



Nile Hauliers Ltd v Busia Outgrowers Company Limited & another (Civil Appeal 91 of 2019) [2025] KECA 483 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 483 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 91 OF 2019
HM OKWENGU, JM MATIVO & JM NGUGI, JJA
MARCH 7, 2025**

BETWEEN

NILE HAULIERS LTD APPELLANT

AND

BUSIA OUTGROWERS COMPANY LIMITED 1ST RESPONDENT

KENYA SUGAR BOARD/KENYA SUGAR DIRECTORATE . 2ND RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Busia
(Kiarie, J) Dated 28th March, 2019 in H.C CC. No. 1 of 2014)*

JUDGMENT

1. This is an appeal arising from a judgment of the High Court (Kiarie, J.), in a suit which was filed by Busia Outgrowers Company Limited (Busia Outgrowers), who is the 1st respondent in this appeal. Busia Outgrowers had sued Kenya Sugar Board (Sugar Board) who is now the 2nd respondent, and Nile Hauliers Ltd, who is now the appellant.
2. In its suit, Busia Outgrowers sought judgment against the Sugar Board and Nile Hauliers for breach of a lease agreement involving a fleet of tractors that had been bought through a loan granted to Busia Outgrowers by the Sugar Board. The fleet of tractors was leased to Nile Hauliers to transport sugarcane to Mumias Sugar Company factory. The lease agreement between Busia Outgrowers and Nile Hauliers which agreement was approved by the Sugar Board, was for lease of the fleet of tractors to operate the cane transport business for a period of twenty-four months.
3. Busia Outgrowers contended that Nile Hauliers prematurely terminated the agreement before the expiry of the lease. Consequently, Busia Outgrowers Company claimed Kshs.25,805,452/ being rent arrears, from Nile Hauliers and Kshs.1.9million being compensation for a tractor valued at Kshs.1.9million belonging to Busia Outgrowers, which was also leased to Nile Hauliers, as well as



general damages from Nile Hauliers for the unexpired period of the lease. Busia Outgrowers also sought judgment against the Sugar Board for release to them all the tractors and general damages for loss of business at the rate of Kshs.3million per month, and release of Kshs.5million which was deposited by Nile Hauliers to Kenya Sugar.

4. The Sugar Board filed an amended statement of defence in which it denied any liability to Busia Outgrowers. It contended inter alia that the agreement was between Busia Outgrowers and Nile Hauliers. The Sugar Board contended that the removal of the fleet of tractors to Mumias Sugar Company Ltd for safe custody, was done amicably, when it emerged that the relationship between Busia Outgrowers and Nile Hauliers was no longer tenable.
5. The Sugar Board maintained that from the outset, Busia Outgrowers had continuously breached its duty to the Sugar Board, and therefore the Sugar Board had a right to recall the collateral, since Busia Outgrowers failed to make remittances as contractually agreed. The Sugar Board maintained that as the financiers it has a right of lien to recall and realize its collateral, when the same is in arrears and nonperforming, and that right of lien was provided in the letter of offer of loan. The Sugar Board admitted that Kshs.5million was deposited with it as security, but maintained that the money was to be reimbursed to Nile Hauliers upon settlement of any outstanding damages, loss or liabilities from the Sugar Board.
6. Nile Hauliers also filed an amended statement of defence and counter claim, in which it denied having leased Busia Outgrowers machineries, and denied making any payments or curtailing any user rights. It admitted without any prejudice that there was an agreement conceived under special prevailing conditions which included Nile Hauliers being the only transporter of cane from BOCO Farmers to Mumias Sugar factory. However, due to adverse intervening factors, the terms of the agreement were varied with regard to the payment of higher charges and the mode of sharing the periodical proceeds of the transport contract.
7. Furthermore, Nile Hauliers contended that Busia Outgrowers lacked any property rights in the hired machinery and therefore lacked the capacity to institute the suit against it. Nile Hauliers dismissed Busia Ougrowers suit as frivolous and solely intended to vex Nile Hauliers to opt out of the nonperforming contract.
8. In the counter claim, Nile Hauliers pleaded that upon entry into the lease agreement, it was given tractors and their trailers that were in dire need of repairs in order to perform the contract. This resulted in Nile Hauliers undertaking the repairs, spending a sum of Kshs.2, 250,000/- from its own funds, which amount they counter claimed from Busia Outgrowers and Sugar Board. Nile Hauliers contended that Busia Outgrowers claim of hire charges of Kshs.3million per month as pleaded, is misdirected and misconceived, as it did not take into consideration the conditions precedent at the time the contract was conceived. In addition, the claim assumes that the conditions never existed and were immaterial to the lease agreement.
9. Nile Hauliers added that the lease agreement between it and Busia Outgrowers had determined, but Busia Outgrowers and Suga Board continued to hold on to a sum of Kshs.5million which it had paid as deposit. Nile Hauliers therefore counter claimed a sum of Kshs.2,250,000/ together with interest at commercial rate at 25% from 21st February, 2014, until payment in full. In addition, Nile Hauliers counter claimed from Busia Outgrowers and Sugar Board all the monies received by them from the revenues generated under the lease agreement.
10. On 20th July, 2016, acting on a letter dated 13th July, 2016 from the advocate of Busia Outgrowers, the suit against Sugar Board was marked as withdrawn. On 4th October, 2016, another consent was recorded between Busia Outgrowers and Nile Hauliers that the sum of Kshs.5million held by the Sugar



Board shall continue to be kept by the Sugar Board pending the hearing and determination of suit. The Kenya Sugar Board had changed to Kenya Sugar Board Directorate.

11. On 19th October, 2017, interlocutory judgment was entered against the Sugar Board in regard to the counter claim of Nile Hauliers on the ground that the Sugar Board had failed to enter appearance or file a defence to the amended defence and counter claim.
12. During the plenary hearing, Fredrick Marthia Wandera testified for Busia Outgrowers, while Benjamin Kigen and Lawi Kiplagat, who were Director and Chairman of Nile Hauliers respectively, testified on behalf of Nile Hauliers. The parties also filed and exchanged written submissions.
13. In his judgment, the learned Judge identified the issues for determination as follows:
 - a. whether the plaintiff and the defendant agreed to vary their lease contract dated 31st July, 2012; and if not,
 - b. whether the defendant was in breach of the contract,
 - c. whether the plaintiff is liable to the defendant for counter claim.
14. The learned Judge rejected the contention by Nile Hauliers that the lease agreement with Busia Outgrowers was re-negotiated, as the correspondences relied on by Nile Hauliers' witnesses, were between Nile Hauliers and Sugar Board who was not party to the lease agreement. The learned Judge found that although clause 16(a) of the lease agreement provided for termination of the agreement, Nile Hauliers did not apply that clause, and therefore its purported termination of the contract was a breach of the lease agreement.
15. As regards Nile Hauliers' counter claim, the learned Judge found that the lease agreement did not address the issue of the initial repairs, but common sense dictated that Busia Outgrowers would meet the repair expenses before leasing the tractors, and that in any case, Busia Outgrowers did not respond to Nile Hauliers claim in this regard. The learned Judge therefore allowed this counter claim.
16. As regards the counter claim for the Kshs.5million, the learned Judge found that according to the lease agreement, it was to be refunded at the expiry of the lease, if there were no outstanding liabilities, and therefore, it cannot be subject of a counter claim but is recognized as a deposit.
17. Finally, the learned Judge found that Nile Hauliers, having improperly terminated the agreement, it was liable to Busia Outgrowers for Kshs.25,070,169/- less Kshs.2,250,000/- which was used for repairs of the tractors. The learned Judge awarded interest at court rates from the date of filing suit.
18. The above judgment is what resulted in Nile Hauliers filing the appeal now before us. In its memorandum of appeal, Nile Hauliers raised five grounds. First, it faulted the learned Judge for failing to evaluate the evidence that was before him or considering the pleadings, and consequently arriving at an unfair decision against the appellant. Secondly, it faulted the learned Judge for misdirecting himself in allowing Busia Outgrowers claim of Kshs.25,070,169/-, for termination of the lease agreement without notice, when the same was not pleaded. Thirdly, it faulted the learned Judge for failing to find that the lease agreement became a tripartite agreement due to the loan financing agreement, and that the tripartite agreement was mutually terminated by the three parties due to events triggered by Busia Outgrowers. Fourthly, it faulted the learned Judge for failing to find that Busia Outgrowers' claim of Kshs.25,070,169/- for the arrears in hire charges as pleaded in its amended plaint, could not stand, due to the mutual departure of the three parties from the revenue sharing arrangements in the lease agreement. Finally, it faulted the learned Judge for failing to find that Busia Outgrowers was estopped from claiming against the Nile Hauliers after it opted to withdraw its suit against the Sugar Board against whom its weighty complaints were directed.



19. In support of the appeal, the appellant filed written submissions through its advocate Wanyama & Company Advocates. In the brief submissions, counsel stated that the Sugar Board loaned out a fleet of tractors machinery to Busia Outgrowers upon conditions which required Busia Outgrowers to lease the said fleet of tractors to another company to professionally manage and operate the same in the business of transporting sugar cane.
20. Counsel submitted that at the beginning of the transport business, the mode of sharing the revenue was done in accordance with the lease agreement. However, when the business became low and incapable of generating the intended minimum monthly revenues of over Kshs.3million, the three parties opted out of the lease agreement and agreed on a new arrangement of sharing the reduced revenue income.
21. Counsel therefore submitted that Busia Outgrowers was estopped from claiming any sum of money as arrears under the lease agreement, and that it was also estopped from alleging that Nile Hauliers had abandoned the lease agreement without issuing a termination notice, and had also left the tractors in a serious state of disrepair. Counsel for Nile Hauliers therefore urged the Court to allow the appeal.
22. Busia Outgrowers also filed written submissions through its advocate, Balongo & Company Advocates. It was submitted for Busia Outgrowers that Nile Hauliers' position in the High Court, was that Busia Outgrowers had promised them monopoly of transport work in BOCO zone, and also that they would prevail upon Mumias Sugar Company Ltd to give Nile Hauliers additional transport work. However, Busia Outgrowers breached that promise and therefore there was lack of cane to transport to the factory. The situation was aggravated further by the entrance of other transporters into the business.
23. It was further argued for Busia Outgrowers that in order to succeed on their defence and counter claim, Nile Hauliers had to prove:
 - i. that the promises were made by Busia Outgrowers and the Sugar Board;
 - ii. that Nile Hauliers was completely unable to raise Kshs.3million in any single month without help of Busia Outgrowers;
 - iii. that Nile Hauliers transported all cane allocated to it;
 - iv. that proof by vouchers, delivery notes, transport assistant report and dates when the new transporters freshly joined transport business were not availed.
24. It was submitted that it was not true that Busia Outgrowers and the Sugar Board promised Nile Hauliers monopoly and additional work. As regards Busia Outgrowers, it was submitted that its position was founded on the lease agreement dated 31st January, 2012, wherein, Nile Hauliers undertook to pay Busia Outgrowers and Sugar Board hire charges at the agreed rate of Kshs.3million, but Nile Hauliers failed to regularly pay the agreed sum, and also neglected collecting cane allocated to them by Mumias Sugar Company. Consequently, Busia Outgrowers were entitled to claim the unpaid monthly hire charges.
25. Counsel for Busia Outgrowers submitted that the promises adverted to by Nile Hauliers were a mere afterthought crafted to desperately raise a defence to a valid claim by Busia Outgrowers. Counsel reiterated that Busia Outgrowers were not party to the reviewed revenue sharing formula. The Court was therefore urged to dismiss Nile Hauliers' appeal.
26. This is a first appeal, and the principles through which this Court should consider such an appeal have been set out in a number of decisions by this Court. For instance, in Abok James Odera t/a AJ Odera



& Associates -vs- John Patrick Machira t/a Machira & Company Advocates [2013] KECA 208 KLR, this Court (Githinji, Nambuye & Koome, JJA) stated as follows:

“This being a first appeal, we are minded of our primary role as a first appellate court namely, to reevaluate, reassess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

27. In *Gitobu Imanyara & 2 others -vs- Attorney General* [2016] KECA, 557 KLR, this Court (Visram, Sichale & Mohammed, JJA), stated as follows:

“This being a first appeal, it is trite law that this Court is not bound necessarily to accept the findings of facts by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

28. In accordance with our mandate as afore-stated, we have reconsidered and reevaluated the evidence which was before the trial court, in light of the contending submissions made before us, and the law. It is not disputed that there was a lease agreement between Busia Outgrowers and Nile Hauliers in regard to a fleet of tractors for the purpose of transporting cane from BOCO area to Mumias Sugar Company Factory. What was in issue is whether this agreement was renegotiated or whether Nile Hauliers breached the agreement, and secondly, whether the learned Judge was right in finding in favour of Busia Outgrowers and allowing its claim and also partly allowing Nile Hauliers’ counter claim with regard to the amounts spent in the repairs of tractors.

29. Again, it was not disputed that Article 16(a) of the lease agreement (which was produced in court) provided for the termination of the contract in the following terms:

Termination

- a. Should either party to this agreement wish to terminate this agreement other than for reasons of fundamental breach of the terms and conditions herein, then it shall give the other party 3[three] months written notice of its intention to do so.

Provided however that such notice shall only be effective upon expiry if the parties hereto have reconciled the books of accounts and any outstanding liabilities settled.

30. There was no evidence adduced by Nile Hauliers nor did it claim that it invoked the above termination or served Busia Ougrowers with a notice of termination of the lease agreement in accordance with the terms of the agreement. Nile Hauliers’ position was that the lease agreement was in fact renegotiated.

31. We have looked at the judgment of the learned Judge, and this is how he addressed this matter:

9. Though the defendant through Benjamin Kigen contended that there was a renegotiated lease agreement with the plaintiff, this is not the correct position. The copies of letters he attached to his affidavit were correspondence between the defendant and the Sugar Board. The sugar Board was not party to the lease agreement and could not therefore be in apposition to vary the same. In any case, the letters were only addressing their interest in the leased tractors. I



accordingly dismiss the claim by the defendant that there was in existence (sic) of a renegotiated lease agreement.

10. Fredrick Marthia wandera (PW1) testified that the defendant brought the contact to an abrupt end in October 2013. The affidavit of Benjamin Kigen (PW1) is that when they entered into the lease contract the understanding was that they were going to be the sole transporter for the cane grown by plaintiff's farmers. It turned out not to be so. This caused the business not to be viable. Clause 12.1 of the lease agreement states:

Area of operation:

The lessee undertakes that the machinery hereby leased shall only be used for purposes of cane transport within the Busia sugarcane Outgrowers zone, for delivery of cane to Mumias Sugar factory or any other duly authorised miller and or recognized cane buying Centre in the said zone but not further.

This is the only clause in the lease agreement that touches on the issue of the out-growers. It is however a very clear clause which was referring to the area of operation and did not state that the defendant was going to be the sole transporter in that zone.

11. When business became challenging, and the defendant was not able to make profits as earlier anticipated, there was an exit clause. This is what clause 16 (a) of the lease agreement provided:

Should either party to this agreement wish to terminate this agreement other than for reasons of fundamental breach of terms and conditions herein, then it shall give the other party 3 (THRE) months written notice of its intention to do so.

Provided however that such notice shall only be effective upon the expiry if the parties hereto have reconciled the books of accounts and any other outstanding liabilities settled.

Had the defendant taken this course of action, it is unlikely this suit will be in existence. She opted to terminate a contract without a notice. This was a breach of the lease agreement.”

32. In its amended statement of defence and counter claim, Nile Hauliers stated at paragraph 5 as follows:

“On without prejudice basis, the 2nd defendant states that owing to adverse intervening factors that rendered the executed agreement unenforceable the concerned parties as demonstrated by the letters dated 20th July, 2012, 15th October, 2012, 27th November, 2012, 26th.02, 2013, 27th.2.2013, 27th.8.2013 and 31.8.2013, agreed to vary the terms of the agreement especially in regard to the payment of hire charges by opting to agree on the mode of sharing the periodical proceeds of the transport contract ran by the 2nd defendant in a mutual manner hence making the suit conceived herein against the 2nd defendant for nonpayment of hire charges to be a nonstarter.

33. Our perusal of the record reveals that most of the letters referred to, at paragraph 5 of the judgment, were signed by one R. Mkok, Chief Executive officer of Kenya Sugar Board. Most of the letters were either written to Nile Hauliers or Managing Director Mumias Sugar Company and some were copied to the General Manager Busia Outgrowers. In a few of the letters, there is reference to renegotiation of the sharing of the revenue, but there is no firm conclusion in any of the letters, nor is there any evidence that Busia Outgrowers was involved in these negotiations or agreed to such an arrangement. There was only one letter dated 15th March, 2013, which was addressed to the Chief Officer Kenya Sugar Board



and signed by F.M. Wandera as Ag. General Manager of Busia Outgrowers. The letter did not make any reference to a renegotiated agreement, but talks of loan repayment for period ended 15th February, 2013 and 28th February, 2013. In the circumstances, Nile Hauliers was not able to substantiate its allegation that the agreement was renegotiated and the learned Judge cannot be faulted in his conclusion in this regard.

34. It is evident that Nile Hauliers was experiencing difficulties in meeting the terms of the contract with regard to monthly payments of Kshs.3million, for the hiring of the fleet. Nile Hauliers does not deny being unable to make the payments, but claims that the agreement was renegotiated and also blames Busia Outgrowers and Sugar Board for failing to protect its monopoly. The lease agreement did not provide for any monopoly, and therefore, Nile Hauliers cannot avoid its responsibility of payment of the hire charges. Nile Hauliers having failed to invoke the termination clause in the agreement, it was liable to pay the hire charges.
35. At paragraph 11(a) of the amended claim, Busia Outgrowers were claiming a sum Kshs.25,805,452.32, on account of hire charge arrears due as at the time Nile Hauliers stopped using the tractors. At page 141 of the record of appeal, is the financial statement indicating that the amount that was the hire charge arrears due from Nile Hauliers was Kshs. 23,566,308.98 to which if added the insurance for 2012 to 2013, came to Kshs.25,805,452.33, which is the amount Busia Outgrowers claimed. However, when Fredrick Marthia Wandera, who prepared the statements of accounts testified, he reduced the claim to Kshs.25,070,169/-, explaining that there were some insurance payments. It was for that reason that the learned Judge gave judgment for Kshs.25,070,169/-. In our view, this amount was due to Busia Outgrowers as arrears in regard to hire charges. Consequently, the learned Judge cannot be faulted for giving judgment in favour of Busia Outgrowers in regard to the arrears of hire charges of Kshs.25,070,169/-. Although Busia Outgrowers claimed general damages for loss of business for the unexpired period of the lease, the learned Judge did not make any award in this regard. There being no cross appeal from Busia Outgrowers in regard to this finding, it is not a matter for our consideration.
36. Finally, there is the issue of Kshs.2,250,000/- which the learned Judge found in favour of Nile Hauliers, and the amount of Kshs.5million which the learned Judge held was a deposit. Again, there being no cross appeal from Busia Outgrowers in regard to these findings, we do not find it necessary to interrogate or interfere with the findings.
37. The upshot of the above is that we find no merit in this appeal.

We, therefore, uphold the judgment of the trial court and dismiss the appeal with costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

