



REPUBLIC OF KENYA



**Whitestone Consulting Agency v Kiarie (Civil Appeal 79 of 2023)
[2024] KEHC 10410 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 79 OF 2023
FN MUCHEMI, J
AUGUST 20, 2024**

BETWEEN

WHITESTONE CONSULTING AGENCY APPELLANT

AND

STANLEY KARANJA KIARIE RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. V. A. Ogutu (RM/Adjudicator) delivered on 22nd March 2023 in Thika Small Claims Court Commercial Claim No. E844 of 2022)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E844 of 2022 arising from a claim of breach of an agreement whereas the respondent paid the appellant Kshs. 200,000/- to assist him in securing a job placement in Poland. The trial court found the appellant breached the agreement and entered judgment in favour of the respondent in the sum of Kshs. 200,000/- plus costs of the suit.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in directing that there existed privity of contract between the parties herein whereas the contract was between Gulfkit International and Stanley Kihui, who are not parties to the suit.
 - b. The learned trial magistrate erred in law and in fact in allowing the respondent's claim, which allegedly arose from a contract and dismissed the appellant's response to statement of claim with costs.



- c. The learned trial magistrate erred in law and in fact in finding the appellant liable and ordering it to pay the respondent Kshs. 200,000/-.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant relies on the cases of Kenya Women Finance Trust vs Bernard Oyugi Jaoko & 2 Others [2018] eKLR; Dunlop Pneumatic Tyre Co. Ltd vs Selfridge & Co. Ltd [1915] AC 847 and Agricultural Finance Corporation vs Lengetia Ltd (no citation given) and submits that the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. The appellant argues that an exception to the privity rule suffices where the contracting parties clearly intended to benefit a third party from their agreement and the third party would be able to rely on and or enforce the agreement if it is not carried out properly.
5. The appellant submits that the respondent filed a Statement of Claim indicating that he approached the appellant seeking assistance in getting a job in Poland. Subsequently, the parties agreed on a professional fee of Kshs. 450,000/- where the respondent's father in law, Mr. Stanley Kihui made a deposit of Kshs. 200,000/- to the appellant via a cheque drawn in favour of Gulfkit International Limited which is the bank account name the appellant has allegedly instructed the respondent to pay into.
6. The appellant argues that they and the respondent are not privy to the contract as the respondent did not make the alleged deposit of Kshs. 200,000/- as the same was done by Stanley Kihui. During the hearing at the trial court, the said Stanley Kihui testified on behalf of the respondent and he testified that he wrote a cheque of Kshs. 200,000/- in favour of Gulfkit International Limited which company was referred to him by Janet and Mercy who are employees of the appellant.
7. The appellant further submits that the respondent nor his witnesses adduced any evidence to demonstrate that the said Janet and Mercy were acting on behalf of the appellant. Furthermore, the appellant argues that the said Stanley Kihui and Gulfkit International Limited are not parties to the suit and therefore this contract cannot be enforced against the appellant.
8. The appellant submits that it is a company registered under the laws of Kenya and is therefore a separate legal entity from its directors. Relying on the cases of Multichoice Kenya Ltd vs Mainkam Ltd & Another (2013) eKLR; Kolaba Enterprise Ltd vs Shamsudin Hussein Varvani & Another (2014) eKLR; China Wu Yi Company Ltd vs Edermann Property Ltd & 2 Others (2013) eKLR, the appellant submits that in the suit herein, no evidence has been adduced for the lifting of its corporate veil. Thus the respondent cannot purport to sue and enforce a contract against the appellant, a party that was never a party in the transactions and neither could the appellant be sued on a contract which it was never a party to.
9. The appellant relies on the case of Midlands Gem Limited & Another vs Airspace Forwarders Limited & another [2016] eKLR and submits that a third party has no locus standi to sue on a contract. Therefore the appellant argues that no court of law can rewrite a contract for parties and imply that parties were never a privity to a contract.
10. The appellant relies on the case of Football Kenya Federation vs Kenya Premier League Ltd [2015] eKLR and submits that necessary parties before the court are the ones that confer jurisdiction to the courts to determine a dispute and when proper parties are not before the court, the court lacks jurisdiction to hear and determine a dispute.



The Respondent's Submissions

11. The respondent submits that he approached the appellant, a family friend and neighbour hence well known to him, seeking a job in Poland which the appellant promised to deliver. The parties negotiated a fee of Kshs. 450,000/- with a down payment of Kshs. 200,000/-. The respondent states that the appellant provided an account, which to his surprise was a different company. Nevertheless, the respondent submits that he obliged but for purposes of averting any risk which eventually materialized, his father in law paid through a cheque for future reference.
12. The respondent submits that he issued cash to his father in law who then drew his own cheque of similar amount in favour of the advised account namely Gulfkit Ltd. The respondent further submits that the cheque was delivered to the appellant's office and it cleared 2 days later, evidence that the cheque was deposited by the appellant.
13. The respondent submits that the appellant proceeded to furnish him with the paperwork which included the letter of offer from Poland as well as interview appointments and visa applications. The respondent states that it was not until he went to confirm with the Polish embassy on the progress of his visa application that he was informed that there was no document indicating that he had applied for a visa.
14. The respondent argues that the appellant is a company dealing in the business of outsourcing jobs abroad and he was desirous of obtaining a job abroad thus he engaged the company for a job opportunity in Poland at a consideration of Kshs. 450,000/- out of which he paid a deposit of Kshs. 200,000/- vide their sub agent as directed by the appellant, a fact that was admitted by the appellant in its Response to Statement of Claim.
15. Upon receipt of the deposit, the respondent states that the appellant invited him for an interview and proceeded to issue documents purporting to have procured a job opportunity in Poland. The respondent argues that the appellant did not controvert the said documents as annexed in his list of documents.
16. Relying on the cases of Bakshish Singh & Brothers vs Panafric Hotels Limited [1986] KLR and Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another (2015) eKLR, the respondent submits that he and the appellant are the contracting parties. Further that Gulfkit Ltd was a stranger to the respondent and there was no formal or informal contract and no contractual obligation from Gulfkit Ltd.
17. The respondent relies on the case of Ukwala Supermarket vs Jaideep Shah & Another [2022] eKLR and submits that the appellant was sued in its capacity as a company with the proper legal entity and no corporate veil was lifted. Further, there is no demonstration that the directors or shareholders of the company were sued individually or collectively, save for the statements by the respondent and his witnesses where persons who engaged with him have been mentioned. The respondent further relies on the case of H. L. Bolton (Engineering Co.) Ltd vs T. Graham & Sons Ltd [1956] 3 ALL ER and submits that no veil of incorporation was lifted and urges the court to find that the rightful party has been sued.
18. Relying on Section 107 of the *Evidence Act* and the cases of Evans Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR; William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526 and Bridgestone Pty Ltd vs Smith & Associates Far East Ltd (no citation given), the respondent submits that he proved his claim by adducing offer letters, other documents sent by the appellant and WhatsApp correspondences between him and the appellant. Further, the appellant through its sole



witness confirmed to having a working relationship with an entity called Gulfkit Ltd and that the appellant was a sub agent.

19. The respondent further submits that the appellant acknowledged he paid to it Kshs. 200,000/-. Furthermore, the respondent argues that the inconsistency of the appellant's witness cast doubt as to whether they were being genuine. The trial magistrate rightfully observed the inconsistencies of the appellant's pleadings as well as their witness testimony and found the appellant negligibly honest.

Issue for determination

20. The main issue for determination is whether the appeal has merit.

The Law

21. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

22. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated 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.

23. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

24. This degree of proof is well enunciated in the case of *Miller vs Minister of pensions* [1947] cited with approval in *D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati* [2014] eKLR where the court stated:-

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 the tribunal can say 'we think it more probable than not', thus proof 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' explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

25. It is trite law that he who alleges must prove. 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.

26. The appellant argues that pursuant to the doctrine of privity of contract, it cannot be sued as it was not a party to the agreement which was between Gulfkit International Limited and Stanley Kihui. From the record, it is the respondent's case that he approached the appellant, who was well known to him as a family friend and neighbor, to assist him in getting a job in Poland at a consideration of Kshs. 450,000/- out of which he paid Kshs. 200,000/- vide a cheque drawn to Gulfkit International Limited as advised by the appellant. On further perusal of the pleadings it is evident that the appellant and the respondent had entered into an agreement and Kshs. 200,000/- was paid to the appellant for the purposes of securing necessary documentation in the respondent's favour. The respondent further adduced evidence in form of WhatsApp communication with one Mercy Njeri Ng'ang'a, a director of the appellant company, showing that the parties were communicating about the job application in Poland. Notably, the appellant's witness did not controvert the said WhatsApp correspondences during the hearing although in her pleadings, the appellant claimed that she did not know the respondent.
27. The record further shows that the appellant's witness admitted to having a relationship with Gulfkit International Limited which she testified was one of sub agents of the appellant. From the WhatsApp correspondences produced by the respondent it is clear that the appellant knew of Gulfkit International Limited and had a working relationship with them. It was the appellant who directed the respondent to pay the funds to Gulfkit International Limited. That notwithstanding, the respondent led evidence through its witness CW3, that he wrote a cheque to Gulfkit International Ltd as advised by the appellant and the cheque cleared after three days, which was not a coincidence. It is evident that the cheque was cleared and received by the recipient.
28. The respondent adduced evidence that he and the appellant entered into a contract and payment was made on the appellant's instructions to Gulfkit International Limited. The said funds were received and the respondent was advised to wait for processing of the Visa to travel to Poland to work. Furthermore, the appellant admitted that they were sub agents of Gulf International Limited. It is my considered view that the contracting parties to the contract were the appellant and the respondent. The appellant failed to make good his part of the agreement and cannot escape liability for breach.
29. The appellant has further argued that it is a company registered under the laws of Kenya and thus being a separate legal entity ought to be sued in its own capacity and no corporate veil ought to be lifted. The appellant seems to be misguided by the definition of the concept of lifting the corporate veil. The law is clear that a company is a separate legal entity or person from that of its directors, shareholders, subsidiary and parent companies. Lifting the corporate veil means disregarding the separate personality of a company and finding the directors or shareholders directly liable. As demonstrated in the case



of *Salomon & Co Ltd vs Salomon* [1897] A.C. 22 H.L as cited with approval in the case of *Kolaba Enterprise Ltd vs Shamsudin Hussein Varvani & Another* (2014) eKLR where the court stated:

A company is a different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.

31. I have perused the proceedings of the Small Claims Court. It is clear that the respondent sued the appellant company and not the company's directors. As such, the issue of lifting the corporate veil does not arise. The court below found that since the funds were paid to Gulfkit International Limited who was a sub-agent of the appellant and who was introduced to the respondent by the appellant, it follows that the appellant was liable to refund the amount in case of the failed agreement. It is noted that there was never a meeting of the minds of the respondent and the said Gulfkit International. The oral agreement which was supported by evidence was between the respondent and the appellant and as such, the two were the parties to the contract.

Conclusion

32. It is my finding that the respondent proved its case against the appellant and that the small claims court rightly found the appellant liable.
33. I find this appeal lacking merit and it is hereby dismissed.
34. The respondent shall have the costs of appeal.
35. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 20TH DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

