Odera v Sukari Industries Limited (Civil Appeal E033 of 2024) [2026] KEHC 3512 (KLR) (11 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3512 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E033 OF 2024

DKN MAGARE, J

MARCH 11, 2026

BETWEEN

SCHOLAR ATIENO ODERA .... APPELLANT

AND

SUKARI INDUSTRIES LIMITED .... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of Hon. C.N.C Oruo - PM delivered on 2.5.2024 in Rongo PMCC No. 281 of 2017. The appellant was the plaintiff in the lower court. The court heard her case and dismissed it, with costs to the Respondent.

2. The Appellant was aggrieved and filed a Memorandum of Appeal dated 28.5.2024 and set forth the following grounds of appeal:

    a. The learned magistrate erred in law and fact in dismissing the Appellant's claim on the basis that the expected yield was not proved, yet the yield was admitted by the Defendant during cross-examination, and the evidence adduced in PMCC No. 134 of 2018 that was ordered to apply to this suit.

    b. The learned magistrate erred in finding that the price of cane was not proved when it was admitted by the Defendant to be Ksh. 3,500/=.

    c. The learned magistrate failed to properly evaluate the evidence on record and came to a wrong conclusion.

3. The Plaint dated 16.8.2017 claimed damages for breach of contract, costs, and interest. The Appellant averred that, by a written agreement entered into on 25.4.2011, the Respondent contracted the Appellant to grow and sell to it sugarcane on the Appellant's land measuring 0.8 ha. It was further the

case of the Appellant that the sugarcane would be harvested at 18-28 months and ratoon after 16-24 months.

4. The Respondent breached the contract by failing to harvest the sugarcane when it was ready. The expected yield for the plant sugarcane and the 2-ratoon sugarcane was Ksh. 378,000/= each, amounting to a total of Ksh. 1,134,000/=.

5. The Respondent filed a defence dated 25.11.2017 denying the allegations in the Plaint. The denials were houses that can be stated to be mere denials. Consequently, the court cannot ascertain from the pleadings what the respondent's defence was.

6. In its judgement dated 2.5.2024, the court dismissed the suit. Surprisingly, the court proceeded on a wrong footing. It held that the reason for dismissal was that there was no document showing how much the price was, and that the yielded report was not produced. This is not true as they were produced as exhibits three and four. This resulted in this Appeal.

Proceedings

7. PW1 was the Appellant. She relied on her list of documents. She testified that she was a farmer. She contracted the Respondent. She produced the documents in her list filed in the lower court. On cross-examination, she testified that the plot was 0.2 ha. It could produce 135 tons. Price per tonne was Ksh. 3,500/=.

8. The Respondent called DW1, John Okinda. He was an agricultural officer of the Respondent. He testified that there was a valid contract. According to him, the Appellant did not demonstrate any clause breached. On cross-examination, it was his case that they did not harvest the sugarcane. Had they harvested, they could have paid Ksh. 3,500/= per tonne and three cycles of sugarcane.

Submissions

9. The Appellant filed submissions dated 20.7.2025. It was submitted that the Appellant proved her case on a balance of probabilities. Reliance was placed on Section 107 – 109 of the *Evidence Act*. The Appellant submitted that DW1 admitted the contract and the magistrate breached the best evidence rule. Reliance was placed on South Nyanza Sugar Co. Ltd v Masiga Mkiwaya (2018) e KLR.

10. The Respondent filed submissions dated 26.11.2025. It was submitted that the lower court relied on an incomplete contract book. Reliance was placed on South Nyanza Sugar Co. Ltd v Shem Ooko Ojwando (2022) eKLR, based on which it was submitted that the Respondent had the expertise in yield per acreage, which was admitted.

11. On quantum, it was submitted that the Appellant was entitled to damages as the Respondent was in breach of contract. Reliance was placed inter alia on John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd (2013)e KLR. It was submitted that Ksh. 1,134,000 were proved to be the damages.

Analysis

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

13. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the court in their usual gusto, held as follows; -

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

15. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows: -

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be e4xercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own conclusions.

18. The Appellant urged the court to find that the lower court erred in dismissing her suit. This court is entitled to reevaluate by way of a retrial the pleadings and evidence at the lower court. On the prove of the allegations of breach of contract in Raghbir Singh Chatte v National Bank of Kenya Limited [1996] KECA 99 (KLR) the Court of Appeal stated thus:

> "When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."...
>
> ...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was

not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

19. The burden was with the Appellant to prove his case against the Respondent. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

20. A party who invokes the aid of the law and asserts affirmative of an issue has the burden to prove the matters in issue. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.".

21. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. The burden of prove also casts upon any party, the burden of proving any particular fact which he desires the court to believe in its existence.

22. In Nyakwana v Ongaro [2015] KEHC 8440 (KLR) it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden… is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

23. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau V George Thuo & 2 Others [2010] KEHC 4124 (KLR) stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

24. Courts have established that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent

is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

25. The preponderance of probabilities is degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. Furthermore in Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] KECA 616 (KLR) the Judges of Appeal held that:

> “ Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

26. With the above guide, in the instant Appeal, the Plaint dated 16.8.2017 claimed damages for breach of contract. The Appellant pleaded Ksh. 1,134,000/= as damages. This was in respect of the claimed 3-cycle harvest that was lost as a result of the failure to harvest the sugar cane by the Respondent.

27. The respondent admitted that if they had harvested, they could have paid Ksh 3,500/= per tonne. The payment formula was set out in the contract. The contract is admitted. It is not the duty of this court to amend or redraft a contract. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR) [Tunoi, Shah & Keiwua JJ A] as follows: -

> 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

> “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.

28. The respondent did not denounce the contract. So, the court could not require more than what was provided. The formula is laid as follows:

> Cane per metric tonne= net price of sugar per metric tonne x farmers share
>
> TC/TS
>
> The farmers' share = 50%
>
> TC/TS= 10

net price of sugar per metric tonne = ex-factory price of sugar per metric ton excluding VAT and SD;

29. The latter terms are to be provided by the respondent, not the farmer. Luckily, this was provided in cross-examination.

30. It was proven that the duration the sugarcane would be expected to mature and be harvested. The cane productivity schedule produced related to years 1995-1997 and did not specifically address the Appellant's claim for the loss of Ksh. 1,134,00/=.

31. The cane was grown in KAKMASIA, where productivity in the sublocation in 1997/1997 was 119.7 for crop plant, 29.3 for the first ratoon, and 82.5 for the second ratoon. The variety of cane assessed in the contract was N14, with an average yield for year 2000 of 94.3 tons per hectare. This thus works out to 75.44 tonnes for the plot in issue, that is:

    94.3 x 0.8 =75.44 tonnes per hectare.

32. The second ratoon last averaged 65.4 tons per hectare. For a 0.8-hectare plot, the yield will be 0.8 × 65.4, which equals 54.32 tonnes. The second agreed ratoon will be based on a yield of 53.3. The yield, therefore, will be based on 53.3 x 0.8 hectares, resulting in 42.64 tonnes. The expected yields for the three cycles ought to work out as follows;

    i. Crop plant works out as follows: 75.44 X 3,500 = Ksh 264,040/=

    ii. First ratoon works out as follows: 54.32 tonnes x 3,500 =190,120/=.

    iii. Second ratoon works out as follows: 42.64 tonnes x 3,500 =149,240/=.

    Total Ksh. 603,400/=.

33. However, the court is drawn to the common position of the parties that the contract period was 5 years. Could all 3 cycles be covered within 5 years, given that the sugarcane plant would be harvested at 18-28 months and ratoons after 16-24 months? 5 years consist of 60 months. The maximum period for the crop plant and two ratoons is 72 months, exceeding 60 months. The respondent was obligated to harvest in a maximum of 28 months. and ratoon in 24 months. The court cannot place an obligation to harvest earlier. Therefore, a reasonable number of cycles can only be one plant and the first ratoon to cover the five-year period. The court therefore finds that the correct computation that is right and just is as follows:

    i. Crop plant works out as follows: 75.44 X 3,500 = Ksh 264,040/=

    ii. First ratoon works out as follows: 54.32 tonnes x 3,500 =190,120/=.

    Total Ksh. 454,160/=.

34. This was not a claim for special damages but for failure to harvest the cane that was contracted. The respondent has a duty to disclose the annual prices as a basis for determining contractual terms. Since the Respondent admitted that the price was a sum of Ksh. 3,500/=, the court should not belabour the point. Farming is not an exact science. It is based on the best available evidence and admissions. The court cannot fail to award simply because there was no agricultural report. In a wide-scale farming like coffee, tea, and sugar, the averages will always work out.

35. The court got it wrong by setting the issue in the judgment as to the existence of a valid contract. The only issue in the case was the amount of loss suffered. The court cannot go into issues that were not raised in evidence or pleadings.

36. Parties are bound to plead their cases fully. In the case of Migore v South Nyanza Sugar Co Ltd [2018] KEHC 5465 (KLR), A C Mrima, J, stated as follows:

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded......
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings ....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

37. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition:

58. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:

....

52. Further, the court went on and observed that:

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.

38. The net effect is that the appeal is allowed as aforesaid. This leaves the issue of costs, which is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

39. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

40. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR), as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances

of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

41. Costs follow the event. The event is the allowance of the appeal. The appellant shall have costs of Ksh 65,000/=.

Determination

42. In the upshot, I make the following Orders:

    a. The Appeal is allowed. The judgment of the court below is set aside. In lieu thereof, judgment is entered for the appellant for the sum of Ksh. 454,160/=.

    b. The Appellant shall have costs of the appeal of Ksh. 65,000/=.

    c. The appellant will have costs in the court below.

    d. 30 days stay of execution.

    e. Right of Appeal 14 days

    f. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF MARCH, 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Ogola for the Appellant

Ms. Theuri for the Respondent

Court Assistant – Michael/Martin