunal established under **section 31(1)** of the **Sugar Act, 2001** had the jurisdiction to hear disputes between a sugar cane grower and a miller in terms of **section 29(1)** of the **Act**. The learned magistrate upheld the preliminary objection and dismissed the suit on 1<sup>st</sup> July 2014.
3. At the time the preliminary objection was being urged, the **Sugar Act, 2001** had been repealed by **Crops Act, 2013** save that the date for commencement was reserved under the **Act**. The gazetted date of commencement was 1<sup>st</sup> August 2014. The effect of the **Second Schedule** to the **Crops Act, 2013** was to repeal the **Sugar Act, 2001** thereby abolishing the Sugar Arbitration Tribunal.
4. The appellant’s argument, in support of the motion to set aside the dismissal order, was that had the matter of the repeal of the **Sugar Act, 2001** been brought to the attention of the court, it would have come to a different conclusion and dismissed the preliminary objection. The learned magistrate held that the application before the court was in the nature of an application for review and that the appellant ought to demonstrate such discovery of new an important matter arising

upon exercise of due diligence at the time, which matter could not be brought to court. The learned magistrate held that;

*The truth of the matter is that the repeal of the Sugar Act occurred upon the commencement of the Crops Act 2013 on 01/08/2014 and the Applicant ..... But the order asked to be reviewed is dated 1<sup>st</sup> July 2014, meaning the suit remained subject to the Sugar Tribunal upon dismissal and shortly after July, the subject of the Crops Act 2013 .....*

5. The thrust of the appellant's appeal is that the learned magistrate erred in dealing with the application as one for review yet the applicant had expressly applied for an order to set aside the order dismissing the suit. The appellant contends that the issue of review cannot arise since no evidence was adduced in the case and that in fact the appellant had no prayed for an order of review. The respondent supported the decision of the learned magistrate and submitted that in substance the application was one for review and the learned magistrate came to the correct conclusion.
6. This is an appeal from the exercise of discretion by the learned magistrate. In ***Mbogo v Shah [1968] EA 93***, Newbold P., expressed the nature and extent of the appellate court's jurisdiction to interfere with the discretion of the lower court;

*A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.*

7. In my view and I hold that the application to set aside the order dismissing the suit was in substance an application for review. The appellant was contending that that at the material time, the court's attention was not drawn to the ***Crops Act, 2013*** and had it done so it would not have dismissed the suit. In effect the appellant was urging the court to consider a matter which in the eyes of **Order 45** of the ***Civil Procedure Rules*** was, "new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made ...."
8. The learned magistrate could therefore not be faulted in dealing with the matter as he did as the application, was in substance, an application for review of his own order. Further he was correct to hold that until the ***Crops Act, 2013*** came into force on 1<sup>st</sup> August 2014, the ***Sugar Act, 2001*** was still operative and applied to the appellant's suit and that therefore the Sugar Arbitration Tribunal was the proper forum of adjudication.
9. The appeal is therefore devoid of merit and is dismissed with costs to the respondent which are assessed at **Kshs. 5,000.00**.

**DATED and DELIVERED at HOMA BAY this 2<sup>nd</sup> day of March 2016.**

**D.S. MAJANJA**

**JUDGE**

Ms Nyarige instructed by G. S. Okoth and Company Advocates for the appellant.

Mr Olendo instructed by Ogejo, Olendo and Company Advocates for the respondent.