



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 610 OF 2018

HAWK AVIATION SERVICES LTD.....APPELLANT

VERSUS

PROACTIVE AGENCIES LTD.....RESPONDENT

(Being an appeal against the judgment of the Hon. Peter Muholi, SRM

delivered on the 31st October, 2018 in Milimani Commercial

Civil Suit no. 8022 of 2016)

JUDGMENT

- 1) Hawk Aviation Services Ltd, the appellant herein filed an action before the Chief Magistrate's Court against Proactive Agencies Ltd, the respondent herein and sought for judgment in the sum of ksh.2,391,411/19 being the balance of payments in respect of aircraft maintenance, inspection and services rendered to the respondent in the period between the month of June 2012 and May 2014.
- 2) The respondent filed the defence to deny the appellant's claim stating that all the amounts outstanding were paid at the time of termination of contract. Hon. Peter Muholi, learned Senior Resident Magistrate, heard the case and on 31st October 2018 he dismissed the suit.
- 3) The appellant being aggrieved, preferred this appeal and put forward the following grounds:
 - i. The learned magistrate erred in law and in fact in dismissing the appellant's suit yet he had found that the aircrafts had been delivered to the respondent before payments had been made.***
 - ii. The learned magistrate misconstrued the provisions of Article 3 of the agreement and thus arrived at the erroneous conclusion that the aircrafts were delivered before payment was done in contravention of the terms of the agreement.***
 - iii. The learned magistrate construed the contravention of the terms of the agreement in favour of the respondent and thus caused a miscarriage of justice by exonerating the respondent from making payments to the appellant for services rendered.***
 - iv. The learned magistrate misapprehended/mistook the date of termination the agreement as 30/04/2012, instead of 24/02/2014 and 19/03/2014 and thus arrived at the following erroneous conclusions;***
 - a. That the invoices appear to have been generated after the contract was terminated, and***
 - b. That the invoices were not presented immediately after the service.***
 - v. The learned magistrate erred in law and in fact in holding that there was no prove that the services were rendered in the absence of the job cards yet the respondent had not denied that the services had been rendered by the appellant.***
 - vi. The learned magistrate erred in fact in failing to consider the fact that the respondent admitted owing the said debt during the hearing.***
 - vii. In all the circumstances of the case, the findings of the learned magistrate are not supported by the evidence and documents***

adduced by both the appellant and the respondent.

- 4) When the appeal came up for hearing learned advocates appearing in the matter recorded a consent order to have this appeal disposed of by written submissions.
- 5) I have re-evaluated the evidence that were presented before the trial court. I have further considered the rival written submissions plus the authorities cited. Though the appellant put forward a total of 7 grounds of appeal the aforesaid grounds revolve around eh question as to whether the appellant proved its case to the required standards.
- 6) It is the submission of the appellant that the trial magistrate misconstrued the terms of the agreement in arriving at its decision that the delivery of the aircrafts to the respondent before payment was in contravention of Article 3 of the agreement.
- 7) The appellant pointed out that the agreement enjoined the respondent to pay for the services rendered before the delivery of aircrafts but did not bar the respondent from paying after delivery. The appellant also argued that the agreement did not provide for a limitation for payments. The trial court was accused of imputing wrong doing on the part of the appellant the aircrafts and the logbooks before payment yet the appellant did so based on the prevailing trust and good faith.
- 8) The appellant further argued that the mere fact that the aircrafts and logbooks were released before payment did not exonerate the respondent from paying of the services. It is also pointed out by the appellant that the agreement recognizes either a pro-forma invoice of an invoice as the basis of payments by the respondent.
- 9) It is stated that the trial magistrate erred when he introduced the requirements of a job card as a pre-condition for payment. It is also stated that the trial court erred by concluding that the invoices were generated after the agreement had been terminated.
- 10) The respondent is of the submission that the invoices were rendered after the termination of the agreement for non-existent work. The respondent pointed out that the agreement stipulated that full payment of the total cost of routing maintenance services and inspection will be made within 30 days from the date of invoice.
- 11) The respondent denied that transacted on trust and good faith. It instead stated they transacted as per the terms of the written agreement. It is the respondent's submission that parties to the agreement intended that the amounts on the pro-forma invoices for each maintenance inspection must be done prior to re-delivery of the aircraft to the customer.
- 12) The respondent further stated that in the absence of evidence of any contrary intention, it should be inferred by the conduct of the parties that all payments had been made by the respondent.
- 13) Having re-evaluated the evidence presented before the trial court and having taken into account the rival submissions, it is clear from the record that the trial magistrate came to the conclusion that the parties executed an agreement which agreement was terminated.
- 14) The respondent stated that all outstanding payments were settled at the time of termination of the agreement. The appellant on its part stated that it realized after the termination of the agreement that there were outstanding invoices which had not been settled in the sum of ksh.2,391,411/19.
- 15) The learned Senior Resident Magistrate stated that there is no doubt the agreement the parties entered presupposes that payments shall be done before delivery of the aircraft. The trial magistrate further concluded the evidence tendered indicate that the aircrafts were delivered before payment and that it was done in contravention of the terms of the agreement.
- 16) The trial magistrate also stated that the appellant did not explain why the invoices were not presented immediately after the service. The learned Senior Resident Magistrate further stated that the invoices were generated after the contract was terminated and he came to the conclusion that services were not rendered in the absence of job cards.
- 17) I have carefully re-examined the invoices produced by the appellant through PW 1. Those invoices were issued by the appellant to the respondent and clearly show the services rendered, the consumables and spare parts used. It would appear from the record that the respondent did not dispute that the services indicated were not rendered by the appellant.
- 18) It is also not denied that the consumable or spare parts indicated in the invoices were utilized by the appellant. Another conclusion arrived by the trial court is the invoices were generated after the termination of the contract. The trial magistrate further concludes that the services were non-existent. I have examined those invoices ie no. 0773 to 0844 and it is clear that the dates of service were prior to the termination of the agreement.
- 19) It is not in dispute that the invoices were raised after the agreement was terminated. It should however be noted that the invoices clearly that they were claims of payments in respect of series rendered before the agreement was terminated. Clause 3.3 of the agreement expressly provides that full payment for the total cost of routine maintenance services and check 1 or check 11 inspections will be made within 30 days from the date of invoices of such services.
- 20) Clause 3.4 of the agreement provides inter alia that proforma invoices for each maintenance inspection preformed under Article 1.1.1 of the agreement prior- to re-delivery of the aircraft to the customer.
- 21) According to the respondent the fact that the aircrafts were re- delivered to the customer before settlement of the invoices raises doubt about the claim. The respondent further argued that the appellant's demand contravenes the agreement. It is apparent from the terms of the

agreement that the customer was required to settle the invoices before re-delivery of the aircrafts.

22) A critical examination of Clause 3.4 of the agreement will reveal that the customer was not barred from making payments on outstanding invoices after the delivery of the invoices.

23) It is also clear from Clause 3.1 of the agreement that the agreement did not provide for a limitation period for payments save that Clause 3.3 provides that payments should be made within 30 days from the date of presentation of the invoices.

24) I am persuaded by the evidence tendered by PW 1 that the appellant released the aircrafts and logbooks to the respondents before payments due to trust and good faith built over time in their relationship. Such business practices cannot be said to amend the agreement executed by the parties.

25) In the end, I find that the learned Senior Resident Magistrate fell into error when he dismissed the appellant’s suit yet the appellant had tendered credible evidence establishing its claim on a balance of probabilities. The appeal is found to be meritorious it is allowed. Consequently the order dismissing the suit made on 31st October 2018 is set aside and is substituted with an order entering judgment in favour of the appellant and against the respondent in the sum of ksh.2,391,411/19. The aforesaid amount to attract interest at court rates from the date of judgment until full payment. The appellant to have costs of the suit and the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF APRIL, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....**FOR THE APPLICANT**

.....**FOR THE RESPONDENT**