REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 25 OF 2018

(CORAM: F.M. GIKONYO J.)

(*Being an appeal from the Judgement of Hon. T. Gesora (S.P. M)*

Delivered on 19th December, 2017 in Narok CMCC No. 211 of 2015)

VINEYARD HOLDINGS LIMITED...APPELLANT

VERSUS

SANJA CONSTRUCTION LIMITED..1ST RESPONDENT

DOMINIC TOROME..2ND RESPONDENT

JUDGMENT

[1]. This appeal arose from the judgment delivered by Hon. T. Gesora Senior Principal Magistrate on 19th December, 2017 in Narok Chief Magistrate's Court Civil Suit No. 211 of 2015. In the said suit, the Appellant had sued the Respondent herein for breach of contract. The appellant claimed a liquidated sum of Ksh.4, 404,700/= from the Respondent.

[2]. The claim was based on breach of contract of hiring machinery to wit; grader and excavator. The appellant adopted his statement and list of documents. The appellant stated that the respondent approached him and they entered into an oral agreement for hire of a grader and excavator at Kshs. 7,000/= and Kshs. 6,500/= respectively per hour. The computation of hours was produced as **P Exh. 1**. The total cost given was Kshs. 6,554,700/= plus an additional Kshs. 230,000/= for demobilization fee. Total Kshs. 6,784,700/= out of which the mobilization fee and costs of Kshs. 2,380,000/= was paid leaving a balance claimed.

[3]. The appellant stated that after **P Exh1** was received by appellant he only asked for time to pursue the county government for payment. He had also been served with delivery notes. The delivery notes were not produced but were only named in the summary **P Exh 1**.

[4]. In his defence, the respondents also adopted his statement and list of documents in which he acknowledges entering into an oral agreement for the hire of the grader but contends that the total cost was Kshs.3.9 million an amount he stated he paid as follows; on 20/6/2014 Kshs 1,000,000/= by transfer, on 1/10/14 Kshs. 1,800,000 by transfer, on 2/1/15 Kshs. 700,000/= by transfer and on 5/20/2014 Kshs. 400,000/= by deposit.

[5]. The respondent stated that the cost of hiring was Kshs. 5,800/= for the grader and Kshs. 5,500/= for the excavator. The respondent claimed he paid the money based on timings worked out with representatives from the appellant. He denied that he was served with the invoices and delivery notes and he stated that the computation is a fabrication by the appellant. The respondents admitted that there were no records kept between the parties. The appellant demanded to be shown where he had signed.

[6]. The trial court rendered its judgment and dismissed the suit with costs on 19/12/2017. The said judgment is the subject of this appeal. The trial court reasoned that no records of the hired machines was kept by the parties to show the number of hours, therefore it was not possible for the court to accept one account at the expense of another. The Appellant had not proved that the respondent had the machines at the time he said he did, thus, he had not satisfied the legal requirements. The trial court considered that a unilateral listing of hours which the defendant has not signed for cannot be said to be proof.

[7]. The Appellant being aggrieved by that judgment preferred this appeal raising 14 grounds of appeal namely:

i. ***That the Learned Magistrate erred in law and in fact in failing to uphold the computation on the equipment hired, the date and the number of hours worked despite the same having been produced by consent of both the appellant and the respondents and marked as plaintiff's exhibit 1.***

ii. ***That the Learned Magistrate erred in both law and fact in failing to find that the appellant had laid a basis for the claim of kshs.4,404,700 arising from the equipment hiring agreement between the appellant and the respondents.***

iii. ***That the learned magistrate erred in law and in fact in failing to uphold the appellant's evidence to wit;***

a) ***That the appellant and the respondents entered into an oral agreement for hire of a grader and excavator at Kshs. 7,000/= for the grader and kshs.6,500/= for the excavator.***

b) ***That the mobilization and demobilization cost for both the grader and excavator was for kshs.230,000/=***

c) ***That the number of hours worked by the grader was 702.2 hours at kshs.7,000/= per hour making a total of kshs.4,915,400/=***

d) ***That the number of hours worked by the excavator was 252.2 hours at kshs.6,500/= per hour making a total of kshs.1,639,300/=***

e) ***That the respondents had made a payment of kshs.1,980,000/= leaving a balance of kshs.4,404,700/=***

iv. That the learned magistrate erred in both law and fact in entertaining and giving more weight to the respondent's false evidence to wit;

a) That the cost of hiring grader was kshs.5,800/= and the cost for hiring an excavator was Kshs. 5,500/=.

b) That the total cost was Kshs.3,900,000/= and the defendants had paid the entire amount.

c) That the payment were made in accordance with the timings worked between the appellant and the respondents' representatives.

v. That the learned magistrate erred in law and in fact in failing to find that despite the allegation of payment of the entire sum by the respondents, the respondents could not point out the equipment they were paying for and the number of hours used for each.

vi. That the learned magistrate erred in law and in fact in holding that there were no records kept between the parties to show the number of hours on the use of the hired machines which was not the case.

vii. That the learned trial magistrate erred in law and in fact in holding that the schedule of hours kept by the appellant was a unilateral listing by the appellant disqualifying the same since it was not signed by the respondents.

viii. That the learned magistrate erred in law and in fact in putting more weight and findings in favour of the respondents despite the clear evidence on record.

ix. That the learned magistrate erred in law and in fact in holding that the appellant had not proved its case against the respondents

x. That the learned magistrate erred in law and in fact in failing to uphold the submissions by the appellant on the matter before him.

xi. That the learned magistrate erred in law and in fact in making a lopsided ruling in favour of the respondents thereby demonstrating bias.

xii. That the learned magistrate erred in law and in fact in dismissing the case before him and enriching the respondents at the expense of the appellant by awarding them costs of the suit.

xiii. That the learned magistrate erred in law and in fact denying the appellant its lawful entitlement in sum of Kshs.4,404,700/= being the unpaid balance as a result of the agreement to hire its equipment to the respondents at agreed hourly rates.

xiv. That the learned magistrate erred in law and fact in arriving at the decision under appeal and delivering the same in the presence of the respondent's and without notice to the appellant.

[8]. The appeal was canvassed by way of written submissions.

[9]. The Appellant faulted the trial court for making a finding that the appellant had not proved the number of hours the respondent had the equipment at work thereby upholding their defence. The appellant contends that it was not disputed that the respondent hired the grader for a

cumulative period of 702.2 hours as shown in the computation produced between the month of May 2014 and March 2015 at an agreed rate of 7,000/= per hour totaling Kshs. 4,915,400/=the respondent also hired the excavator on diverse dates between November 2014 and January 2015 for a cumulative period of 252.2 hours as shown in the computation produced at Kshs. 6,500/= per hour totaling Kshs. 1,639,300/=. Further the respondents were to make payments on the cost of mobilization and demobilization of the equipment hired which amount was totaling Kshs. 230,000/=. The appellant further argued that the respondents in their evidence confirmed that they did not keep a record of the hours the equipment were at work. They only made payments on the account of their own calculations. The respondents did not produce such calculations before the court. The appellant submitted that the computations made on the equipment hired was produced as evidence by the appellant with the consent of the respondents.

[10]. The appellant submitted that respondents did not demonstrate how they arrived at the sum of Kshs. 3,900,000/=.

[11]. The appellant faulted the trial court for finding that the appellant had not proved its case despite the overwhelming evidence presented before it. The appellant contend that it proved what equipments were hired, rate and number of hours utilized while the respondents could not particularize their payments.

[12]. The appellant submitted that there were records kept to show the number of hours. The appellant produced a computation on the equipment hired, the date and the number of hours worked with consent of the respondents as **P Exh 1**.

[13]. The appellant submitted that the trial court erred in holding that the schedule kept by the appellant was a unilateral listing by the plaintiff on the basis that it was not signed by the respondent. The appellant contend that the court did not interrogate the respondent's evidence which did not deny the said computation. The appellant argued that there were no records by the respondents to disqualify the appellant's records.

[14]. The appellant submitted that notice of judgment was not served upon them and hence judgment was delivered in their absence.

[15]. The appellant submitted that the trial court was biased in the manner in which it arrived at its finding. The appellant prayed the appeal be allowed, the decision of the learned magistrate dismissing the suit with costs be set aside and judgment be entered as prayed in the plaint. The appellant also prayed for costs of the appeal and costs before the trial court.

<u>THE RESPONDENTS' SUBMISSIONS.</u>

[16]. The respondents submitted that the appellant failed prove its case. That the documents relied on by the appellant was merely hearsay.

[17]. The respondents submitted they met their end of bargain. They made payments as evidenced by bank statements.

[18]. The respondents submitted that the appellant claimed to have filled delivery notes but failed to produce the same in court back up the said allegations.

[19]. The respondents submitted that the appellant failed to prove how the hourly charges were computed. They contend that the payments they made was based on that the workers of the appellants were present during the work. Further that the document produced by the appellant was not signed by both parties.

[20]. The respondents submitted that the document produced by the appellant was prepared by the appellant and they were not invited to counter sign the same to show their approval. They argued that the document was prepared without their disclosure.

[21]. The respondents submitted that the appellant failed to prove breach of contract in which their pleadings relied.

[22]. The respondents submitted that costs follow the event. They relied on Section 27 CPA and the case of ***<u>Party of Independent Candidate of Kenya & Another Vs Mutula Kilonzo & 2 Others [2013] eKLR</u>***

[23]. The respondents submitted that no document was produced by the appellant stating the agreed hours in which the work was to be done and the agreed rates. Further the appellant failed to call any witnesses who accompanied the respondent on site during contract period. The respondents urged this court to dismiss the appeal. They relied in the case of ***<u>Kenya Breweries Limited Kiambu Vs General Transport Agency Limited [2000] eKLR.</u>***

ANALYSIS AND DETERMINATION

<u>Duty of court</u>

[24]. I have considered the appeal herein, the respective parties written submission and the annexed authorities. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).***

[25]. It is not in dispute that there was an oral agreement between parties for hiring the grader and the excavator. It is also not in dispute that the appellant was paid some money pursuant to the oral agreement. The respondent claims he paid Kshs. 3,900,000/=. The appellant claims he was paid Kshs. ***1***,980,000/=. The real issue in controversy is the amount of hiring and the numbers of hours the machines were hired.

[26]. I have carefully considered the evidence adduced by all parties in this matter, the written submissions filed as well as the relevant law. The Evidence Act, places the burden of proof of any fact on the person who wishes to rely on it. See Section 107 of the Evidence Act provides as follows: -

> **"Burden of proof**
>
> **(1) Whoever desires any Court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

[27]. The determination is on the following:

> **i. The terms of the contract between the appellant and the respondents?**
>
> **ii. Dismissal of suit by trial court.**
>
> **iii. Who pays the costs of this suit?**

[28]. An oral contract is valid unless vitiated in law for being unlawful or lacking in material elements of a contract. The court of Appeal in ***Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR***, stated that a contract between parties can exist where no words have been used or it can be inferred from the conduct of the parties that a contract has been concluded. The court said;

"It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."

[29]. In any case, there is no claim or anything which shows that the oral contract is invalid. And, both parties admit there was offer, acceptance and consideration. What is in dispute is the quantum of consideration.

Cost of hiring the excavator and the grader.

[30]. The appellant submitted that the cost of hiring the excavator was Kshs 6,500/= per hour and the grader was Kshs. 7,000/= per hour. The respondents on the other hand submitted that the cost of hiring the grader was Kshs. 5,800/= and the excavator was Kshs. 5,500/= per hour.

Hours worked

[31]. The appellant submitted that the respondents hired the grader for a cumulative period of 702.2 hours between the months of May 2014 and March 2015. On diverse dates between November 2014 and January 2015, the respondents hired the excavator for a cumulative period of 252.2 hours.

[32]. The appellant also submitted the cost of mobilization and demobilization of the equipment hired at Kshs. 230,000/=

[33]. Parties cannot run away from the obligations under the oral contract between them.

[34]. The appellant produced computation of how they arrived at the cost of Kshs. 4,915,400/= and Kshs.1,639300/= for hire of a grader and excavator.

[35]. The evidence show that the respondents paid the sum of Kshs. 3,900,000/= in furtherance of the oral agreement. But, the respondents did not have computation of how they arrived at a figure of Kshs. 3,900,000/=. As they alleged a different rate, they ought to have established it. The figure stated by the respondent was not broken down into exact hours and rate, and were left at very high level of generalization.

[36]. I find the document produced by the appellant was not impeached and was kept in the ordinary course of doing business. Evidence also show that the grader worked for 702.2 hours at a cost of 7,000 per hour bring a total of Kshs, 4,915,400; and the excavator worked for 252.2 hours at a cost of Kshs. 6,500 per hour making a total of Kshs. 1,639,300. The total claim should be Kshs. 6,554,700 less paid Kshs. 3,900,000 leaving a balance of Kshs. 2,654,700. Therefore, I find that the appellant proved the hours worked and cost of hiring per hour on a balance of probability.

[37]. The appellant sought Kshs 230,000/= for mobilization and demobilization of the equipment.

[38]. The respondents in their testimony stated that they catered for mobilization and demobilization of equipment fee at a cost Kshs. 80,000/=.

[39]. The appellant has not provided any evidence to support his claim for Kshs. 230,000 in respect of this cost. I therefore reject it.

[40]. The upshot of all these is that the appeal has merit. I therefore set aside the judgement of the lower court delivered on 19 th December 2017. In its place the following orders shall abide:

> **i. Judgment in favour of the appellant in the sum of Kshs. 2,654,700/= being the balance after deduction of Kshs. 3,900,000/= already paid.**
>
> **ii. Each party shall bear its own costs of the appeal.**
>
> **iii. Cost of the suit goes to the appellant.**

[41]. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 30TH DAY OF MARCH, 2022

....

F. GIKONYO M.

JUDGE

In the presence of:

1. Onduso for the Respondent

2. Mwaniki Kariuki for the Appellant - absent

3. Mr. Kasaso – CA