



Grande Afrique Consulting Group Limited v Standard Group PLC (Commercial Appeal E002 of 2023) [2023] KEHC 24743 (KLR) (Commercial and Tax) (30 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E002 OF 2023
JWW MONG'ARE, J
OCTOBER 30, 2023**

BETWEEN

GRANDE AFRIQUE CONSULTING GROUP LIMITED APPELLANT

AND

THE STANDARD GROUP PLC RESPONDENT

(An Appeal against the decision of Hon. Judith Omollo issued on 9th December 2022 in Nairobi SCC E2782 of 2022)

JUDGMENT

1. By an amended Memorandum of Appeal filed on 27th March 2023, the Appellant has moved this court seeking to overturn in part the decision of Hon Judith Omollo issued on 9th December 2022 in Nairobi SCC E2782 of 2022 on the following grounds:-
 1. The learned Trial Magistrate erred in law in dismissing the Appellants counterclaim without consideration despite it having proved its case on a balance of probabilities.
 2. The learned Trial Magistrate erred in law and grossly misdirected herself as to the principles applicable in breach of contract by failing to appreciate that the Respondent did not perform its contractual obligations as per the contract dated 17th September 2018.
 3. The learned Trial Magistrate erred in law and grossly misdirected herself as to the principles applicable in privity of contract by finding that the Respondent was not privity to the agreement dated 27th September 2019 yet it immensely benefitted from the contract while occasioning loss to the Appellant.



4. The learned Trial Magistrate erred in law and grossly misdirected herself as to the principles of equity applicable to the facts before her by finding that the Respondent was not privy to the agreement dated 27th September 2019 yet it immensely benefited from it while occasioning loss to the Appellant.
 5. The learned Trial Magistrate erred in law by failing to consider all issues arising from the suit.
 6. The learned Trial Magistrate erred in law by ignoring the submissions adduced by the Appellant.
 7. That the judgment and decree of the Trial Magistrate is against the evidence before her.
2. The Appellant urged the court to find in its favour and sought the following orders:-
1. That this Appeal be allowed, the judgment and decree of the subordinate court be set aside.
 2. That the Appellant's counterclaim be allowed as prayed.
 3. That the Appellant be awarded costs of the subordinate court.
 4. That costs of this Appeal be borne by the Respondent.
3. The Appellant faults the judgment of the Small Claims Court in its failure to find that there was a contract established between Momentum Credit and the Respondent and in its failure to hold the Respondents responsible for the reimbursements of the funds claimed under the counterclaim. In doing so, the Appellant has invited the court to be guided by the definition of "privity of Contracts" as defined in Sweet & Maxwell "*Chitty on Contract*" textbook. The Appellant being cognizant on the limitations placed upon the High Court by dint of Section 38 of the Small Claims Act argues that the court failed to correctly interpret the law and that it erred in its finding that there was no contract established by the Factoring Agreement between the Respondent and Momentum Credit limited.
4. In its submissions during the hearing of the Appeal, the Respondent opposed the Appeal as filed. The Respondent urged the court to uphold the decision of the Small Claims Court in its judgment herein. The Respondent argued that the trial court was right in its finding that no contract was established by the factoring agreement to hold the Respondent as bound to make any payments or refunds to momentum Credit who was not even a party to the main suit. That to do so would have amounted to the court rewriting the terms of the contracts for the parties.

Analysis and Determination

5. I have considered carefully the Memorandum of Appeal and the Record of Appeal. Although this is a first Appeal, I am alive to the provisions of Section 38 of the *Small Claims Court Act* which has limited the jurisdiction of the High Court in respect of the Appeals from the Small Claims Courts to Appeals on points of law. The said Section 38 provides as follows;

“A person aggrieved by the decision or an order of the Court may Appeal against that decision or order to the High Court on matters of law”



6. I therefore note that despite the various grounds of Appeal set in the Memorandum of Appeal, the only issue that this court is expected to determine is

“whether the trial court erred in law in its determination in its finding that there was no privity of contract between the Respondent and Momentum Credit to warrant judgment in the counterclaim for the Appellant”.

7. The Appellant urged the court to be guided by the definition by Sweet and Maxwell on “Chitty on Contracts” in determining whether there was Privity of Contract between the Respondent and Momentum Credit and if so, failure to make the payments set out in the factoring agreement amounted to breach of contract on the part of the Respondent. *Black’s Law Dictionary* describes privity of contract as follows: _

“Privity of contract is that connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the Plaintiff and Defendant in respect of the matter sued on.”

8. I note that the trial court dismissed, in its judgment, the counterclaim by the Appellant of its claim for reimbursement by the Respondent under the Factoring Agreement which the court found had the effect of vitiating the original agreement between the parties. The Court of Appeal in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR stated as follows;

“A Court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

9. Similarly, the Appellant in the present Appeal before this court is arguing that the court was wrong in finding that its claim in the counterclaim was not sustainable in the absence of an express contract between the Respondent and Momentum Credit, and that the said contract could only be enforced by either the Appellant or Momentum Credit who were parties thereto and not the Respondent. Having carefully considered the judgment of the small claims court, I am satisfied that the trial magistrate correctly interpreted the law on privity of contracts and that she did not commit any error of law. I therefore find, that the appeal herein has not been proved to the required standard to warrant interference of the Small Claims Court judgment by this court. I hold and find that the interpretation of the law and facts by the trial court was correct and find no good reason to disturb the courts findings.

Final Disposition

10. The upshot of the above finding is that the judgment by the Small Claims Court is upheld and the Appeal herein dismissed as being devoid of merit. Costs of the Appeal are awarded to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF OCTOBER 2023

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J. W. W. MONG'ARE

JUDGE

