



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.E60 OF 2021**

**BETWEEN**

**CHINA HENAN INTERNATIONAL CORPORATION GROUP.....APPELLANT**

**AND**

**TOBIAS OBURU T/A ODURU ENTERPRISES.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Oyugis Principal Magistrate's*

*PMCC No. 59 of 2020 by Hon. C. Okore –Principal Magistrate).*

**JUDGMENT**

1. China Henan International Corporation Group, the appellant herein, was the defendant in Oyugis Principal Magistrate's PMCC No. 59 of 2020. This was a claim that arose from a contract entered with the respondent and which the respondent claimed the appellant had breached. The learned trial magistrate delivered judgment on 17<sup>th</sup> June, 2021 in favour of the respondent.

2. The appellant was dissatisfied with the said judgment and filed this appeal through the firm of the firm Nyamurongi & Company Advocates. Ten grounds of appeal were raised as follows:

- a) That the learned trial magistrate erred in her rendition of issues for determination by failing to note the germane issue whether out of the alleged breach of contract the respondent was entitled to the pleaded sum of kshs.3,732,156.60/-.
- b) The learned trial magistrate erred in law by failing to find and to hold that breach of contract could only be proved by the respondent by proof of pleaded particulars of breach which particulars the respondent did not prove on a balance of probability.
- c) That the learned trial magistrate erred by failing to find that the respondent had a burden of proof on his pleadings and thereby erroneously shifted the burden of proof to the appellant.
- d) The learned trial magistrate erred by awarding the respondent the sum of kshs.3,732,156.60/- notwithstanding the evidence on the part of the respondent to the effect that the said sum did not (admittedly) flow from the breach of the contract entered into with the appellant.
- e) The learned trial magistrate erred by failing to find no compensation was due to be made to the respondent as he had not done the work for which he sought compensation.
- f) The learned trial magistrate erred by failing to find and to hold that parties herein were bound by the contract they entered into and that no award extraneous to the contract could be made in favour of the respondent.
- g) The learned trial magistrate failed to find and to hold that the respondent had not strictly complied with the terms of the contract entered into and could not in the circumstances benefit therefrom.
- h) The learned trial magistrate failed to find and to hold that the respondent had not proved his case on a balance of probabilities and that the same was liable to be dismissed with costs.
- i) The learned trial magistrate erred by failing to consider legal authorities submitted to her and thus arrived at a demonstrably

wrong decision.

j) The learned trial magistrate's judgment is a miscarriage of justice.

3. The respondent opposed the appeal through the firm of Robert Ochieng Advocates. The following grounds can be distilled from the submissions:

a) That parties are bound by the terms of their contract.

b) That the appellant was in breach of the contract.

c) That the appeal lacks merit.

4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. Both parties in their pleadings confirmed the existence of the contract complained of. The respondent produced a copy of the said contract and testified about it.

6. The respondent demonstrated that after the contract was terminated by the appellant, he sought clarification for the action. He also produced a letter requesting for a negotiated settlement of the dispute.

7. The appellant did not testify or call any evidence. They relied on their pleadings. Averments in pleadings do not amount to evidence. In **CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J** (as he then was) expressed himself as follows:

**Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.**

8. The learned trial magistrate did not have any contrary evidence on record other than what the respondent adduced. The respondent therefore discharged his burden of proving his claim on a balance of probabilities. I therefore have no reason to vary the judgment. Consequently, the appeal is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF MARCH, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**