Turbo Highway Eldoret Limited v Karira (Civil Appeal 21 of 2019) [2024] KEHC 9939 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9939 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 21 OF 2019

JRA WANANDA, J

JULY 31, 2024

BETWEEN

TURBO HIGHWAY ELDORET LIMITED ..... APPELLANT

AND

NICHOLAS KARIRA ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment entered in Eldoret Chief Magistrate's Court Civil Case No. 670 of 2009. The Appellant was the Defendant in the suit whereas the Respondent was the Plaintiff.

2. The suit was instituted vide the Plaint filed on 26/08/2009 through Messrs Karira & Co. Advocates, a firm of Advocates. The Respondent (as the Plaintiff) pleaded that the Appellant was indebted to the Respondent in the sum of Kshs 435,000/- and had issued two cheques for Kshs 200,000/- and 225,000/-, respectively, but when the Respondent presented the cheques for payment, they were returned with remarks "refer to drawer" and upon which the bank debited the Respondent's account with Kshs 5,000/- being charges for "bounced" cheques. The Respondent pleaded further that the Appellant also owed the Respondent a further sum of Kshs 10,000/- against which it had not issued a cheque. In total therefore, the Respondent prayed for Judgment for a total sum of Kshs 440,000/-.

3. Subsequently, the Plaintiff changed his Advocates to Messrs Mathai Maina & Co. whom he also later replaced with Messrs Mukabane & Kagunza Advocates.

4. The Appellant, through Messrs Nyairo & Co. Advocates filed a Defence on 23/09/2009 whereof it denied being indebted to the Respondent. The Appellant pleaded that the Respondent approached and informed it that the Respondent was acting for the Municipal Council of Eldoret in respect to rate demands for title number Eldoret Municipality/Block 6/6 owned by the Appellant and for which the Appellant was in debt to an amount exceeding Kshs 835,000/-, that the Respondent then agreed that the Appellant issues cheques to the Respondent for payment of the debt due to the Respondent's

client, Municipal Council of Eldoret, and for which the Respondent would issue receipts for the said amounts.

5. The Appellant pleaded further that pursuant to the above arrangement, the Appellant issued the Respondent with cheques being No. 71 and 709 in the Respondent's favour and each for Kshs 200,000/- together the two post-dated cheques mentioned in the Plaint for Kshs 200,000/- and Kshs 235,000/-, respectively. The Appellant pleaded further that the Respondent banked the said cheques No. 71 and 709 and received payment for the value thereof, namely, Kshs 200,000/- for each cheque (total Kshs 400,000/-) respectively, but failed to provide the Appellant with Receipts either from himself or the Municipal Council of Eldoret. The Appellant pleaded further that after making numerous requests to the Respondent to provide Receipts and after the Respondent failed to do so, the Appellant countermanded the post-dated cheques. The Appellant therefore prayed that the suit be dismissed.

6. The matter then proceeded for hearing wherein the Respondent (as Plaintiff) called 2 witnesses) while the Appellant (as Defendant) called 1 witness. After the trial, the Court delivered its Judgment on 29/08/2009 whereof it agreed with the Respondent and entered Judgment against the Appellant for the sum of Kshs 440,000/- as prayed in the Plaint.

7. Aggrieved by the said decision, the Appellant, in a lengthy Memorandum of Appeal comprising 10 grounds, preferred this Appeal. The grounds are as follows:

   i. That the learned Magistrate erred in law and in fact in holding that the Appellant is liable to pay the Respondent Kshs 440,000/- without considering the evidence which pointed to the fact that the Respondent never entered into an agreement with the Appellant.

   ii. That the learned trial Magistrate erred in law and fact in finding that the Respondent had established a case against the Appellant contrary to the evidence on record.

   iii. That the learned trial Magistrate erred in in law and fact in finding that the Respondent is entitled to the relief sought.

   iv. That the learned Magistrate erred in fact and in law in finding that there was an enforceable agreement between the Appellant and the Respondent.

   v. That the learned trial Magistrate erred in law and fact in failing to consider the submissions and authorities filed by the Appellant hence an erroneous judgment.

   vi. That the learned Magistrate erred in law and fact in failing to consider the provisions of Section 3(1) of the *Law of Contract Act*. Cap 23, Laws of Kenya and/or by misapplying the said provision.

   vii. That the learned Magistrate erred in law and fact in failing to appreciate that the alleged contract was illegal and invalid and contrary to public interest.

   viii. That the learned Magistrate erred in law and fact in failing to appreciate the principle of privity of contract and/or misapplying the said principle.

   ix. That the learned Magistrate erred in law and fact in failing to appreciate the separate legal personality of the Appellant herein.

   x. That the learned Magistrate erred in law and fact in failing to dismiss the Respondent's claim with costs for want of proof.

Respondent's Evidence before the trial Court

8. PW1 was the Respondent, Nicholas Karira Advocate practicing in the name of Karira & Co. Advocates. He stated that he was working for the Eldoret Municipal Counsil as an Advocate and part of his job was collection of land rates, that he was given brief relating to the rate payer known as D.G. Aggarwal who was the registered owner of L.R. No. Eldoret Municipality Block 6/6 and who owed the Council, as at 21/04/2009, a sum of Kshs 3,014,200/- as rates arrears, that the Respondent was personally known to the rate payer's family and was the owner of the Appellant company herein, Turbo Highway Eldoret Limited. He stated further that he was aware that the said D.G. Aggarwal had passed and he thus informed the son, Amit Aggarwal, about the issue and who requested the Respondent to assist him to obtain a waiver of the rates, and that on 30/04/2009, such waiver was given when the rates were reduced to Kshs 725,515/-. The Respondent stated further that the said Amit Aggarwal requested the Respondent to settle the account on his behalf, that at that time, the Municipal Council was indebted to the Respondent and upon his request to the Town Clerk, it was accepted that the debt due from Mr. Aggarwal be offset from the Respondent's fees and upon which Mr. Aggarwal accepted to reimburse the Respondent the sum of Kshs 725,515/- and also promised the Respondent a further Kshs 100,000/- for having negotiated the waiver for the rates.

9. The Respondent testified further that they agreed that the Respondent would first pay the rates then Mr. Aggarwal would refund or issue him with post-dated cheques to cover the sum of Kshs 825,505/-. The Respondent testified further that he proceeded and paid the rates on 30/04/2009 and that upon presenting the Receipts to Mr. Aggarwal, he told the Respondent that he wanted to first confirm that indeed the rates had been settled. The Respondent testified that Mr. Aggarwal later informed the Respondent that he had indeed confirmed payment of the rates and thus issued the Respondent with post-dated cheques, that the first two cheques covered Kshs 400,000/- and were honoured but the 3rd cheque dated 5/07/2009 No. 000711 was dishonoured for insufficient funds and he informed Mr. Aggarwal, that regarding the 4th cheque No. 000712 for Kshs 225,000/-, before the Respondent banked it, Mr. Aggarwal asked him to bank it a week later but upon banking the same, it too, was dishonoured. He added that he issued the demand letter dated 12/08/2009 to the Appellant and pointed out that that the cheques were issued prior to clearance of the rates arrears, but that the agreement was not reduced into writing.

10. In cross-examination, the Respondent stated that waiver of the rates was given pursuant to his negotiation and that he is the one who paid the amount of Kshs 725,515/-. He however conceded that he did not have evidence to demonstrate the same and also that he did not have an Advocate-client relationship with the Respondent's family and further, that he did not produce any document to show that the Municipal Council of Eldoret owed him any sum as fees. In Re-examination, he stated that the "Request for Payment Form" acts as a Receipt.

11. PW2 was one Barnabas Cheruiyot, an Administration Officer in the Legal Department of the Uasin Gishu County Government who came to testify pursuant to Witness Summons issued for that purpose. He produced the "Payment Request for Rates" dated 30/04/2009 relating to the property, L.R. No. Eldoret Municipality Block 6/6. In cross-examination, he confirmed that there is no claim against the rates.

Appellant's Evidence before the trial Court

12. DW1 was the said Amit Aggarwal. He stated that the Respondent called him and told him that the Respondent had instructions to collect rates on behalf of the Eldoret Municipal Council, and that they agreed on a payment plan pursuant to which DW1 issued 4 post-dated cheques amounting to

Kshs 825,505/-. He confirmed that a waiver was given and stated that after the 1st cheque was paid, DW1 requested to be supplied with Receipts but none was supplied, that similarly, no Receipt was supplied when the 2nd cheque was paid, and that in the circumstances, he countermanded the 3rd and 4th cheques. He denied that he agreed that the Respondent was to pay the rates on his behalf and that he would then reimburse him. He however conceded that he did not have any documents to demonstrate that he was asked to pay any further rates. He stated that the claim was made against Turbo Highway Co. Limited in which his now deceased father was a director and contended that he did not enter into any Advocate-client relationship with the Respondent or any other agreement with him or with the Municipal Council.

13. In cross-examination, DW2 stated that payment of the cheques was made in the name of the Appellant in which his mother and herself are directors, and that the property is in the name of his deceased father. He confirmed that the amount claimed in the Rates Demand was Kshs 3,040,000/- but that there was a waiver to Kshs 725,515/-. He also conceded that he did not have any demand from the Municipal Council claiming for the amounts in the countermanded cheques and also that he had never demanded for refund of the amount he paid to the Respondent and further, that he had not filed any counterclaim demanding any refund. In Re-examination, he stated that his demand for the Receipts was verbal.

14. Aa aforesaid, after the trial, the Court entered Judgment in favour of the Respondent at the sum of Kshs 440,000/- and pursuant to which the Appellant filed this Appeal.

Hearing of the Appeal

15. The Appeal was canvassed by way of written Submissions. Pursuant thereto, the Appellant, through Messrs Nyairo & Co. Advocates filed its Submissions on 27/10/2023 while the Respondent filed his on 7/08/2023 through Messrs Mukabane & Kagunza Advocates.

Appellant's Submissions

16. Counsel for the Appellant submitted that the dealings alleged by the Respondent raised the assumption that there was an agreement capable of enforcement between the parties, that there was however no such enforceable agreement, that the Respondent sought to enforce an oral agreement which however the Appellant was not a party to and which agreement was, in any event, in contravention of Section 3(1) of the *Law of Contract Act*. She faulted the trial Magistrate for finding that the contract by the parties showed that there was an intention to create a legal relationship and that the Appellant could not run away from the transaction for lack of a written agreement. According to Counsel, that finding was not correct because the Appellant is a limited company and all its transactions ought to stem from a company resolution, that there was no documentary evidence showing that the Respondent paid the rates on behalf of the Appellant or in respect of the property the subject hereto, and that from the evidence, the Respondent approached Amit Aggarwal as the son of D.G. Aggarwal and not in his capacity as a director of the Appellant

17. According to Counsel, the only reason why the Appellant was sued was on account of the cheques issued by Amit Aggarwal and which cheques were in the Appellant's name and that allegedly since Mr. Amit Aggarwal is a director of the company, that then the Appellant ought to pay. According to the Appellant, that argument cannot stand in law as the said Amit Aggarwal and the Appellant are two distinct and separate entities. She cited the case of Salomon v Salomon [1897] A.C. 22 and also the case of Mohamed Adan Molly v Linksoft (K) Ltd & Another [2013] eKLR.

18. Counsel submitted further that there was no privity of contract between the parties herein since the gentleman's agreement was as between the Respondent and Mr. Amit Aggarwal whom he did not

sue. According to Counsel, the issuance of the cheques by the Appellant could not imply privity of contract. She cited Halsbury's Laws of England, 3rd Edition, Volume 8, the case of Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & Another [2014] eKLR and also the case of Muriuki Duncan Mukaburu v Kisao Pharmacy Limited.

Respondent's Submissions

19. Counsel for the Respondent cited Section 3 of the *Bills of Exchange Act*, Cap. 27 and submitted that upon the said cheques being dishonoured, right of recourse against the Appellant arose and the Respondent then demanded payment through the letter dated 12/08/2009, and that the evidence of PW2 corroborated the evidence of PW1 that it is the Respondent who paid the rates which D.G. Aggarwal owed the Municipal Council. He submitted further that although the Appellant alleged that it stopped the cheques after the Respondent failed to present receipts for the 1st and 2nd cheques, nothing was produced to show that such demand had been made, and that there is also nothing to show that the Municipal Council later demanded for any unpaid land rates.

20. He contended further that there are exceptions to the general rule under Section 3(1) of the *Law of Contract Act*, that where there is no express provisions on the parties' intentions, the Court will have regard to all surrounding circumstances and imply a contract as per the parties' conduct, that in this case, and the conduct of the parties demonstrated an intention to create binding legal relationship. He cited various foreign authorities and also the local case of Ali Abdi Mohamed vs. Kenya Shell & Company Limited [2017] eKLR.

Determination

21. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court and draw its own conclusion. In the case of Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212, for instance, the following was stated:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

22. Although there are 10 grounds of Appeal raised, it is clear that the one broad issue that arises for determination in this Appeal is "whether the trial Court properly entered Judgment for the sum of Kshs 440,000/- in favour of the Respondent on the basis of the same being the proceeds of the two dishonoured cheques issued by the Appellant".

23. Regarding dishonoured cheques", Section 47(1) (a) of the *Bills of Exchange Act* provides as follows:

> " A bill is dishonoured by non-payment: - (a) when it is duly presented for payment and payment is refused or cannot be obtained."

24. Section 47(2) then provides as follows:

> " Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder."

25. From the foregoing, it is evident that a cheque is a bill of exchange drawn on a bank payable on demand. Liability of a drawer of a bill is provided under Section 55 of the *Bills of Exchange Act*, in the following terms:

(1) The drawer of a bill by drawing it—

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured, he will compensate the holder or any endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

(2) The endorser of a bill by endorsing it—

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken;

(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements;

(c) is precluded from denying to his immediate or a subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill, and that he had then a good title thereto.

26. By virtue of the provisions above, the Appellant who was the drawer of the dishonoured cheques would, prima facie, be liable to compensate the Respondent for payment. This presumption can only be rebutted if the Defendant is able to show some good reason why the Respondent is not entitled to the payment.

27. Section 55 above was explained in the case of Paresh Bhimsi Bhatia –vs- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported), in the following terms:

> " A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken."

28. Regarding the effect of a "bounced" or dishonoured cheque, in the case of Hassanali Issa & Co v Jeraj Produce Store [1967] 1 EA 555, the Court of Appeal for East Africa stated as follows;

> " The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.'

29. In this case, in its Statement of Defence, the Appellant did not deny that indeed the Respondent approached and informed it that the Respondent (as an Advocate) was acting for the Municipal Council of Eldoret in respect to rate demands for the property known as Eldoret Municipality/ Block 6/6 owned by the Appellant and/or the Appellant's directors and for which land rates arrears was outstanding. The Appellant did not also deny that they agreed with the Respondent that the

Appellant would issue cheques to the Respondent for payment of the debt due to the Respondent's client, Municipal Council of Eldoret. The Appellant did not also deny that pursuant to the above arrangement, the Appellant voluntarily issued the Respondent with the cheques No. 71 and 709 in the Respondent's name and each for Kshs 200,000/-, together with the further two post-dated cheques for Kshs 200,000/- and Kshs 235,000/-, respectively. It is also not denied that the Respondent banked the said cheques No. 71 and 709 and received payment for the value thereof, namely, Kshs 200,000/- for each cheque (totalling Kshs 400,000/-), respectively. It is further not denied that while the said first two cheques totalling Kshs 400,000/- "went through" and were paid, the subsequent two post-dated cheques for Kshs 200,000/- and Kshs 235,000/- were dishonoured with the remarks "refer to drawer".

30. According to the Appellant, the cheques were dishonoured because it stopped or countermanded them for the reason that there was an agreement that the Respondent would issue Receipts from the Municipal Council of Eldoret or from himself for the payments but failed to do so. The Appellant alleged that only after numerous requests to the Respondent to provide Receipts did it eventually stop or countermand the cheques. I however note that the Appellant did not provide any evidence to demonstrate that production of Receipts was a condition precedent for payment of the cheques. I notice further that although the Appellant claimed that it issued numerous requests to the Respondent, the Appellant did not produce or adduce any evidence of such requests. I also note that upon dishonour of the cheques, the Respondent issued the demand letter dated 12/08/2009. There is also no evidence that the Appellant responded to this letter thus lending credence that the denial of the Respondents claim in the Defence may have been an afterthought.

31. I also note that there is no evidence that any rates are still owing for the period in contention. The conclusion is that the same was fully paid on behalf of the Appellant or its directors. Indeed, PW2, an Administration Officer in the Legal Department of the Uasin Gishu County Government (the successor to the Municipal Council of Eldoret) who came to testify pursuant to Witness Summons issued by the Court, produced the "Payment Request for Rates" dated 30/04/2009 relating to the property, L.R. No. Eldoret Municipality Block 6/6 and emphatically confirmed to the Court that there was no claim owing in land rates over the property. This testimony was proof that indeed the Rates Demand had been fully paid. The Appellant or its directors have not alleged that it is they who paid the outstanding rates. Who then paid it on the Appellant's or its directors' behalf, if not the Respondent? The Appellant did not disprove the Respondent's contention that he is the one who paid the same on behalf of the Appellant as per the agreement he had with the Appellant and which payment he made by way of offsetting of his legal fees payable by the Municipal Council.

32. I also observe that it is not in dispute that the first two cheques totalling Kshs 400,000/- were both honoured and paid upon presentation to the bank. Inasmuch as the Appellant denies that the Respondent is entitled to any payment for the entire transaction, curiously, he never sought refund of this part-payment of Kshs 400,000/- whether by demand letter or by filing a counterclaim. Under this scenario, can the Appellant seriously still argue that this initial payment of the 1st and 2nd instalment was lawful but that the 3rd and 4th instalments were not? How can that be the case when it is not denied that all the 4 instalments arose from one and the same transaction? The Appellant's argument amounts to approbating and reprobating at the same time, which is unacceptable.

33. I note that the Appellant has relied heavily on the decision of Mrima J in the case of Muriuki Duncan Mukaburu v Kisao Pharmacy Limited, [2017] eKLR in which, on appeal, the Judge upheld the decision of the trial Magistrate declining to enter Judgment on the basis of dishonoured cheques. That case is however easily distinguishable because first, the Plaintiff in that case, gave conflicting explanations on the reason for the payment and thus came out as not believable, secondly, the Defendant denied receiving any consideration for issuing the cheque and which consideration, the

Plaintiff failed to demonstrate, thirdly, the Plaintiff had delayed to issue a notice of the dishonour until after 4 years later, fourthly, the Advocate who purported to issue the notice did not hold a Practicing Certificate. Further, in that case, there was evidence that the Defendant had stopped payment of the cheques and communicated such stoppage to the Plaintiff but the Plaintiff ignored the communication and defiantly still went ahead to bank the cheque. According to the Defendant in that case, such stoppage was because the parties had agreed that in exchange to issuance of the cheques, the Plaintiff would sign an agreement reducing the arrangement into writing but which agreement the Plaintiff failed to execute. Again, the amount alleged to have been advanced to the Defendant via a Banker's cheque and for which it was alleged that the dishonoured cheques were in refund of, was never proved as the Defendant denied any such advancement and also a copy of such Banker's cheque was never produced in evidence.

34. The Appellant also argued that the learned Magistrate erred in failing to consider the provisions of Section 3(1) of the *Law of Contract Act*. Cap 23 and/or by misapplying the said provision, in failing to appreciate that the alleged contract was illegal and invalid and contrary to public interest, in in failing to appreciate the principle of privity of contract and/or misapplying the said principle and in failing to appreciate the separate legal personality of the Appellant from its director. My observation is that all these matters were never pleaded in the Defence in the first place and could not therefore be properly taken up or canvassed at the trial or at this appeal stage since a party is bound by its pleadings and generally, the Court is obligated to only to determine matters arising out of the pleadings as issues for determination. I will nevertheless still analyze and answer the same.

35. According to the Appellant, under the provisions of Section 3(1) of the *Law of Contract Act*, the alleged rates payment agreement was not enforceable to the extent that it was not in writing. According to the Appellant therefore, the suit was bad for it contravened Section 3(1) above. A similar argument was raised in the Court of Appeal in the case of Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2014] eKLR and determined in the following terms:

> "On illegality and unenforceability of the agreement, Mr Mwenesi submitted that under section 3(1) of the *Law of Contract Act*, the respondent's suit could only have been sustained if, and only if, the agreement upon which it was founded or some memorandum or note thereof was in writing and signed by the 1st appellant who had allegedly entered into the agreement with the respondent.
>
> Section 3(1) of the *Law of Contract Act* provides as follows:
>
> "3.
>
> (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."
>
> Mr Mwenesi further submitted that in the absence of an agreement or some memorandum or note in writing signed by the 1st appellant, the alleged agreement was unenforceable against any of the appellants. Learned counsel urged that the agreement between the respondent and the 1st appellant, being oral, was contrary to statute and thus unenforceable. He cited PATEL VS SINGH, (No 2) (1987) KLR 585, for the proposition that a contract entered into contrary to the provisions of a statute is void ab initio and unenforceable.

The holding in NAPIER VS NATIONAL BUSINESS AGENCY LTD, (1951) 2 ALL ER 264 that an agreement that is contrary to public policy is equally unenforceable was also relied upon. Learned counsel also relied on the judgment of this Court in MACHAKOS DISTRICT CO-OPERATIVE UNION LIMITED VS PHILIP NZUKI KIILU, Civil Appeal No. 122 of 1997 where, relying on section 3(3) of the *Law of Contract Act*, the Court declined to enforce an unwritten contract by declaration or specific performance. PARAMOUNT BANK LTD VS QUREISHI & ANOTHER, (2005) 1 KLR 730 was cited as authority for the proposition that a court of law will not sanction an illegality.

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There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the *Law of Contract Act* is one such provision. The origin of this provision has been traced to section 4 of the Statute of Frauds, 1677, whose object was to prevent fraudulent claims based on perjured evidence and to protect guarantors, (See G. H. TREITEL, LAW OF CONTRACT, 10th edition, Sweet & Maxwell, Page 161-170). Section 3(1), therefore, applies where the defendant has guaranteed the creditor that he shall answer for the debtor's debt should the debtor fail to pay. In such a situation, the guarantee agreement between the creditor and the defendant must be in writing or witnessed by some note or memorandum in writing and signed by the parties. (See also AGRICULTURAL FINANCE CORPORATION & ANOTHER VS KENYA ALLIANCE INSURANCE CO LTD & ANOTHER, (2002) 1 KLR 231 where the High Court held that S 3(1) of the *Law of Contract Act* applies to suits founded on contracts of guarantee or surety).

In the present appeal, the 2nd appellant was not strictly speaking a guarantor to the debt of the 1st appellant. Consequently section 3(1) of the *Law of Contract Act* cannot be invoked, let alone be read as the appellants invite us to do, to create a universal requirement that to be enforceable all agreements must be in writing or evidenced by some written note or memorandum signed by the parties to the agreement. There is nothing in section 3(1) to require that for the agreement between the respondent and the 1st appellant to be enforced as against the 1st appellant, the same must be in writing or witnessed by a note or memorandum signed by the parties."

36. The authority above therefore lays to rest the Appellant's argument that the agreement is unenforceable simply because it was not reduced into writing. The conclusion to draw from the above authority is that applicability of Section 3(1) of the *Law of Contract Act* is limited to guarantees, and only requires that a guarantee agreement be in writing. An agreement such as the one cited in this matter therefore need not be in writing for it to be enforceable. The fact that the agreement herein was not in writing did not therefore make it unenforceable.

37. On privity of contract and separate personality or legal entity, Counsel for the Appellant argued that there was no privity of contract between the parties since the agreement was as between the Respondent and Mr. Amit Aggarwal (a director) whom the Respondent did not sue. According to Counsel, notwithstanding that the cheque was issued by the Appellant, the same could not imply privity of contract. In regard to this argument, the Court of Appeal in the case of Emco Plastic International Ltd v Freeberne [1971] EA 42 as follows:

> "...someone had to represent the appellant company in the conduct of its business, particularly at the initial period, and such person must surely have authority to bind the

> appellant company. Thus a third party dealing with the appellant company was entitled to assume that there was authority on the part of that person to bind the appellant company. The question as to whether or not the Articles of Association or a resolution of the board empowered the Chairman or any other director to enter into a contract binding the appellant company was not a matter into which a third party should have inquired as long as he acted on a representation that the Chairman or director had authority to bind the appellant company.
>
> In my view, it is immaterial whether [the director] had authority to enter into the contract. The appellant company cannot repudiate the actions of the Chairman/director done within the scope of this ostensible authority."

38. On the ground that the contract was illegal or invalid or contrary to public interest, Counsel did not sufficiently submit on this and I will not therefore belabour the point. In any event, I am unable to discern evidence of any such illegality or invalidity or anything done contrary to public interest as regards the contract.

39. The above holding therefore affirms the general rebuttable rule that a contract made between a third party and a director acting under the implied or ostensible authority of a company is binding on the company and that the third party is therefore not obliged to enquire whether the Articles of Associations were complied with or whether resolutions of the board were made to that effect. This is the general rule and which in this case, the Appellant has not presented any material to rebut. The cheque having been issued by the Appellant, I cannot therefore accept Counsel's argument that the same did not bind the company (Appellant).

40. In conclusion, as stated in the case of Hassanali Issa & Co v Jeraj (supra), where a suit for payment of money is based on a dishonoured cheque and issuance of the cheque is admitted, the onus is on the Defendant to demonstrate circumstances which would disentitle the Plaintiff to a judgment to which otherwise he would be entitled. In view of the matters aforesaid, I am satisfied that the Appellant failed to discharge the onus of demonstrating the existence of such circumstances that would disentitle the Respondent to a judgment.

41. In the circumstances, I am satisfied that the Appellant issued the dishonoured cheques in satisfaction of the debt owing to the Respondent. In my view, the Appellant did not demonstrate the existence of any grounds that would disentitle the Respondent to payment upon presentation. In the circumstances, I find that the trial Magistrate did not err in entering Judgment based on the two dishonoured cheques.

Final Orders

42. The upshot of my findings above is that this Appeal fails. Accordingly, it is dismissed in its entirety with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Ms. Odwa for Appellant

N/A for Respondent

Court Assistant: Brian Kimathi