



REPUBLIC OF KENYA



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Tumaz and Tumaz Enterprise Ltd v Lanemark Commercial Enterprises Limited (Civil Appeal E018 of 2021) [2024] KEHC 15330 (KLR) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E018 OF 2021
AC BETT, J
NOVEMBER 29, 2024**

BETWEEN

TUMAZ AND TUMAZ ENTERPRISE LTD APPELLANT

AND

LANEMARK COMMERCIAL ENTERPRISES LIMITED RESPONDENT

(Being an appeal from the Judgement and orders of Hon. F. Makoyo (Senior Principal Magistrate), in Butere CMCC. No. 108 of 2018 delivered on 27th day of January 2021)

JUDGMENT

1. By a memorandum of appeal dated 18th March 2021, the Appellant appealed against the Judgement and orders of the trial court and set out its grounds of appeal as follows:-
 1. That the learned Honourable Magistrate erred in both law and fact by finding that the Plaintiff had established its claim against the Defendant for a sum of Kshs. 2,694,720.00 (Two Million, Six Hundred and Ninety-Four Thousand Seven Hundred and Twenty Shillings Only) without providing sufficient evidence of successful deliveries.
 2. That the learned Honourable Magistrate erred both in law and fact by misapprehension and misunderstanding of the facts as presented by the parties before him and more particularly the Appellant thereof.
 3. That the learned Honourable Magistrate erred both in law and fact by finding that the Defendant admitted its indebtedness yet there was nothing of that sort.
 4. That the learned Honourable Magistrate erred both in law and fact when he failed to render a determination premised on the correct facts.
 5. That the learned Honourable Magistrate erred in law and fact by reaching a determination premised on the wrong interpretation of the facts.



2. The appeal arises from a claim for settlement of the sum of Kshs. 2,900,000/= arising from an agreement dated 7th November 2017 wherein the Respondent was to supply round poles to the Appellant and which the Respondent did supply. The Respondent claimed that despite demand and notice of intention to sue, the Appellant failed to pay the purchase price for the poles as agreed whereof the Respondent was constrained to file suit by way of plaint on 1st November 2018.
3. In defence to the Respondent's claim, the Appellant filed a defence in which it denied the Respondent's claim. It further stated that the suit had been filed in contravention of clause 17 of the LPO which called for arbitration. It further stated that its payment was pegged on a completion certificate and hand over which had not been done. The Appellant also averred that the delay in payment was a result of noncompliance by the Respondent and not its decline.
4. After hearing the parties, the trial court found that the Respondent had proved its claim and entered judgement in its favour for the sum of Kshs. 2,694,720/= plus costs and interest. The Appellant was dissatisfied by the decision of the trial court and filed this appeal in which it urges the court to allow the appeal and set aside the Judgement of the trial court.

Appellant's Submissions

5. The Appellant submits that the gravamen of its appeal is that the trial court condemned it to pay Kshs. 2,694,720/= without the Respondent proving its case on a balance of probabilities and despite the court lacking jurisdiction. The Appellant therefore puts forward the issues for determination as follows:-
 - (a) Whether the trial court had the jurisdiction to entertain the Respondent's suit.
 - (b) Whether the Respondent proved its case on a balance of probabilities.
6. It is the Appellant's submissions that the contract between the parties as encapsulated in the LPO contains an arbitration at Clause 17.1 thereof which stipulates that:-

“In the event of any dispute, controversy, or claim arising out of or relating to the LPO, the complaining Party shall notify the other Party in writing thereof. Within sixty (60) days of such notice, both Parties shall meet at an agreed location and attempt to resolve the dispute in good faith. Should the dispute not be resolved within sixty (60) days after such meeting, the complaining Party shall seek remedies exclusively through arbitration administered under the *Arbitration Act* of Kenya, 1995. The number of Arbitrators shall be one. The place of Arbitration shall be in Nairobi, Kenya.”
7. The Appellant submits that the dispute outlined in the Respondent's plaint is within the scope of Section 6 (1) (b) of the *Arbitration Act* and that the suit ought to have been referred to arbitration. The Appellant faults the trial court for raising the issue of jurisdiction in its judgement and failing to render a decision in respect thereof therefore arriving at an erroneous decision. Relying on Section 10 of the *Arbitration Act* that states that no court shall intervene in a matter governed by the *Arbitration Act* except as provided by the Act, the Appellant cites the cases of *Wringles Company (East Africa) -vs- Attorney General & 3 others* [2013] eKLR, *Kenya Airports Parking Services Ltd & Another -vs- Municipal Council of Mombasa* [2010] eKLR and *State -vs- Ollagoruwa* [1992] CSCD 17 and maintains that owing to the presence of the arbitration clause in the agreement, the trial court had no jurisdiction to hear and determine the matter.
8. On the second issue, the Appellant submits that the delivery of the poles was made fifteen (15) days past the delivery date stipulated in the LPO by which time the Appellant no longer had any use for the



poles and rejected the poles and refused to sign the delivery notes. The Appellant contends that in view of the late delivery, it exercised its right to terminate the contract when it informed the Respondent of its acquisition of the desired poles from another supplier. The Appellant further submits that property in goods supplied and delivered only passes to the purchaser once the goods are accepted and delivery notes signed and stamped and in its view, the evidence of the rejection of the goods is the fact that there were no delivery notes before the trial court to show that the goods had been delivered and accepted.

9. The Appellant submits that the Respondent failed to substantiate its allegations or tender tangible evidence in support of its claim that the poles were delivered to the Appellant and that they were accepted and/or signed for by the Appellant. The Appellant contends that the Record of Appeal bears witness that the Respondent only produced invoices and the LPO to show the Appellant's indebtedness and that the said two documents are insufficient to prove the Respondent's claim. The Appellant relies on Section 37 of the *Evidence Act* which states:-

“Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

10. The Appellant therefore maintains that invoices and LPOs alone do not prove delivery of goods and further cites the case of *E.P. Communications Limited -vs- East Africa Courier Services Limited* [2019] eKLR where the Court held that:-

“Therefore, invoices and LPOs alone do not prove delivery or receipt of the goods. The appellant produced two delivery notes. The one dated 9/11/2009 relate to the invoice dated 9/12/09 for Kshs. 135/695/- PW1 stated that the invoice was settled but for Kshs. 995/- that remained unsettled. The other delivery note is dated 6/11/09 and relate to the invoice dated the same date for Kshs. 114,055/-. The delivery note bears the stamp of the respondent as well as a signature of approval. The other invoices dated 23/20/08 and 20/08/09 were not supported by any delivery note or notes to show receipt of the goods stated therein. The Appellant may have supplied the goods, but courts of law act on hard evidence not sympathy or speculation. In the absence of a delivery note or evidence of receipt of the goods, it becomes doubtful whether the goods were delivered.”

11. In addition, the Appellant faults the trial court for arriving at the conclusion that the correspondence between the two parties dated 28th February 2018 and 7th April 2018 amounted to an admission of indebtedness. The Appellant contends that the said correspondences are subject to interpretation as they are far from a plain case of admission. The Appellant relies on the case of *Chotram -vs- Nazari* [1984] KLR 327 and *Agricultural Finance Corporation -vs- Kenya National Assurance Company Limited (In receivership)* [1997] eKLR where the Court held:-

Final judgment ought not to be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion.”

12. It is the Appellant's submissions that it cannot be said that the defence on record or sworn statement of Mr. Evanson Mwale stating that no deliveries were done or evidence adduced is plain admission of indebtedness. The Appellant maintains that the Judgement was therefore erroneous and ought to be set aside.



Respondent's Submissions

13. On its part, the Respondent maintains that the trial court had jurisdiction to hear and determine the claim. While conceding to the presence of an arbitration clause in the contract between the two parties, the Respondent submits that once it filed suit in the lower court, it was incumbent on the Appellant to file an application before the trial court to have the proceedings stayed and the dispute referred to an Arbitrator. The Respondent contends that Section 6 (1) of the *Arbitration Act* upon which the objection to jurisdiction is predicated stipulates as follows:-

“6 (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

- (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
- (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

14. Based on the aforesaid provisions of the *Arbitration Act*, the Respondent submits that once the Appellant entered appearance and filed a defence, it subjected itself to the jurisdiction of the court, and the jurisdiction of the court to hear and determine the issue was invoked. The Respondent relies on the case of Ila P Karia & Another -vs- Bishop Peter Ikatwa Inanga & another [2020] eKLR. The Respondent submits that having submitted to the jurisdiction of the trial court, the Appellant is precluded from raising the issue of jurisdiction on appeal.

15. On the second issued, the Respondent submits that it discharged the burden of proof as contemplated by Section 107 – 19 of *Evidence Act*. It is the Respondent's submission that having adduced evidence in support of its claim, the Appellant in its turn was under duty to adduce evidence to disprove the Respondent's case, which the Appellant failed to do. The Respondent refers this court to Section 3 of the *Evidence Act* which states:-

“The means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity.”

16. The Respondent further submits that it adduced oral and documentary evidence to prove its case and that under the *Sale of Goods Act*, a party is estopped from avoiding contractual obligation and is deemed to have waived its right to rescind the contract where goods are delivered and accepted out of time in discharge of a contract where time is of essence. The Respondent contends that the property in the goods passed to the Appellant upon receipt of the goods and failure to sign delivery notes is not sufficient reasons to avoid payments.

17. This court is duty bound to deal with the issue of jurisdiction in the first instance for it is trite law that jurisdiction is bedrock of legal proceedings. In the case of Owners of Motor Vessel “Lillian S.” -vs- Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) the Court held as follows:-

“...that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.



Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Having dealt with the issue of jurisdiction, the court shall now proceed to determine the other issue raised in the appeal.

18. The Supreme Court in *Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others* [2012] eKLR held that a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law and that the court cannot corrugate itself jurisdiction exceeding that which is conferred by law.
19. The question before this Court is whether the Clause 17.1 of the contract between the parties serves to oust the court’s jurisdiction. Clause 17.1 is couched in clear terms. It was an agreement that in the event of any dispute in regard to the contract for supply of poles, then the dispute would be referred to an arbitrator under the *Arbitration Act*. However, the Respondent opted to file suit in the courts. Having been served with summons to enter appearance, the Appellant was required, under Section 6 (1) of the *Arbitration Act*, to enter appearance and to file a Chamber Summons for stay of proceedings and a referral of the parties to arbitration. The Appellant did not make such an application but proceeded to file its defence, list of witnesses and documents. The Appellant took part in the entire proceedings before the trial court and in its final submissions, did not object to the jurisdiction of the court. By its conduct, the Appellant submitted itself to the jurisdiction of the court.
20. It has been held that a defendant’s admission of the court’s jurisdiction is a bar to the matter being referred to arbitration. In *Kisumuwalla Oil Industries Limited -vs- Pan Asiatic Commodities PTE Limited and Another* [1997] eKLR, the Court of Appeal stated as follows:-

“The parties can of course expressly agree to ignore or disregard the clause. They may also do so by conduct. Once the parties have submitted to the jurisdiction of the court they cannot blow hot and cold and subsequently without consent of each other rely upon the condition precedent in the arbitration clause.”
21. By its conduct, the Appellant acceded and acquiesced to the jurisdiction of the court and is deemed to have waived its right to refer the dispute to an Arbitrator. It was therefore estopped from raising any objection to the proceedings that gave rise to the impugned judgement. The trial court did not address the issue of jurisdiction because the Appellant did not address it in its submissions save to claim that had the Respondent sought arbitration, the issues between them would have been resolved. The trial court did not err in failing to address the issue of jurisdiction for it was moot at that point. In the case of *Martin Otieno Okwach & Charles Ong’ondo Were T/a Victoria Cleaning Services -vs- Kenya Post Office Savings Bank* [2014] eKLR, the Court held thus:-

“Although there was a dispute that was capable of being determined, the same could not be referred to arbitration as the court was now seized of the matter, the Defendant having filed its statement of defence in this matter.”
22. Based on the proceedings in the trial court and the relevant sections of the *Arbitration Act*, I find and hold that the trial court had jurisdiction to hear and determine the Respondent’s claim.
23. This being a first appeal, it is well settled that the duty of a trial court in a first appeal is to re-evaluate and assess the evidence before the trial court and arrive at its own independent conclusion as to whether



or not to allow the appeal while bearing in mind the fact that unlike the trial court, it did not have the benefit of seeing and observing the demeanour of witnesses as they tendered their evidence. This duty was enunciated in *Selle & Another -vs- Associated Motor Boat Co. Ltd & others* [1968] EA 123 and in *Peters -vs- Sunday Port Limited* [1958] EA 424. In the *Selle & Another* case, the Court held:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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...”

In *Peters -vs- Sunday Port Limited* (Supra) the Court rendered itself thus:-

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

24. In regard to the second issue which was whether the Respondent proved its case on a balance of probabilities, it was not disputed that the Respondent was late in delivering the poles. The Appellant, through the written statement of its Chairman Julius Mwale which was produced by his co-director DW1, admitted to taking delivery of 3,298 poles. According to him 2,013 poles were accepted while 1,285 poles were rejected. According to the said Chairman, the said poles were brought in two deliveries of 1,548 and 1,750 poles each. This statement was corroborated by DW1 in his evidence. The Appellant’s concession that it received 3,208 posts as delivered by the Respondent who apart from oral evidence, adduced Delivery Note No. OO1 dated 23rd November 2017 for 1,458 posts and Delivery Note No. OO2 dated 29th November 2017 marked in the original record as part of the bundle of documents produced as P.Exh.1-15 is proof, on a balance of probabilities that the Respondent delivered the said posts to the Appellant.
25. The Appellant contends that an Invoice alone is not sufficient proof of a delivery. However, the records are clear that apart from the invoices, the Respondent adduced delivery notes. The delivery notes are endorsed and signed as having been received by one Henry. Affixed on each of the said delivery notes and invoices are a similar rubber stamp bearing the name of the Appellant company.
26. In its evidence, the Appellant did not contest the documents nor did they state that the person who took delivery was not their employee. Ultimately, I do find that despite the Respondent having failed to perform his obligations within the contractual timeline, it did deliver, and the Appellant did accept delivery of the poles.
27. At the time of hearing of the suit, none of the poles had been returned to the Respondent despite the Appellant’s claim that it had rejected part of the consignment for failing to meet the stipulated specifications.
28. The Appellant did not adduce any evidence oral or otherwise to prove that it had accepted some of the poles while declining others. It did not also adduce any evidence to prove its assertion that it had conditionally accepted the late consignment of 2,013 poles which incidentally was more than the number set out in the LPO, subject to the purchase price being reduced to Kshs. 450/= per pole for which the Respondent was supposed to issue a fresh invoice.



29. In the witness statement dated 7th June 2019 produced by DW1, the Appellant's Chairman Julius Mwale averred that the company had informed the Respondent that its poles would be accepted since the LPO had been cancelled, subject only to the Respondent agreeing to a "fair price after using them and after being invoiced for the poles used". The Chairman did not state exactly what would constitute a "fair price". While admitting that he had written the two letters with a payment schedule based on invoices submitted by the Respondent, the Chairman averred that the letters were written in error and that upon realising the clerical error, the Appellant requested the Respondent to correct the invoices to reflect a fair market price for the poles which were used but the Respondent declined and resorted to harassing them. The Chairman did not attend court to give evidence and so his testimony was not tested by way of cross-examination.
30. DW1, a Director of the Appellant stated that the Appellant was willing to pay the Respondent for 2,013 poles at Kshs. 450/= per pole an averment which was a departure from the Chairman's "fair price". According to him the price of Kshs. 450/= was agreed upon by phone with no written document to prove the agreed review of the purchase price.
31. I have considered the evidence on record and the documents adduced by the parties. It is trite law that the burden of proof in this case was on a balance of probabilities. Simply stated, it means that the court is bound to believe the party whose evidence is more credible than the other. It is also trite that the burden of proof lies on the party alleging that he has a certain right and the onus never shifts to the other party until the party on whom the onus lies discharges his duty.
32. The Respondent in its claim before the trial court averred that in discharge of its obligation under the LPO for the supply of 2,000 poles, it supplied, albeit outside the contractually agreed date, a total of 3,208 poles. According to the Respondent, the Appellant accepted the said poles at Kshs. 800/= per pole which price was inclusive of transport from Kitale. The Respondent averred that the Appellant never requested for a price review and have never returned the poles to them three (3) years down the line. The Respondent produced the LPO, delivery notes, invoices and two letters from the Appellant's Chairman committing the company to pay the sum of Kshs. 2,694,700/=.
33. The Appellant through its Chairman alleged that the said letters contained clerical errors. It also averred that the price of the poles was revised to Kshs. 450/= per pole for 2,013 poles only. Neither the Chairman nor DW1 who said he is the Director and Co-ordinator of the company could state the exact price they had agreed upon with the Respondent. Since the Respondent had laid its claim and adduced evidence, it was the onus of the Appellant to adduce evidence to refute the Respondent's claim. This is position of the law as laid out in Section 109 of the *Evidence Act* which states as follows:-

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The burden of proving that the Appellant had not accepted all the 3,208 poles for which they had been invoiced and whose payment they had committed to twice in writing, lay upon the Appellant. DW1 produced an undated, unsigned work evaluation report in a bid to rebut the Respondent's claim. In Sarkar's Laws of Evidence, 18th Edition 2014 at page 1896, the author states:-

"...the burden of proving a fact rests on a party who substantially asserts the affirmative of the issue and not upon the party who denies it, for negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reason... Until such a burden is discharged the other party is not required



to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party.”

34. Since the burden of proof had shifted to the Appellant, and the Appellant failed to rebutt the Respondent’s case, the court made a finding after carefully analyzing the evidence availed. In Data Centre Limited -vs- High Peak enterprises Ltd [2004] eKLR, the court upheld a Judgement in favour of a supplier despite the purchaser asserting that the goods supplied were inferior and delivered late. The court held that an appellate court should not interfere with the finding of fact by a trial court:-

“Unless is based on no evidence or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion” (See Makube vs Nyamuro (1983) KLR 403).

35. The trial court heard the witnesses and observed their demeanour. She chose to believe the Respondent in entirety. I have re-evaluated the evidence, and I find that the Respondent proved its case to the required standard. It was able to demonstrate that it delivered the poles, which were accepted by the Appellant, and upon being invoiced, the Appellant wrote two letters dated 28th February 2018 and 7th April 2018 respectively in which its Finance Department committed the Appellant company to pay a sum of Kshs. 2,694,700/= to the Respondent for the 2017 deliveries by instalments as specified in the letter.

36. It is settled law that an appellate court should not overturn a trial court’s finding on facts unless the trial court made a clear error, overlooked facts or improbabilities or made a demonstrable and material misdirection. In Mwangi -vs- Wambugu [1984] KLR 453, the Court of appeal held as follows:-

“ A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge’s finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

37. Having found that the trial court analyzed the evidence availed before her carefully, and upon review of the said evidence and consideration of the rival submissions by the parties, I find that the appeal is not merited. I therefore dismiss the said appeal with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF NOVEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Odhiambo holding brief for Mr. Nyachiro for the Respondent

No appearance for the Appellant

Court Assistant: Polycap

