Niletrack Kenya Ltd v Civicon Group Limited (Civil Appeal E028 of 2022)
[2023] KEHC 23153 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23153 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E028 OF 2022

MW MUIGAI, J

SEPTEMBER 26, 2023

BETWEEN

NILETRACK KENYA LTD ..... APPELLANT

AND

CIVICON GROUP LIMITED ..... RESPONDENT

(Being an Appeal from the judgment of Hon. Kasavuli Mavoko CMCC No. 450 of 2020 delivered on 17 th February,2022)

JUDGMENT

Background

Proceedings in the lower court

The Plaint

1. Vide plaint dated 24th June,2020 and filed in court on 25th June,2020 the Appellant herein averred that at all material times relevant to the suit, the Respondent was indebted to the Appellant to the Tune of Kshs 1,097,668.83/=. Averring that on diverse dates between the months of September 2017 and June 2018 the Respondent entered into an agreement with the Appellant to be supplied with array of machine spare parts on credit on the understanding that the said spare parts would be payable within 90 days of delivery. Contending that upon delivery of the said goods the Appellant raised invoices to the Respondent for settlement but the Respondent blatantly refused, ignored and/ or neglected to pay despite numerous and adamant demands from the Appellant to the Respondent to pay to the Appellant a sum of 1,097,668.83/=.

2. Reasons whereof the Appellant prayed for judgment against the Respondent for orders that:

i. The Respondent pays to the Appellant the sum of Kshs 1,097,668.83/= plus cost and interest from 7.6.2018 to date

ii. Costs and interest of (a) above

iii. Any other and/ or further relief that this Honorable court deems fit to grant.

3. Pursuant to a request for judgment dated 10th August,2020 and filed in court on 17th August,2020 the Appellant herein requested for interlocutory judgment against the Respondent who despite having been with summons to enter appearance failed to enter appearance and file defence within prescribed time.

4. An interlocutory judgment was entered and endorsed on 24th August,2020 for the Appellant as against the Respondent.

5. Vide a notice of motion dated 10th November,2020 and filed in court on 18th November,2020, the Respondent/ Applicant sought orders that: notice of motion be certified urgent and heard ex parte in the first instance; pending the hearing and determination of the notice of motion execution of the interlocutory judgment endorsed on 24th August,2020 against the Respondent be stayed and the interlocutory judgment endorsed on 24th August,2020 against the Defendant be set aside and the Respondent be granted leave to defend the suit.

6. The notice of motion was supported by the Affidavit filed in court on 18th November,2020 sworn by Ben Kiilu, the Respondent's acting CEO. It was deposed inter alia that the interlocutory judgment endorsed against the Respondent at the Appellant's request be set aside and for leave of court to defend the suit. Deposing that the outbreak the Covid-19 pandemic saw the Government release various directives to business to allow their employees to work from home in order to contain the spread of the virus. Stating that the Respondent followed the directive and that due to financial constrains directed their employees to proceed on unpaid leave. That he was advised by the Respondent's Advocate that upon perusal of the court files, she established that there is an interlocutory judgment on record that was endorsed by the court on 24th August, 2020 against the Respondent in default of entering appearance and that the said advocate also saw an affidavit of service deponed that Respondent was served with the summons to enter appearance. It was deposed that the Respondent Acknowledged that they were served with summons to enter appearance and attributed the failure to enter appearance within timelines set by law to a regrettable error on part of their employee and the confusing time they were operating under and that the Respondent has Constitutional right to be heard on its defence.

7. The Appellant vide its Replying Affidavit sworn by Dennis Eugene deposed inter alia that the application dated 10/11/2020 was frivolous, vexatious, is an abuse of court process, lacks merit and same ought to be dismissed; that the grounds of application and the facts stated in the supporting affidavit did not warrant the grant of the orders sought and that allowing the said application will only serve to embarrass the Honorable court and prolong litigation.

8. The mater was to proceed for hearing however, the parties reached a consent which was adopted by the trial court as an order that the Respondent/ Applicant file the defence within 30 days from the date of the said consent.

9. The Respondent vide its defence dated 27th January,2021 denying the contents of the plaint averred that it fully honored its obligations towards the Appellant including payment of all uncontested invoices as and at when due. The Respondent denied that it is guilty of the alleged breaches of contract and any allegations of indebtedness to the Appellant. Contending that the Appellant's claim is contrived and without any basis in law and fact and prayed that the suit be dismissed with costs.

Hearing in the Trial Court

10. The Appellant called one witness PW1 Dennis Oganda gave his sworn statement and testified that he had the authority to appear for the Appellant, stating that the case related to a debt owned by Respondent to Appellant. He adopted his witness statement and also relied on the list of documents. He testified that usually the Customer contacts them, they raise performance invoice and the customer receives L.P.O. then they service and a wait for payment. It was PW1 testimony that they issued delivery notes which were received, stamped and signed. 1,097,668.83. stating that they made several demands in vain and that they issue receipts after payment and that they pray for award as per plaint.

11. On cross-examination PW1 testified that they raise performance invoice or quotation. The claimants raises L.P.O and that all these procedures were followed. Stating that they issue delivery notes on delivery of goods and that they were all signed.

12. On Re-examination, PW1 stated that all amounts were owed not only on delivery of parts. Others were services so L.P. Os not raised some were signed (delivery notes) and that they could not have them stamped for instance when a boda boda rider delivers them to the customer.

13. The Respondent called one witness DW1 Geoffrey Njue Muthe who gave his sworn statement and testified that he is a finance manager for the Respondent stating that he knew the Appellant and he is court because the Appellant's claim for about 1,097,000/- against the Respondent. He adopted his witness statement. Testifying that the procedure starts from request, L.P.O, delivery, invoice then payment and having looked at the documents by the Appellant for any payment to be credible, the company must sign for receipts of goods. It was DW1 testimony that he could only see one document to prove delivery. Its delivery document No. 7, stating that others were not liable for payment and that there is no evidence goods were supplied. He testified that there will be delivery note and invoice for payment to be made. The documents must be signed and that there was no corresponding invoice or goods were not supplied that is why no payment was made.

14. On cross-examination DW1 testified that he has been with the Respondent for four (4) years and that they deal with the Appellant in business for 2-3 years based on the documents on record. Stating that they have their clients. He confirmed that all L.P. Os come from Civicon and that Civicon has one main office and it would have offices at various projects and that Civicon has several projects where procured goods would be delivered at. Testifying that there would be representatives at the site to receive and that document 5 is labelled a service report. Stating that he cannot confirm service was done and that he is not aware of any documents showing they paid for all services and goods finally that he is not aware of the demand letter sent to Civicon.

15. The matter was canvassed vide written submissions.

16. Vide a judgment dated 17th February,2022, it was found that the Respondent breached contract and awed the Appellant the sum of KSHS 350,646.01 with interest from 7/6/2018 till payment in full.

The Appeal

17. Pursuant to Memorandum of Appeal dated 9th March,2022, the Appellant sought orders that: part of the judgment dated, signed and delivered on 17th February,2022, decree and consequential orders dismissing the Appellant's claim therein be set aside; Respondent be found liable to pay the rest of the Appellant's claim amounting to Kshs 747,668.83/- and that costs of this appeal be provided for.

18. The appeal is premised on grounds that:

1. The trial court erred in finding that the Respondent had partially proved its case on a balance of probability;

2. The trial court failed to critically analyze the evidence on record and it gave no cogent reasons for rejecting the Appellant's case;

3. That the learned trial Magistrate court erred in law and fact by arriving at a decision that was not based on evidence on record and thus erroneously dismissed part of the Appellant's claim.

4. The Learned Trial Magistrate Court erred in law and fact by not determining that the appellant had proved its case on a balance of probabilities.

5. The Learned Trial Magistrate Court erred in law and fact by failing to appreciate that the Respondent oral testimony on settling invoices was contrary to the evidence they produced before court.

6. The Learned Magistrate erred in law and fact by disregarding the grounds and submissions tendered by the Appellant's counsel on issuance of local purchase orders, raising invoices and submission of delivery notes given the circumstances.

7. The Learned Trial Magistrate Court erred in law and fact by making an order dismissing part of the case against the Respondent.

8. The Learned Magistrate after considering all the evidence and submissions before she arrived at wrong and unjust decision.

19. The matter was disposed by way of written submissions.

Submissions

Appellant's submissions

20. Vide the Appellant's submissions dated 31st January,2023 and filed in court on 3rd February,2023, the Appellant identified the following issues for determination:

    a. Whether the Appellant had proved it case on the balance of probabilities.

    b. Whether the Respondent is indebted to the Appellant to the tune of Kshs 747,668/=

21. As regards the first issue on the burden of proof, reliance was placed on the case of Hellen Wangari Wangechi v Carumera Muthini Gathua (2005) e klr, in which Justice Mativo quoted with approval Lord Brandon in in Rhesa Shipping Co SA vs Edmunds[1955] 1 WLR at 955 as follows:

> " No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Justice Mativo, in the above decision, went on to state as follows:

> " Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly

put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd [2007] 4SLR (R)855 at 59:

> " The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

22. Further, the Appellant relied on Section 107 of the *Evidence Act* and opined that the principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which asserts must prove those facts exists. Reliance was similarly placed on the case of Millner vs Minister of Pensions (1942)2 ALLER 372, in which Lord Denning held as follows:

> 'The ... {standard of proof} ...is well settled. It must carry a reasonable degree of probability.... if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

23. It was the Appellant's contention that there was a formal contract between the parties relating to the supply of goods, averring that there were basic trading terms between the parties herein as regards the supply of goods and an understanding on the payment of the subsequent invoices.

24. It is the position of the Appellant the Court find that the issuance of an LPO's as the most critical component and the document upon which the delivery notes and invoices would be premised and that the LPO's were stamped by the Respondent and it is thus not in contention that the same emanated from the Respondents. Contending that goods ordered by the said LPO's were supplied to various stations i.e. Eldoret, Kisumu or Mombasa depending on the specified delivery point.

25. It is the Appellant's case supplied delivery notes were received by the concerned officers i.e. Margaret Luku, Mr. Reddy, Reuben and others and that the Respondents witness did not refute the fact that the above named were employees of the Respondent working in the Administration Department and would order goods.

26. It is submitted by the Appellant that the Respondent did not in any way prove that the LPO's were cancelled for none performance and that the allegation and denial of the respondent were oral and unsupported by documentary evidence. Urging that the Appellant proved its case on a balance of probabilities having exhibited delivery notes to prove its case. It is prayed that the Honorable Court finds that the Appellant has demonstrated the Respondent is still indebted to it to the full sum of Kshs 1,097,668.83/= and with regards to this Appeal to the tune of Kshs 747,668.83/=.

27. The Appellant attached to its Submissions the following cases: Barnabas Biwott vs Thomas Kipkorir Bundotich (2018) eklr and Hellen Wangari Wangechi v Carumera Muthini Gathua (2005) e klr, to support its case.

Respondent's Submissions

28. The Respondent vide its submissions dated 2nd March,2023 and filed in court on 6th March,2023, while submitting on the role of the Appellate court relied on the case of Okeno vs Republic (1972) EA 32.

29. On whether or not this appeal should be dismissed and the orders issued on 17th February,2022 be set aside and or varied, it is submitted by the Respondent that there is no contention that there existed a contract between the Appellant and the Respondent what is being contended is whether there is part of bargain that was not met by either party. Opining that being a contract for the supply of spare parts it is upon the Appellant to prove that they delivered the goods they allege and whether they served the Respondent with invoices for the delivery done.

30. It is the position of the Respondent that the contract between the parties would only be deemed to have been entirely performed upon delivery of the ordered goods and that without proof of deliver, the Appellant cannot rely on a LPO to claim payment for goods supplied/ delivered. Reliance is placed on the case of Bora Global Limited vs National Youth Service (Civil Case E235 of 2019) [2022] KEHC 10268 (KLR) (Commercial and Tax) (1 July 2022) (Judgment) stated as follows:

> " ... Again, Delivery Note No. 063 for supply of 125 90Kgs bags of green grams was not stamped. This raises the question whether goods were indeed delivered.
>
> .... Having given due consideration to the evidence and the material placed before this court, the conclusion I come to is that Bora Global did not prove the case to the required standard and this court cannot endorse such a transaction that has not been proved on a balance of probability."

31. Further, reliance is placed on the case of Teknical Equipment International Limited vs National Water Conservation & pipeline Corporation (2013) eKLR, stated that:

> " ...In this case the alleged agreement is only evidenced by a delivery note which is not stamped by the Defendant and whose signatories are not clear, and which, in any event, is disputed by the Defendant. There is actually no valid document before the court.
>
> It is for the Plaintiff to discharge the burden of proof by providing substantial evidence to support its claim of Kshs. 7,174,000/= from the Defendant. It is trite law that he who alleges must prove. See Section 107 of the *Evidence Act* (Cap 80) Laws of Kenya. See also CMC AVIATION LTD VS CRUSSAIR LTD (NO. 1) [1978] KLR 103at page 104 where the Court stated that proof is the foundation of evidence...

32. It is averred by the Respondent that the trial court did not error in making a decision that the Appellant had only proved delivery of some goods as per the stamped delivery notes and that the sum entitled is Kshs 350,646.01/= all the other delivery notes were nit stamped hence delivery of such goods was not done urging that the appeal be dismissed with costs to the Respondent.

33. The Respondent attached to its submissions the following cases: Bora Global Limited vs National Youth Service (Civil Case E235 of 2019) [2022] KEHC 10268 (KLR) (Commercial and Tax) (1 July 2022) (Judgment) and Teknical Equipment International Limited vs National Water Conservation & pipeline Corporation (2013) eKLR, to support its case.

Analysis/ Determination

34. The Court considered the Trial Court proceedings and judgment, written submissions by parties through Counsel and the issue for determination is whether the judgment of 17/2/2022 should be upheld or dismissed.

35. Section 107-112 *Evidence Act* provide for burden and standard of proof in both criminal and civil cases. Section 112 of *Evidence Act* provides for proof of special knowledge in civil proceedings as follows;

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

In Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue
>
> There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

36. In the Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes burden of proof thus:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"

The *Evidence Act* provides in a nutshell that 'He who alleges must/shall prove'

37. This being a first appellate court, as was held in Selle vs. Associated Motor Boat Co. [1968] EA 123 the Court should comply with the following that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

38. PW1 testified that usually the customer contacts them, they raise performance invoice and the customer receives L.P.O. then they service and wait for payment. It was PW1 testimony that they issued delivery notes which were received, stamped and signed by the Defendant totaling Ksh 1,097,668.83. PW1 employer, made several demands in vain and he stated that they issued receipts after receipt of payment and that they pray for award as per Plaint.

39. DW1 testified that the procedure starts from a request, L.P.O, delivery, invoice then payment after having looked at the documents by the Appellant for any payment to be credible, the company must sign for receipt of goods delivered. It was DW1 testimony that he could only see one document to prove delivery. Its delivery document No. 7, stating that others were not liable for payment and that there is no evidence goods were supplied. He testified that there will be a delivery note and invoice for payment to be made. The documents must be signed and that there was no corresponding invoice or delivery note for goods delivered and therefore the goods were not supplied that is why no payment was made.

40. The Plaintiff's statement was that on diverse dates between 13/9/2017 & 7/6/2018 the Plaintiff Company and the Defendant Company entered into an Agreement for supply of assorted machine parts on credit on the agreement that payment would be in 90 days. The Agreement was not presented before the Trial Court or evidence led if it was an oral Agreement.

41. The Plaintiff stated further that from 13/9/2017 -7/6/2018, the Plaintiff supplied the Defendants the spare parts requested and for each sale raised Invoices that were valued at Ksh 1,097,668/-Each delivery the Defendant through its representative signed a Delivery Note.

42. This Court gleaned the annextures Pg 68-90, the Delivery Notes for delivery of goods are not signed by anyone on behalf of the Defendant and the Delivery Notes are blank on delivery except the name Civicon Ltd. The Delivery Notes signed on delivery are on servicing machines for Civicon Ltd signed Service Technician Joel Mugendi and Customer Reuben Mudenyo. There was no proof of representative of Civicon Ltd who signed on delivery of goods.

43. The Defendant admitted in the Defense, that the Plaintiff delivered goods on 14/9/2017 which were paid for immediately on delivery.

44. The Trial Court in its judgment of 17/2/2022 considered whether there was an oral or written contract between the parties on supply of goods and payment thereof. The Trial Court considered the evidence on record on whether the Plaintiff was/is owed Ksh 1,097,668/- or not. The plaintiff submitted they proved the case on a balance of probabilities, the invoices and delivery notes for spare parts were delivered to various stations Eldoret, Kisumu and Mombasa. The Defendant submitted that the Plaintiff did not deliver the goods and therefore not entitled to payment. The Trial Court found that Invoice 3 for Ksh 239,866 Invoice 13 for 58,580/- & Invoice 16 for Ksh 52,200/- bear the Defendant's signature and awarded judgment in favour of the Plaintiff for Ksh 350,646/- with interest and costs.

45. The Service Reports to Civicon Ltd were not acknowledged signed for or names of representative who signed or ordered repair. The goods delivery were also not acknowledged by one who signed or indicated name or made request.

46. Relying on earlier case-law cited Boniface Ndegwa vs Jamleck Mwaniki (2016) eKLR relying on the case of John Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR C.A. decided that where the Court is faced with 2 probabilities, it can only decode a case on the balance of probability if there is evidence to say one probability was more probable than the other. See also DT Dobie Co Ltd vs Wanyonyi Wafula Chebukati [2014] eKLR on the same point.

47. From the evidence on record, this Court finds that the Appellant did not prove on a balance of probability that they provided goods/services on request and delivered which delivery was acknowledged by the Defendant/representative, who signed and gave names and it was signed dated and stamped with Company's stamp. The ones that are signed and stamped were approved.

Disposition

1. The appeal filed 19/7/2022 is dismissed with Costs.

2. The Judgment of 17/2/2022 is upheld.

JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 26/9/2023 (VIRTUAL /PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In The Presence Of:

Ms Watuka for the Appellant

Ms Muia H/B Mr Makundi for the Respondent

Geoffrey/Patrick – Court Assistant(s)

Muia: We pray for stay of execution for 30 days.

COURT: Stay of execution for 30 days granted.

M.W.MUIGAI

JUDGE