Max TV Plus Limited v Njihia & 4 others (Commercial Appeal E003 of 2023)
[2023] KEHC 21845 (KLR) (Commercial and Tax) (31 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E003 OF 2023

DAS MAJANJA, J

AUGUST 31, 2023

BETWEEN

MAX TV PLUS LIMITED ..... APPELLANT

AND

MBUGUA NJIHIA ..... 1ST RESPONDENT

MEDIAMAX NETWORK LIMITED ..... 2ND RESPONDENT

KEN NGARUIYA ..... 3RD RESPONDENT

ALFRED NJOROGE ..... 4TH RESPONDENT

ROSE MUCHORI ..... 5TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.V.M Mochache, Adjudicator/RM dated 23rd December 2022 at the Small Claims Court at Nairobi SCC Claim No. 4854 of 2022)

JUDGMENT

Introduction and Background

1. This is an appeal against the judgment of the Small Claims court dated 23.12.2022 where the 1st Respondent's ("the Respondent") Claim was allowed and judgment entered in his favour against the Appellant for Kshs. 600,000.00.

2. The Respondent's case was set out in its Statement of Claim dated 05.08.2022 where he averred that in July 2021 he was approached by the Appellant's executive to help promote the Appellant's K24+ platform by offering his professional services as a social media influencer. After preliminary engagements and in-house budgetary approvals, the Appellant and the Respondent entered into a contract for the provision of those services on 18.10.2021 for a monthly fee of Kshs. 200,000.00 ("the

Contract"). The Respondent stated that despite offering his services to the Appellant, the Appellant failed to meet its obligations as it did not pay him. He filed suit seeking judgment for Kshs. 960,000.00, costs and interest.

3. In its response to the Claim, the Appellant denied instructing the Respondent to carry out any known services. It claimed that he had failed to produce any Local Purchase Order, Signed Contract, Agreed Schedule of Works, Pre-agreed contractual amount and/or proof of the alleged service rendered. The Appellant contended that it was unaware of the services allegedly rendered by the Respondent on their respective behalf and that the claim was based on fraudulent correspondence and an attempt towards unjust enrichment.

4. The Appellant further stated that the engagement between the Respondent and its former employee was done at a personal level and that the Appellant did not issue any approved instructions to the Respondent in regard to its K24+ product. The Appellant thus urged the court to dismiss the Respondent's claim. It is noted that the Respondent's suit against the 2nd, 3rd, 4th and 5th Respondents were withdrawn by a consent dated 26.08.2022 and filed on 31.08.2022 thus the only outstanding claim was between Appellant and the Respondent.

5. At the hearing, the Respondent testified on his own behalf (CW 1) and also called another witness, Andrew Endovo Alovi, the Appellant's former employee (CW 2). The Appellant called its Chief Accountant, Alfred Njuguna Njoroge (RW 1) as its witness. After considering the testimony and written submissions, the Subordinate Court rendered its judgment on 23.12.2022.

6. In the judgment, the Adjudicator identified three issues for determination; whether an agreement existed between the Appellant and the Respondent, whether the Respondent offered services to the Appellant and whether the Respondent was entitled to the reliefs sought.

7. The Adjudicator found that the Respondent was engaged by CW 2 who had apparent and ostensible authority to engage him and that CW 2 had authority from the Appellant including a pre-approved budget for the very services that he hired the Respondent. That the fact that the Appellant and its holding company authorized the expenditure clearly showed its intention to retain services of influencers and further affirmed that CW 2 had apparent and ostensible authority to bind the said companies.

8. The Adjudicator held that Appellant was appraised of the ongoing work by the Respondent as evidenced by the email correspondence which was copied to the Appellant's senior and decision-making officials. The Adjudicator also held that notwithstanding the Contract was only signed by the Respondent, the parties proceeded to execute the terms contained therein. That the Respondent was provided with a social media account and log in details and proceeded to offer services and that issues only emerged when payment was sought. The Adjudicator therefore concluded that the agreement was executed by conduct and that the Respondent offered services as evidenced by the fact that the Appellant handed over its log in details and the Respondent made 936 posts. Having reached this conclusion, the Adjudicator held that the Respondent was entitled to Kshs. 600,000.00 as he had worked for three months at a rate of Kshs. 200,000.00 per month.

9. The Appellant has appealed against the judgment grounded on the Memorandum of Appeal dated 18.01.2023. The Respondent has opposed the appeal through his replying affidavit sworn on 17.04.2023. The parties have also filed written submissions in support of their respective positions.

Analysis and Determination

10. The parties are in agreement that this court's jurisdiction is limited to matters of law as provided for under section 38(1) of the *Small Claims Court Act*, 2016 that, "A person aggrieved by the decision or an order of the court may appeal against the decision or order to the High Court on matters of law." This means that that this court is not permitted to substitute the Subordinate Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR and *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* NYR CA Civil Appeal No 48 of 2013 [2013] eKLR).

11. The Appellant submits that the Subordinate Court's conclusion that the Respondent was entitled to a Kshs. 600,000.00 for services offered in a period of 3 undisclosed months is not supported by evidence and the law. The Appellant reiterates that there was no evidence that the Appellant accepted any of the Respondent's proposals and in fact hired the Respondent in any of his proposed positions. That the Respondent failed to produce any confirmation of acceptance of proposals such as an appointment letter, executed contract, Local Purchase Order or an email confirming appointment.

12. The Appellant contends that there was no evidence of the services allegedly rendered by the Respondent including an activity report or statement of account showing the nature and dates when the alleged services were rendered. That there is no commencement date for the alleged services in the contract and that the said 3 months when services were rendered could not be specified. In sum, the Appellant reiterates that the subordinate court's conclusions were erroneous and were not supported by evidence and the law.

13. From the record, it is not in dispute that the engagement between the Respondent and Appellant leading up to the Contract of 18.10.2021 was done by CW 2 who at the material time an employee of the Appellant. Even though the Appellant assailed CW 2's authority to engage the Respondent on behalf of the Appellant, I agree with the Subordinate Court that CW 2 represented to the Respondent that he had authority to engage him and bind the Appellant and the Respondent was entitled to presume that CW 2 had this level of authority.

14. By presenting himself as an employee of the Appellant, CW 2 had ostensible and apparent authority to bind the Appellant as an "apparent agent" which Black's Law Dictionary (9th Ed.), at page 72 defines as "A person who reasonably appears to have authority to act for another, regardless of whether actual authority has been conferred – also termed ostensible agent." Regardless of whether or not he had the authority to enter into a contract, the Respondent rightly believed he had the authority to enter into such a contract (see *Total Kenya Limited v D Pasacon General Construction & Electri Cal Services* KECA 593 (KLR)). The only way the Appellant could be absolved from being bound by such a contract initiated by CW 2 is if the Respondent had knowledge of the limits of CW 2's authority. However, the evidence indicates otherwise and as pointed out by the learned Adjudicator, senior employees and/or officials of the Appellant who apparently had 'real and actual' authority to bind the Appellant were always copied into the email correspondence between the Respondent, CW 2 and other agents of the Appellant. They did not object to the engagement between CW 2 and the Respondent and neither did they disclaim the limits of CW 2's authority.

15. I have also gone through the record to ascertain the Appellant's contention that the Respondent had not performed any services worth Kshs. 600,000.00 and that he was not entitled this amount as urged by the Appellant. The amount of Kshs. 600,000.00 awarded by the Subordinate Court was for three months' services apparently rendered by the Respondent at a cost of Kshs. 200,000.00 per month. This

amount stems from the Contract of 18.10.2021 that was only signed by the Respondent and which the Appellant claimed did not constitute a valid contract between the parties.

16. The Adjudicator was correct to hold that a contract need not be signed or be in writing for it to be binding and that a contract can be inferred from the conduct of the parties. This position was confirmed in *Abdulkadir Shariff Abdirahim and Another v Awo Shariff Mohammed t/a A.S. Mohammed Investment* [2014] eKLR where the Court of Appeal aptly settled this position as follows:

> There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the *Law of Contract Act* is one such provision.

17. In this case, the Respondent made an offer by presenting proposals to the Appellant through CW 2. The Appellant accepted these proposals through CW 2 as per the Appellant's budget lines. The discussions led to the Contract of 18.10.2021 which CW 2, in the email of the same date expressly asked the Respondent to input into the contract the monthly fee as agreed. The Respondent complied and shared the same with CW 2 where it indicated a fixed fee of Kshs. 200,000.00 per month being the consideration. All these facts satisfy the ingredients of a valid contract; an offer, acceptance and consideration and the parties clearly intended to be bound. I therefore reject the Appellant's submission that the contract lacked specifics.

18. The evidence also shows that the parties were corresponding on how the Respondent would engage and build the Appellant's viability and presence on the Twitter platform between November 2021 and February 2022. On 25.02.2022, the Appellant shared its Twitter Log in details with the Respondent and on 30.03 2022 the Respondent attached "the report from posts done on my Twitter handle" and further reported that, "On the larger scope, I have so far managed to pull approximately 1.9 million handles of your Twitter followers from your parent handle. Currently running an analysis to see how each stack up with the agenda to not reach out to anyone below 100 followers, just to manage resources on my end. The database that we had first integrated to for movie and tv series metadata changed their terms at the beginning of the year and we have had to look for a different provider ... and found that alternative. What remains now is to populate the content engine and have it start serving the posts on the K24Plus handle. As there are limits to the number of posts one can do in a day, we are looking at using only 60% of that post capacity. The Appellant, through one of its agents acknowledged this report on the same day.

19. On 20.04.2022 the Respondent gave another update that "I have successfully pulled 2,016,979 records (will not be pulling any more in the foreseeable future) and also moved from the development / staging server to live / production. Yesterday, I pushed some content directly on the handle and it is running beautifully. To reiterate, we are only tagging profiles with 100 users and while the daily post limit is 2,400, it will be overkill to hit that. Working with a post every 10 minutes.". On 11.05.2022, the Respondent issued the Appellant with an invoice for the sum of Kshs. 600,000.00 for "Activation and promotion of the K24 Plus Platform and service through bespoke content posts on Twitter and lead generation emails on a drip campaign" and the date of issue of the invoice is stated as 30.03.2022. On 11.05.2022, the Appellant through its agent informs the Respondent among others that "Once we get the date from our CFO for you to pick your cheques, we will let you know"

20. On 23.05.2022, the Respondent reported that he could not reach the K24+ website and urged the Appellant to check with its technical team or hosts. On 27.05.2022, the Respondent informs the Appellant that his, ".... content engine has lost all API access and I to dashboards. The parameters

that were shared earlier seem to have been changed arbitrarily." What followed was correspondence for payment from among others the Respondent to the Appellant which went unanswered.

21. My review of the evidence and the chronology of the correspondence reproduced above leads me to conclude that there were services done by the Respondent at least between 25.02.2022 when he was granted access to the Appellant's Twitter account and 27.05.2022 when the said access was apparently cancelled. This period is approximately three months and negates the Appellant's argument that the period for when the services were rendered is unclear and that there was no commencement date for the Contract. The evidence clearly shows when the services were rendered and that the Respondent was giving regular updates on the progress of his engagements, which negates the Appellant's argument that there were no activity reports from the Respondent. The Respondent presented an invoice of Kshs. 600,000.00 in relation to the three-month period in which the services were offered to the Appellant. Further, the correspondence by the Appellant's agent of 11.05.2022 that she will inform the Respondent on when to pick cheques was an implied admission that the Respondent's invoice was due and payable.

22. I also dismiss the allegation that the Respondent was involved in illegal and unauthorized data mining as claimed by the Appellant because the correspondence between the parties on 07.02.2022 and 08.02.2022 indicates that the Appellant, through its agent signified approval of the Respondent's alternative method of mining "all the K24 user profiles" should the "Twitter API team keeping stalling".

23. From the totality of the evidence, I find and hold that evidence supported the conclusion by the Adjudicator that the parties were in a contractual relationship as evidenced by the conduct between them and that CW 2 had apparent and ostensible authority to bind the Appellant. Further, that the Respondent offered services to the Appellant for three months and that it was entitled to be paid Kshs. 200,000.00 every month as had been initially agreed between the Respondent and CW 2. Any reasonable tribunal considering the same evidence would come to the same conclusion as the Adjudicator.

Disposition

24. The appeal is dismissed. The Appellant shall pay the Respondent costs assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.