



Huzzan Printer & Stationery Limited & another v National Aids Control Council (Civil Appeal E091 of 2022) [2024] KEHC 14870 (KLR) (Civ) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E091 OF 2022
H NAMISI, J
NOVEMBER 28, 2024**

BETWEEN

HUZZAN PRINTER & STATIONERY LIMITED 1ST APPELLANT

CRISPINE OPONDO 2ND APPELLANT

AND

NATIONAL AIDS CONTROL COUNCIL RESPONDENT

(Being an Appeal against the Judgement of Hon. L. I. Gicheba, Chief Magistrate delivered on 31 January 2022 in Milimani CMCC NO. 61 of 2013)

JUDGMENT

1. This appeal arises from a suit filed by the 1st Appellant against the Respondent and the Attorney General (2nd Defendant), seeking the following reliefs:
 - i. Kshs 3,889,250/=;
 - ii. Interest on (i) above at the market rate of 19% per annum from 30 January 2012 until payment in full;
 - iii. Costs of the suit plus interest thereon;
2. The particulars of the suit are that on 1st November 2011, the 1st Appellant received a Local Purchase order Number 1316 from the Respondent requisitioning for design and printing of 20,000 wall calendars and 2500 desk calendars for the year 2012, which were to be printed and delivered to the Respondent immediately. The total cost was Kshs 3,889,250/=. The 1st Appellant executed the purchase order and delivered the items in two batches, first on 16 December 2011 and then on 22



- December 2011. The 1st Appellant then raised an invoice for the said sum of Kshs 3,889,250/=, which amount was never settled, thus occasioning the suit.
3. The Respondent entered appearance and filed a Statement of Defence and Counterclaim, in which the Respondent enjoined the 2nd Appellant. In its defence, the Respondent averred that the local purchase order was signed as a result of fraud and misrepresentation on the part of the 1st Appellant, who colluded with the 2nd Appellant, who was a former Senior Procurement Officer with the Respondent. The Respondent further averred that from the onset, the contract between the 1st Appellant and the Respondent was entered into fraudulently by the 2nd Appellant, who was acting in cahoots with the 1st Appellant. The 1st Appellant was, therefore, the author of his own misfortune.
 4. In the counterclaim, the Respondent sought the following reliefs:
 - i. That the 1st Appellant's suit be dismissed;
 - ii. Orders declaring the contract entered into between the 1st Appellant and the Respondent for the design and printing of calendars for the year 2012 as void ab initio;
 - iii. Orders that the 2nd Defendant be held personally liable for any losses that might have been occasioned to the Respondent herein;
 - iv. Costs of the counterclaim;
 - v. Any other relief that the Honourable Court may deem fit to grant.
 5. The 2nd Defendant, the Attorney General, also entered appearance and filed a Statement of Defence averring that the national Government of Kenya is neither the procuring entity for the goods and services the subject matter of the suit nor a party to any contract for procurement of the subject goods and services.
 6. In its judgement, the trial court identified three issues for determination:
 - i. Whether the procurement process was flawed;
 - ii. Whether the Plaintiff is entitled to payment of the amount claimed;
 - iii. Cost
 7. The trial court found that the contract between the 1st Appellant and Respondent was void ab initio for reason that it was based on a tender process that was flawed. The court subsequently dismissed the suit against the Respondent, with costs. With respect to the counterclaim, the trial court found that the Respondent had proven its case and judgement was entered accordingly.
 8. Aggrieved by the judgment of the trial court, the Appellants lodged an appeal on the following grounds:
 - i. That the learned Magistrate erred in law and in fact, and totally misapprehended the 1st Appellant's pleadings to the main suit and thereby reached findings that took away the Appellants rights as enshrined in the law of contract and thereby abrogated the 1st Appellant's right under *the Constitution* of Kenya;
 - ii. That the learned Magistrate erred in law and in fact in failing to appreciate or consider very succinct legal points, which were pointed out to her, and supported by the authorities that were binding upon her, and some that should have persuaded her;



- iii. That the learned Magistrate erred in law and in fact in failing to find that the 1st Appellant was not involved in the processes of printing the Respondent's Minutes leading to the introduction of a company known as "huzza Printers" a narrative by the Respondent provoke misrepresentation and mislead the court;
 - iv. That the learned Magistrate erred in law and in fact when she failed to find and hold that the 1st Appellant had won the tender contract that was a restricted tender No. NACC/RT/006/2011-2012 and not tender number NACC/P004/2009-2010 as averred by the Respondent;
 - v. That the learned Magistrate erred in law and in fact by not appreciating; (sic!)
 - vi. That the learned Magistrate erred in law and fact in failing to appreciate that the tender contract was a restricted tender and the funding donor was the World Bank and not the Kenya Government;
 - vii. That the learned Magistrate erred in law and in fact in allowing the Respondents' doctored list of Documents vis-a-vis the alleged tender Committee Minutes showing different tender numbers which are unsupported by law;
 - viii. That the learned Magistrate erred in law and in fact in proceeding to decide on issues not before the court and relying on extraneous matters in dismissing the 1st Appellant's suit, therefore, not exercising her discretion judiciously;
 - ix. That the learned magistrate erred in law and in fact in failing to appreciate the 2nd Respondent's submissions and evident on the record as per the restricted tender and the methods used by the Respondent in giving out an LPO;
 - x. That the learned Magistrate erred in law and in fact in faulting the 2nd Respondent that he was liable to the entire deliberations and recommendation of the entire Tender Committee and bore personal liability;
 - xi. That the learned Magistrate erred in law and in fact in failing to prove collusion as alleged between the 1st and 2nd Appellants herein and relying on other extraneous circumstances;
 - xii. That the learned Magistrate erred in law and in fact in making a finding on the issue of fraud which had not been proved to the required standard as required by law;
 - xiii. That the Learned Magistrate erred in law and in allowing the Respondent's counterclaim as badly drawn and pleaded;
 - xiv. That the learned Magistrate erred in law and in fact in making a finding on the issue of the alleged other company "huzza Printers" was the 1st Appellant and it was a typo error created by the Respondent to defeat justice;
 - xv. That the Honourable Judge erred in law and in fact that in arriving at a decision that had no legal basis and which amounted to a travesty of justice against the Appellants
9. Parties were directed to file written submissions. Both parties filed their submissions.

Analysis & Determination

10. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing



and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123.

11. I have considered the Record of Appeal and respective submissions. I have also analysed the impugned judgement as well as the proceedings.
12. Sections 107, 108 and 109 of the *Evidence Act* provide as follows:
 - 107 (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - 107 (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.
 - 108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 - 109 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.
13. Turning back to the case herein, it was the 1st Appellant's case that they submitted an application for tender to the Respondent. PW1 was called and informed that the company had won the tender, and she was asked to collect her order. It is against this backdrop that the 1st Appellant issued a local purchase order for the design and print work. In proof of their claim, the 1st Appellant produced the local purchase order, the delivery notes, invoices and demand letter.
14. It is not contested that the 1st Appellant designed, printed and delivered the calendars. However, what was disputed by the Respondent was the process through which the 1st Appellant was allegedly awarded the tender and consequently, if there was a valid contract in existence between the parties.
15. On the issue of the tender process, the trial court extensively analysed the prequalification requirements as proved by the Respondent. First, the process was done in 2009. Secondly, prequalifying companies were expected to provide mandatory documents which included the Certificate of Incorporation and Statements of Accounts. In this instance, the 1st Appellant failed at both. For starters, the company was incorporated in 2011, which was two years after the prequalification. This in itself raises questions as to how they were subsequently awarded the tender, yet the company was not in existence at the time of prequalification. Further, as noted by the trial court, two Certificates of Incorporation were produced, each indicating a different year of incorporation and different directors. The 1st Appellant did not provide any clarity on the discrepancy. Additionally, the 1st Appellant did not provide any Statements, which would have been presented at the prequalification stage.
16. The Respondent, on its part, provided documentary evidence to prove that the 1st Appellant was never awarded the said tender. DW1, the head of Procurement, confirmed that the prequalification began in November 2009 and ended in December 2009. A company known as Huzza Printers had submitted and was prequalified by the Tender Evaluation Committee for supply and printing of promotional material. The 1st Appellant's name did not appear in the Respondent's documentation until around July 2011, when the 2nd Appellant, deliberately or inadvertently, omitted the name of Huzza Printers and replaced it with the 1st Appellant in the list of names of recommended service providers presented approved by the Tender Committee.
17. DW1 testified that when the calendars were delivered, some errors were noted. It is at this juncture, when the Respondent tried to contact the 1st Appellant to collect the calendars for rectification that it emerged that the registration details at the Companies Registry were different from those



provided by the 1st Appellant. Two certificates bearing remarkably similar registration numbers, CPR/2009/55069 and CPR/2011/55069, the only difference being the year of incorporation. The Directors were also different, save for Anne Wavinya Mbithe who appeared in both companies.

18. Suffice it to say that the Respondent, who had pleaded fraud in its counterclaim, had discharged its burden of proof to the requisite standard. The matter tilted in favour of the Respondent, both on a test of preponderance of evidence and balance of probabilities. The ball then fell into the 1st Appellant's court to prove that the process was not flawed. The 1st Appellant failed at this. As noted by the trial court, the 1st Appellant did not provide a single document to demonstrate that it applied for and subsequently won the prequalification, much less the tender. Not even a receipt to show that they purchased the tender documents. It, therefore, comes as little surprise that the trial court was persuaded and found that the process was flawed ab initio. Despite claiming that the documents produced were doctored, the 1st Appellant did not provide any evidence to controvert the Respondent's averments.
19. In *Ratilal Gordhanbha Patel Vs Laiji Makanji* [1957] E.A., the Court set the standard of proof for fraud thus;
- “Allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probability is required”.
20. In *Hussamuddin Gulam Hussein Pothiwalla Administrator, Trustee And Executor Of The Estate Of Gulamhussein Ebrahimji Pothiwalla V Kidogo Basi Housing Corporative Society Limited& 31 Others* [2009] eKLR the Court of Appeal stated that:-
- “The law will not allow a party to wriggle out of an agreement freely entered into..... That a court of law cannot re-write a contract between the parties. The parties are bound by their contract unless coercion, fraud or undue influence are pleaded and proved..... save for those special cases where Equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of Equity's function to allow a party to escape from a bad bargain”. (See *National Bank Of Kenya Vs Pipe Plastic Samkolit & Another* [2001] KLR 112.
21. The upshot of the foregoing case is that contracts must be honoured. However, a party cannot seek to benefit from a contract that is the result of fraud, as is the case herein. I, therefore, find that this appeal lacks merit and the same is dismissed. Costs are awarded to the Respondent, assessed at Ksh 40,000/=.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF NOVEMBER 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Mr. Kibathi..... for the Appellants

..... for the Respondent

