



Trustees, Nzoia Sugar Co Ltd Staff Retirement Benefits Scheme 2007 v Makhanu t/a Architects N Systems (Civil Appeal E088 of 2023) [2024] KEHC 9923 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E088 OF 2023**

DK KEMEL, J

JULY 29, 2024

BETWEEN

**THE TRUSTEES, NZOIA SUGAR CO LTD STAFF RETIREMENT BENEFITS
SCHEME 2007 APPELLANT**

AND

**CHRISTOPHER NYONGESA MAKHANU T/A ARCHITECTS N
SYSTEMS RESPONDENT**

*(Being an appeal against the Judgment of the Chief Magistrate's
Court at Bungoma by Hon. Maundu, delivered on 1st August 2023)*

JUDGMENT

1. By an amended Plaint dated 24th April 2017, the Plaintiff/Respondent herein instituted a suit against the Defendant/Appellant herein claiming Kshs. 12, 487,500/= plus taxes applicable, costs and interest.
2. The Plaintiff/Appellant averred that in the year 2012 he was retained by the Defendant/Respondent herein for proposed construction of 72 residential flats on land reference number 15720 in Bungoma Municipality. The Chairman of the Defendant/Appellant gave verbal instructions to the Plaintiff/Respondent herein to prepare a design for 72 new flats but which was later changed to 48 flats in order to accommodate the Defendant/Appellant's budget.
3. The Plaintiff/Respondent alleged that he was later locked out of supervising the said construction and that he instituted the suit in the lower Court claiming instruction fees for professional architectural design services rendered as per the *Architects and Quantity Surveyors Act* (CAP 525).
4. On 10th May 2016, the firm of M/S Kiarie & Company Advocates entered appearance on behalf of the Defendant/Appellant herein.



5. In denying the Plaintiff/Respondent's claim, the Defendant/Appellant filed its statement of defence dated 28th May 2016, which was amended on 30th March 2023. While admitting the names and description of the parties, the Defendant/Appellant denied all the allegations as contained in the amended Plaintiff.
6. The Defendant/Appellant averred that it never placed the Plaintiff/Respondent on retainer during the year of 2012 or any other time over a proposed construction of residential flats on land parcel No. 15270 in Bungoma Municipality; that in the alternative, they retained the services on the National Housing Corporation which, at that time was the employer of the Plaintiff/Respondent herein, over the proposed residential houses. Further, the Defendant/Appellant duly paid the National Housing Corporation for the services rendered and that the services rendered by the Plaintiff/Respondent were in his capacity as an employee of the National Housing Corporation.
7. The Defendant/Appellant averred that it denies liability to the Plaintiff/Respondent for Kshs. 12, 487,500/= as he never rendered any professional services over the construction of the flats. The Defendant/Appellant urged the Court to dismiss the suit as it was an abuse of process.
8. At the hearing, the Plaintiff/Respondent testified in support of his case. The Defendant/Appellant did not offer any evidence to substantiate the claims made in its amended defence (the defence).
9. The Plaintiff/Respondent who testified as PW1 adopted his written statement and his list of documents dated 21st March 2016 as his evidence-in-chief. His documents were produced in Court as PEXH. 1-14 as per the list. He testified that that he is an architect by profession and that he trades as Architect N-Systems. He denied the contents in the Defendant/Appellant's defence. According to him, he was employed by Pension Fund and not NHC as alleged and referred the Court to PEXH. 7 which indicates the architect as Architect N-Systems. He told the Court that he is the proprietor of Architect N-Systems as per the availed PEXH. 11.
10. On cross-examination, he told the Court that he had an oral contract with the Defendant/Appellant and that he only worked with NHC from 2002-2019. He insisted that the Defendant/Appellant did not pay NHC to offer architectural services for this particular project. He referred the Court to PEXH. 9 and 10 which testified to the work he did.
11. On re-examination, he told the Court that the Defendant/Appellant approached him vide its Chairman and that in his profession he is allowed to receive oral instructions as payments are subject to the dictates of CAP 525.
12. At the close of the Plaintiff/Respondent's hearing, as stated earlier, the Defendant/Appellant did not offer any evidence and at the close of the hearing, the parties filed written submissions. Based thereon, the learned trial magistrate by a judgement dated 1st August 2023, held that the Plaintiff/Respondent had proved his case on a balance of probabilities and proceeded to award him the Kshs. 12, 487,500/= plus taxes applicable, costs and interest.
13. Aggrieved by the said decision, the Defendant/Appellant herein has lodged this appeal in which it is challenging the said award on the following grounds: -
 1. The learned magistrate erred in law when he delivered a judgement that offended the provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010.
 2. The learned magistrate erred in law and fact when he made a judgement in an ambiguous and unequivocal terms.



3. The learned magistrate erred in law and fact when he found that the Plaintiff's evidence was unchallenged since the Defendant did not offer any defense yet there was a defence on record and that the evidence was challenged during cross-examination.
4. The learned magistrate erred in law and fact when he found that the Plaintiff had proved the existence of an oral agreement with the Defendant for Kshs. 12, 487, 500/=.
5. The learned magistrate erred in law and fact when he awarded Kshs. 12, 487,500/= without evidence of the Plaintiff's performance of his obligations under the alleged contract.
6. The learned magistrate erred in law and fact when he failed to appreciate the evidence presented in the pleadings and failed to apply the relevant applicable legal principles to the evidence on record.
7. The learned magistrate erred in law and fact when he awarded Kshs. 12, 487,500/= to the Plaintiff against his own admission of not having supervised the construction.
8. The learned magistrate erred in law and fact when he awarded Kshs. 12, 487,500/=without any basis as to how the amount was arrived at.
9. The learned magistrate erred in law and fact when he failed to frame and determine all the issues brought before the Court, which led to a miscarriage of justice.
10. The learned magistrate erred in law and fact when he took into consideration submissions filed by a firm not properly on record and therefore a stranger to the proceedings.
11. The learned magistrate erred in law and fact when he decided based on presumptions rather than facts.
12. The learned magistrate erred in law and fact when he decided against a non-existent legal entity.
13. The learned magistrate erred in law and fact by opening the pleadings by allowing an amended defence then proceeding with the hearing.
14. The Appellant prayed that this appeal be allowed, the judgement of the trial Court be set aside and that this Court renders a judgement dismissing the Respondent's claim with costs to the Appellant.
15. The first appellate Court should evaluate the evidence afresh and make its own conclusions, albeit it must bear in mind that it neither saw nor heard the witnesses first hand. (See *Selle & Anor -vs- Associated Motor Boat Co. Ltd* [1968] EA 123).
16. Directions were given that the appeal be disposed of by way of written submissions. Both parties duly complied.
17. After carefully considering the pleadings, the evidence adduced by the Plaintiff/Respondent, the comprehensive written submissions made on behalf of the parties herein, i find that the only issue for determination is whether this Court can interfere with the finding of the lower Court.
18. First and foremost, on the ground whether the Plaintiff's evidence was unchallenged since the Defendant did not offer any defense yet there was a defence on record and the evidence was challenged during cross-examination, it must be noted that pleadings are not evidence. This was duly appreciated in *Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989* where it was held that the Court cannot be guided by pleadings since pleadings are not evidence and nor can they be a substitute therefor. Before that, the then East African Court of Appeal held in *Mohammed & Another vs. Haidara* [1972] E.A 166 where it was held that the contents of a plaint are only allegations, not



evidence. According to *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997*, where a Defendant does not adduce evidence the Plaintiff's evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835*, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

19. What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*, Lesiit, J (as she then was) citing the case of *Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998* appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

20. Again, in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001* the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

21. This simply means that the effect of the Defendant/Appellant not calling evidence to challenge a Plaintiff's testimony renders not only the Defence unsubstantiated but also leaves the Plaintiff's case unchallenged.

22. Based on the Appellant's grounds of appeal numbers 3,4,5 and 6, it is unfair to the Court to just throw all manner of documents at the Court by way of pleadings and submissions and expect the Court to decide which ones to rely on and which ones to discard since as was appreciated by Ringera, J (as he then was) in *Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001*:

“...the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant's state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise.”

23. The same Judge in *Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989* held that:

“Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident.”



24. On the ground of appeal no. 10, submissions, with due respect, do not amount to evidence unless expressly adopted as such. A perusal of the lower Court judgement does not show any evidence that the learned magistrate relied on the Plaintiff/Respondent's submission, that apparently were drafted by a party not properly before the Court. It is imperative to note that as observed above and as guided by the aforesaid authorities, that submissions are not evidence on which a case is decided. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party.
25. On allowing the Defence to amend its pleadings then proceed with the hearing, Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court as follows: -
- (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
26. Further, Order 8, Rule 5 gives the Court the general power to amend.
5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
- Subject to the Court proceedings dated 4th April 2023, the Plaintiff/Respondent's counsel suggested that the Appellant could proceed and pay for the draft Amended Defence and thereafter the matter does proceed. The Appellant's counsel indicated that they were not ready to proceed to which the learned trial Magistrate declined to grant the adjournment and declared that the matter proceeds.
27. On the failure by the learned magistrate to adhere to the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010, i take the following view of this issue. The form and contents of a judgment is provided for under Order 21 Rule 4 of the Civil Procedure Rules, 2010 which provides in clear terms that:
- “Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason for such decision.”
28. Order 21 Rule 5 provides that a Court shall state its decision on each issue. It should capture all relevant arguments made in the case in a concise and clear manner. But, again, i hasten to add that a severely restricted summary or precise manner of the parties' arguments may serve an altogether different purpose: distortion or omission of pertinent elements of the parties' cases.
29. In my view, judicial writing and decisions should accord with the law; state the parties' case; state the issues, determine the issues and reasons thereof; and, effectually and completely determine the dispute. But, there is another aspect of judgment writing; communication, effective communication: every sentence must carry the reasoning forward in a manner which creates and keeps legitimate excitement constantly renewed to reach the significant conclusion of the judgment. This avoids much bald and dry judgments.
30. The argument made on this point by the Appellant, does not, therefore, yield any profit to the appeal. This is because the Appellant did not tender evidence and thus it is only the Respondent's evidence that was considered by the trial court. However shallow the contents of the judgement, the same did communicate the final determination of the dispute. The Appellant's attempt to discredit it with a view to benefitting from avoiding being called upon to satisfy the judgement must be resisted.



31. The only argument by the Appellant that deserves evaluation is that the trial magistrate did not list, determine and give effective reasoning behind all the issues in the case.
32. I have perused the judgment. The trial magistrate after perusing the pleadings and the proceedings delved straight into reiterating that the Respondent's claim was unchallenged and thus he had proved his case on a balance of probabilities but failed to give his in-depth reasoning behind the same holding.
33. Reasons are ordinarily embedded in the decision in respect of every issue, and i do not think there is a requirement of law that they be stated separately or on a separate cover entitled "reasons for the decision" unless it was in relation to an ex tempore decision of which reasons were reserved and rendered later and separately or it is an executive summary. The obligation to give reasons for the decision is not merely a common law or statutory requirement, but also has a constitutional dimension within the principle of substantive justice. See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 ('Osmond') and *Wainohu v New South Wales* (2011) 243 CLR 181. Therefore, a decision devoid of reasons is hollow, and cannot be said to determine the dispute effectively and effectually.
34. Whether the reasons are adequate or sufficient, does not, however, envisage a simple answer. It is always a matter of degree in relation to the facts of the case and the nature of the decision. The reasons should nevertheless be clear.
35. The process of reasoning in the judgment charts the path by which the Court arrived at the conclusions in the decision. The trial magistrate stated his finding drawing upon the evidence of the Respondent herein the way he perceived and understood them. He failed to give the factual and legal basis for his findings. These matters will become clear when i shall be discussing the specific finding by the trial magistrate later.
36. On whether this Court can interfere with the holding of the lower Court, it is proper to look at the provisions of Section 3 of the of the *Architects and Quantity Surveyors Act* (Cap 525) ("the Act"), which is as follows:

“

 - “ 1. Subject to the provisions of this Act, no person shall practice under any name, title or style containing any of the words or phrases “architect”, “architecture”, “architectural”, quantity surveyor” or “quantity surveying” unless he is registered under this Act as an architect or a quantity surveyor, as the case may be ...
 2. Any person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence and liable to a fine not exceeding five thousand shillings ...”.

From the above, it is clear that the Respondent is compliant with the law as per his PEXH.1. He availed before the Court his requisite certificate of registration. The Respondent bears the Registration number Arch. No. 970 (A) and practices as “Architect-N Systems.”
37. It is imperative to establish whether there existed a valid contract between the Appellant and the Respondent. As per the exhibits availed in Court, all indicate that instructions were issued by the Appellant to the Respondent to begin the plan designs for the residential flats with payment being made for the drawings and documents by the Respondent. It is essential for this Court to establish that the Appellant did not avail any evidence to controvert that of the Plaintiff (PEXH.2). The Respondent



has proved to this Court that it is his details on the Site Board for this project as per PEXH. 11. Further, PEXH.10 also indicates that the Respondent was the confirmed architect for the project and the advisory by NICA was duly received by the Appellant on 15th March 2013 but on perusal of the record, no response to the same was accorded. The averments by the Appellant that it only retained and paid NHC were not substantiated before the Court as no evidence towards the same was duly availed. I wish to regurgitate my reliance on the case of CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

38. Having established that a contract existed between the parties, i will indulge into whether the Respondent rendered the alleged services in efforts to establish if indeed the contract relation between the Respondent and the Appellant was enforceable. Subject to the availed evidence, the Respondent established that he immediately began the project by advising on conditions of engagement of an architect and the applicable law. He visited the site for analysis, requested for relevant information including mutation maps, ownership documents and proceeded to prepare scheme outline proposal (PEXH. 8). It is also clear as per PEXH.4 that the Appellant was in receipt of a letter from the Municipal Council of Bungoma dated 18th January 2012 commenting on architectural plans as prepared by the Respondent. On perusal of the Appellant’s statement of Defence, it did not refute the fact that the Respondent rendered services in question but its only stand was that the same services were rendered by his employer as an employee of NHC. It is imperative to note as per PEXH 4 and 5 that the Respondent forwarded the drawings to Municipal Council of Bungoma. Further, the site board on the construction site indicated the architects on the project as Architect N-System. The evidence availed by the Respondent was uncontroverted as no contrary evidence was availed by the Appellant to show that no services were rendered by the Respondent.

39. Having established that the Respondent did render the requisite services, it is essential for this Court to determine if the Appellant paid him for the same. According to the Appellant’s defence, it paid NHC all the requisite money as they had contracted NHC and not the Respondent herein. It is clear that a party that seeks to rely on the existence of a set of facts must prove that the said facts exist. This is as per the dictates of Section 107 of the Evidence Act which provides -

“107(1) 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. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

40. In this case, the Appellant did not tender evidence and that witnesses were never called. There was therefore no basis at all upon which a holding that the Respondent was paid could have been made by the trial Court.

41. Having established that there exists a contract, the Respondent rendered services and that he was never paid. This Court moves on to deliberate on the relief sought by the Plaintiff/Respondent. Subject



to PEXH 6, it is elaborate that the Respondent did render services to the Appellant herein and that he prepared drawings necessary for preparation of bills of quantities and hence, the Respondent was entitled to be paid his dues. According to the amended Plaintiff, the Appellant was charged as per revised instructions and that the project was for 48 flats and as per the *Architects and Quantity Surveyors Act*, Part 3 Clause C.2 any architect is entitled to charges of 4.5% of the construction up to submission of detailed design and production. The Respondent prayed for Kshs. 12, 487,500/= plus applicable taxes plus costs and interest.

42. From a perusal of the Respondents documents, it is noted that he is only entitled to 4.5% of the construction of 48 flats. As per PEXH.15, the Respondent did a costing analysis for the construction of 48 flats by the Appellant to a tune of Kshs. 185,000,000/=. This simply means that the Respondent is only entitled to Kshs. 8,325,000/=. Hence, the amount awarded by the trial court was in excess of what was due to the Respondent. To that extent, the said sum must be interfered with.
43. Accordingly, I find that the Respondent proved on a balance of probabilities that there was a valid and enforceable contract between the parties. The appeal partially succeeds to the extent that the award by the trial court for Kshs 12, 487, 500/ is hereby set aside and substituted with the sum of Kshs 8, 325, 000/= plus taxes, costs and interest. As regards costs, I order each party to bear their own costs of the appeal while the Respondent will have full costs in the lower court.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS.29TH DAY OF JULY 2024

D. KEMEI

JUDGE

In the presence of:

Miss Wakoli for Appellant

Bulimo for Khaemba for Respondent

Kizito Court Assistant

