



**Nature Expeditions Africa v Tourism Promotion Services (Kenya) Limited (Civil Appeal E061 of 2020) [2022] KEHC 15975 (KLR) (Commercial and Tax) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15975 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E061 OF 2020  
DAS MAJANJA, J  
NOVEMBER 30, 2022**

**BETWEEN**

**NATURE EXPEDITIONS AFRICA ..... APPELLANT**

**AND**

**TOURISM PROMOTION SERVICES (KENYA) LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. G. A. Mmasi, SPM delivered 25th September 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 6600 of 2015)*

**JUDGMENT**

**Introduction and Background**

1. This is an appeal against the judgment of the subordinate court dated September 25, 2020 where the court entered judgment for the respondent against the appellant for the sum of Usd 31,473.74 and Kshs 14,230.00 together with interest and costs of the suit.
2. The facts and background leading to the respondent filing suit in the lower court are largely common cause and can be gleaned from the record of appeal as follows. The respondent is the proprietor of all those hotels, resorts and safari lodges known as Serena Hotels which hotels offer inter alia accommodation services. Between 2006 and 2013 the parties had a contractual agreement wherein the respondent offered the appellant, as an agent, a credit period of 30 days for settlement of the appellant's liabilities towards the respondent in respect of accommodation and other services that the respondent offered the appellant's clients.
3. By a plaint dated October 29, 2015, the respondent claimed that the appellant made use of the credit facilities offered in a number of the respondent's hotels resorts and lodges and accumulated a facility



sum totaling Usd 31,473.74 and Kshs 14,230.00 which the appellant had not paid. The respondent thus sought these sums together with general damages, interest and costs of the suit.

4. In its statement of defence dated December 16, 2016, the appellant denied owing the respondent any money insisting that it had settled all its outstanding liabilities towards the respondent in a timely manner and in consonance with the contract between the parties. That some of the invoices whose payments were purportedly claimed related to periods when the credit facility arrangement was not in place and was therefore unrealistic and/or unjustifiable and that in any event, the respondent had placed the appellant on a cash basis meaning there was no issue of debt being carried over.
5. After disposing preliminary issues raised by the appellant, the subordinate court set down the matter for hearing. To advance their positions, the respondent presented two witnesses whereas the appellant presented one witness. The subordinate court rendered its judgment on September 25, 2020 where it identified the following four issues for determination:
  - a. What were the terms and scope of the contracts between the parties?
  - b. Whether there was a breach in any of the contractual terms
  - c. Whether the respondent proved its case on a balance of probabilities on the basis of the material placed before the court to be granted the orders sought
  - d. Who bears the costs of the suit.
6. The subordinate court found that the salient terms of the parties' agreement was that the appellant's guests would be charged at contractual rates save for a client called Donatello which were to be pegged on a special booking rate and the same clearly indicated in the booking voucher. The court noted that from the evidence, the appellant made reservations with the respondent where the Donatello clients were charged the preferential rate if their booking indicated the same. Those with vouchers that were not so indicated were charged normal rates and this was presumed once a booking voucher had no such indication as being Donatello clients. The court stated that the appellant, apart from showing payments made, did not lead evidence that the bookings as claimed were in fact Donatello clients so that the quantification would have been erroneous having been based on a non-preferential rate. The learned magistrate thus found that the balance of convenience tilted in favour of the respondent and therefore allowed its claim. Since the respondent succeeded in its claim, it was awarded costs of the suit and interest.
7. It is this decision by the subordinate court that has precipitated the instant appeal by the appellant as grounded in its memorandum of appeal dated October 21, 2020. The appellant has also filed written submissions in support of the appeal. The respondent has not filed any response or submissions to the appeal.

### **Analysis and Determination**

8. In determining this appeal, I am aware that this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (*Selle and Another v Associated Motor Boat Co Ltd and others (1968) EA 123*).
9. The appellant has raised and submitted on seven grounds in its appeal. First, it faults the trial magistrate for relying on invoices filed by the respondent without a certificate of production of electronic evidence as required section 106A as read with section 106B (4) of the *Evidence Act* (chapter 80 of the Laws of Kenya). Even though the term 'Electronic record' is not defined in the *Evidence Act*, I note that



section 106B thereof describes it as ‘computer output’ which refers to ‘any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer’.

10. There was no indication that the invoices produced contained information in an electronic record that was either printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer for them to be deemed as ‘electronic records’. Further, there was nothing indicative that the said invoices were created, maintained, modified or transmitted in digital form by a computer or related system (see *In re Estate of Washington Olweny (Deceased) NKR HC Succession cause No 243 of 2017 [2021] eKLR*). What is clear though is that the invoices were records prepared in the ordinary course of business and hence admissible under section 37 of the *Evidence Act*.
11. At the hearing or in the course of proceedings, the respondent produced copies of the unpaid invoices without any objection from the appellant. The Court of Appeal, in *County Assembly of Kisumu and 2 Others v Kisumu County Assembly Service Board and 6 Others [2015]eKLR*, while discussing the application of section 106(B) observed that this provision was introduced to vouchsafe the authenticity and integrity of the electronic records sought to be produced. Since the appellant did not deny receiving these invoices nor question their authenticity or indeed object to their production, it cannot raise the issue of admissibility at the appellate stage. This ground of appeal is therefore dismissed.
12. Second, the appellant faults the trial court for delivering a judgment that was not based on the evidence of the court’s record. The appellant mainly takes issue with the subordinate court’s reference to its ‘non-Donatello’ clients accounts being underpaid, which the appellant states was not part of the respondent’s claim. The respondent’s claim was general; that the appellant owed it Usd 31,473.74 and Kshs 14,230.00. However, in its statement of defence dated December 16, 2015, the appellant stated that the invoices in respect of its Donatello clients were subject of the dispute. It expressly introduced them in a bid to state that it had settled all its outstanding liabilities and that it was the respondent that had misapplied the applicable rates to them. Since the claim for the unpaid invoices admittedly and largely related to the Donatello clients, the court was bound to make a determination of the same and thus it cannot be said that it made a determination outside of the parties’ pleadings and evidence presented. This ground therefore fails.
13. Third, the appellant claims that the trial magistrate disregarded its evidence. It submits that had the court considered the entirety of the evidence including the vouchers and agreements, it would have found that the appellant had settled the amounts claimed to be owed to the respondent. This being the case, the appellant argues that the trial court should have subtracted the amount paid as indicated by the vouchers from the respondent’s claim. I note from the judgment, the court took into account the cheques amounting to Usd 6,032.00 sent by the appellant while the amount owed at the time, being August 2012, was Usd 22,608.15 meaning that the debt was reduced to Usd 16,576.15. The trial court also went through the cheques and cash requisition vouchers and was unable to find for example, cash payment in satisfaction for the month of October 2012. This is demonstrative that the trial court considered the appellant’s evidence.
14. Fourth, the appellant submits that the trial court awarded the respondent prayers that it did not seek in its plaint, more so the Kshs 14,230,000.00 rather than Kshs 14,230.00 as prayed in the plaint. From the record, the appellant applied for and the trial court reviewed and corrected the error in the amount. This ground by the appellant is therefore spent.
15. Fifth, the appellant stated that the subordinate court erred in applying an erroneous standard of proof and failed to appreciate that the appellant had discharged its burden of proof. In concluding its decision that the appellant was liable, the trial magistrate held that, “So that the balance of convenience



thus tilts in favour of the plaintiff in having proved its case as having owed amounts claimed in its plaint.” Although trial magistrate referred to the term balance of convenience in concluding that the respondent had proved its case, the issue in this appeal is whether, in fact, the respondent had proved its case.

16. The burden of proof is provided for in sections 107 and 109 of the [Evidence Act](#) provide that:

107. Burden of proof

1. Whoever desires any court to give judgment as to any legal right 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.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

17. In [Evans Nyakwana v Cleophas Bwana Ongaro HB HCCA No 7 of 2014 \[2015\] eKLR](#), the court held that:

- (15) ..... As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(i) of the [Evidence Act](#), chapter 80 Laws of Kenya. [16] Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the [Evidence Act](#) provides the burden lies in that person who would fail if no evidence at all were given as either side.

18. As regards the standard of proof, I would quote what the court stated in [William Kabogo Gitau v George Thuo & 2 Others \[2010\] 1 KLR 526](#) stated that:

In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

19. The subordinate court considered the booking vouchers on record and concluded that only those vouchers indicated as being bookings for Donatello clients would have been charged differently by the respondent. A perusal of the contract rate agreements of the parties for the years 2011, 2012 and 2013 demonstrated that the appellant was to indicate “Donatello special rates” in its booking vouchers. This fact was admitted by the appellant in its defence when it stated that its booking vouchers would always indicate the name Donatello. Therefore, it was not wrong for the respondent and the trial court to presume that vouchers that had not indicated that they were for Donatello clients, would be charged according to the respondent’s standard rates. At the end of it all, the respondent claim was based on



unpaid invoices and it was incumbent upon the appellant to prove that it had paid them. From the record, I find that the appellant did not mirror payments made by it against the invoices claimed by the respondent. The trial court was therefore right find in favour of the respondent. Although the use of the term balance of convenience was used by the trial magistrate, it does not change the substance of the finding and appreciation of the standard and burden of proof. The respondent was only required to prove its case on a balance of probabilities which it did.

20. Sixth, the appellant contends that the trial court erred in failing to find that the respondent's suit was time barred when it was instituted. In its decision, the trial court stated that in as much as section 4(1) of the *Limitation of Actions Act* (chapter 22 of the Laws of Kenya) limits causes of contracts to be instituted within a six-year period from the date of accrual, the same is negated once a party partially makes payment in line with section 23 thereof which provides for the extension of the limitation period where a right of action has accrued to recover a debt or other liquidated pecuniary claim and the person liable or accountable acknowledges the claim or makes part payment of it.
21. The appellant submits that no part-payment had been made by it but rather the payments made had been for "other expenses". However, the appellant does not state what these expenses were and in the absence of a satisfactory and clear explanation, I agree with the trial court that these payments were made to partly reduce the debt and the cause of action therein thus started afresh (see *Charles Masese and Another v Julius Maina Mwangi NYR CA Civil appeal No 75 of 2010 [2016] eKLR*).
22. The last issue is on costs and interest. Having found that the respondent's claim was successful, I cannot fault the trial court for awarding the appellant costs of the suit as this is in tandem with the principle that, 'costs follow the event'. The respondent was rightly awarded to compensate it for the trouble taken to prosecute the suit (see *Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR*). On the issue of interest, section 26 of the *Civil Procedure Act* (chapter 21 of the Laws of Kenya) provides that interest payable in matters where the claim is for a liquidated amount may be granted from the date of the suit. In this case though, the trial court awarded interest from the judgment date until payment in full contrary to the general principle that interest on special damages or a liquidated claim should be awarded from the date of filing suit. The respondent though did not cross-appeal on this point. There is therefore no basis to interfere with this part of the judgment.

### **Disposition**

23. Having reviewed the evidence on record, I find that the decision of the subordinate court was well founded and there is therefore no basis for this court to interfere with it.
24. The appeal is dismissed. The appellant shall pay costs of the respondent assessed at Kshs 80,000.00 only.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2022.**

**D S MAJANJA**

### **JUDGE**

Court Assistant: Mr M Onyango.

Mr Shako instructed by NOW Advocates LLP for the appellant.

Mr Mbithi instructed by Okongo Omogeni and Company Advocates for the respondent.

