



Dragon Fire Protection Limited v African Highlands Produce Co Ltd (Civil Appeal 41 of 2015) [2023] KEHC 1735 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 41 OF 2015
AN ONGERI, J
FEBRUARY 24, 2023**

BETWEEN

DRAGON FIRE PROTECTION LIMITED APPELLANT

AND

AFRICAN HIGHLANDS PRODUCE CO LTD RESPONDENT

*(Being an appeal from the judgment of HON. LIMO B. BENJAMIN(RM)
in Kericho CMCC No. 1066 of 2003 delivered on 4/11/2015)*

JUDGMENT

1. The Appellant Dragon Fire Protection (hereafter referred to as the appellant only) was the Plaintiff in Kericho CMCC 1066 of 2003.
2. The Appellant filed a suit against the Respondent African Highlands Produce Co Ltd (hereafter referred to as the Respondent only) who was the Defendant in the primary suit.
3. The Appellant was seeking a sum of Kshs 602, 396 plus costs which was in respect of a contract entered into between the Appellant and the Respondent for servicing of fire equipment.
4. The Appellants alleged that they serviced fire equipment in several factories owned by the Respondent at an agreed price of Kshs 500,000 plus *VAT* amounting to a total of Kshs 602,390.
5. The work was carried out during the period starting from September 17, 2000 to October 7, 2000.
6. The trial court found that the Appellant failed to provide specific details of the work done and made a finding that the Appellant had failed to prove its case and dismissed the Appellant's case with costs.
7. The Appellant was aggrieved with the judgment of the trial court and filed this appeal on the following grounds;



- i. That, the Learned Magistrate erred in law and in fact in failing to evaluate the evidence adduced by the Appellants on record.
 - ii. That, the Learned Magistrate erred in law and fact by failing to address the relevant issues that were raised by the Appellant.
 - iii. That, the Learned Magistrate erred in law and in fact in not considering the Appellant's evidence adduced at the hearing in his judgment.
8. The parties filed written submissions in the appeal which I have considered.
 9. The Appellant submitted that the Respondent vide a letter dated August 24, 2000 pursuant to the contract between the parties, commissioned the Appellant to carry out firefighting equipment services on the premises of the Respondent.
 10. The Appellant submitted that on diverse dates in the months of September and October 2000 carried out firefighting equipment maintenance and/or services on several premises of the Respondent.
 11. The Appellant submitted that vide invoice dated November 27, 2000 and No 646 requested the Respondent to pay it a sum of Kshs 602, 390/= towards settlement of its fees on account of firefighting maintenance and/or service of equipment of the Respondent to which it declined to pay hence the primary suit and the instant appeal.
 12. The Appellant submitted that the Respondent has not disproved the same and not proven payment to the Appellant under the contract and on account of what service.
 13. The Appellant submitted that it had proven its case on a balance of probability, urged the court to award it Kshs 602,396/=, costs of both the lower court case and the instant appeal together with interest from the date of filing the lower court case.
 14. The Respondent conceded that vide a contract dated April 27, 1998 the Appellant was contracted to inspect and service the Defendant's fire equipment and issue recommendations for repairs where necessary and that inspections were conducted on diverse dates between September and October 2000 which services the Defendant duly paid for in sum of Kshs 301,205.55/=.
 15. The Respondent maintained that the Appellant was only tasked with servicing the equipment and only give recommendations on the defective equipment to be repaired and at no point did the Appellant repair the equipment.
 16. The Respondent submitted that it was perplexed by the arbitrary figure of Kshs 602,390/= that the Appellant was claiming while alleging to charge a sum of Kshs 500/= for each equipment serviced whereas the terms of the contract duly entered into by the parties provided for a sum of Kshs 60/=.
 17. The Respondent contended that the record of appeal presented was fatally and incurably defective for lack of a certified copy of the judgment, a certified copy of the decree and a record of the Plaintiff's submissions as filed before the trial court. The Respondent cited order 42, rule 13 (4) (f) of the *Civil Procedure Rules, 2010* and relied on the following cases to buttress his point the *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR, *Kilonzo David T/A Silver Bullet Bus Company v Kyalo Kiliku & Another* [2018] eKLR, *Paul Karenny Lesbuel v Ephantus Kariithi Mwangi & Another* (2015) eKLR.
 18. The Respondent reiterated that the failure to annex a certified decree and certified judgment of the lower court was fatal and could not be cured by the provisions of Article 159 of the *Constitution of Kenya*.



19. The Respondent maintained that the Trial Court considered all the material placed before it and therefore could not be faulted for considering the merits of what was presented before it to arrive at its decision.
20. The Respondent maintained that the entitled were only entitled to Kshs 310, 205.55/= for servicing and not repairs and therefore the arbitrary figure of Kshs 602, 396/= was tantamount to unjust enrichment.
21. The Respondent contended that the parties herein were bound by the terms of their contract of service entered into on November 27, 1998 and therefore the terms of the contract could not be rewritten or construed unilaterally without the input of either party. The Respondent cited the following cases to support its position *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR & *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR.
22. The Respondent faulted the record of appeal for being incurably defective and asserted that the Appellant had not demonstrated that it was deserving of the orders sought.
23. This being a first appeal, the duty of the 1st Appellate court is re-evaluating the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the advantage of seeing the witnesses.
24. The Court of Appeal in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, stated as follows with regard to the duty of the first appellate court; “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
25. The issues for determination in this appeal are as follows;
 - i. Whether the record of appeal is defective
 - ii. Whether the Appellant proved its case to the required standard
 - iii. Who pays the costs of this Appeal.
26. On the issue as to whether the Record of appeal is defective, the Respondent submitted that the Record of appeal does not contain a certified copy of the judgment and the order or decree appealed against.
27. The Respondent relied on the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others*[2015] eKLR where the Supreme court held that “an incompetent appeal divests a court of jurisdiction to consider factual or legal controversies embodied in the relevant issues”
28. I find that the Respondent raised this issue in the final submissions and the appellant did not have a chance to respond to the same.
29. I also find that the Record of appeal contains the judgment and decree although they are not certified. The appeal had already been admitted and the same can proceed. In *Nyota Tissue Products v Charles Wanga Wanga & 4 Others* [2020] eKLR it was held that:- “The rule applicable to the appeals to the High Court makes provision under Order 42 Rule 13 (f) of the *Civil Procedure Rules* for the filing of a copy of the ‘judgment, order or decree appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the judgment of the trial court according to the requirements of Order 42 Rule 13 (4) (f) of the *Civil Procedure Rules*, and in my respectful view, I would be too draconian to strike out the appeal in these circumstances.”



30. On the issue as to whether the Appellant proved its case to the required standard, I find that apart from giving a list of the premises the Appellant visited, there are no details of the work the Appellant did to deserve the amount of money they are seeking.
31. There is evidence which is not disputed that the Appellant was paid Kshs 310,205.55/= in accordance with the service contract entered into by the parties.
32. I find that the Appellants did not discharge the burden of proof imposed on them by law which is on a balance of probabilities.
33. The trial court was right in dismissing the Appellant's suit. I find that the appeal herein lacks in merit and I accordingly dismiss it.
34. I direct that each party bears its own costs of this appeal.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 24TH DAY OF FEBRUARY 2023.

A. N. ONGERI

JUDGE

