



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 59 OF 2019

ELIZANYA INVESTMENTS LIMITED.....APPELLANT

VERSUS

LEAN ENERGY SOLUTIONS.....RESPONDENT

(An Appeal from the Judgment of Hon. S.D Sitati (Mr.), Resident Magistrate, delivered on 8th July, 2019 in Kilifi Senior Principal Magistrate's Court Civil Case No. 326 of 2018)

JUDGMENT

1. The suit against the defendant (respondent) in the lower court was that on diverse dates in the year 2015, the plaintiff (appellant) delivered firewood worth Kshs. 1,716,628/= to Coastal Bottlers at the request of the respondent. It was claimed that it was mutually agreed that the respondent was to pay for all the firewood. The appellant averred that the respondent paid Kshs. 1,078, 072/= leaving an outstanding balance of Kshs. 638,556/=. The appellant's claim against the respondent in the lower court was for the said amount together with interest thereon, until payment in full.

2. In its statement of defence dated 15th November, 2018, the respondent denied having requested the appellant to deliver firewood to Coastal bottles. The respondent averred that all the supplies that were delivered were fully paid for and that there were no amounts due on account of any supplies made by the appellant.

3. In the lower court, the Hon Magistrate stated that in the absence of evidence of PW1 having been authorized to file suit for and on behalf of the appellant, the said suit could not be allowed to stand as the appellant was not properly before the court. The said Magistrate then went ahead and dismissed the appellant's suit with costs to the respondent.

4. The appellant being dissatisfied by the decision of the Trial Magistrate filed a memorandum of appeal on 8th August, 2019, raising the following grounds of appeal-

(i) That the learned Magistrate erred in law and fact in dismissing the suit on a technicality without due regard to the substance of the suit;

(ii) That the learned Magistrate erred in law and fact in failing to consider the main issue for determination being the appellant's claim for Kshs. 638, 556/= with interest thereon at 14% from 19th December, 2015 until payment in full;

(iii) That the learned Magistrate erred in law and fact in failing to consider in totality the appellant's evidence on record in determining its claim for the outstanding sum that remained unpaid (sic);

(iv) That the learned Magistrate erred in law and fact in giving effect to technicalities without due regard to substantive justice;

(v) That the learned Magistrate erred in law and fact in determining the matter based on submissions by the respondent, that had not been served on the appellant; and

(vi) That the learned Magistrate erred in law and fact in awarding costs to the respondent.

5. The appellant's prayer is for the appeal to be allowed and for this court to set aside the Judgment delivered by the Hon. Magistrate and enter Judgment for the appellant.

6. This appeal was canvassed by way of written submissions. On 11th June, 2020, the law firm of Mathew Nyabena & Co. Advocates filed written submissions on behalf of the appellant. The respondent's submissions were filed on 31st August, 2020 by the law firm of Musa, Boaz & Thomas Advocates.
7. The appellant's Counsel submitted that the Trial Magistrate in the Judgment delivered on 8th July, 2019 dismissed instead of striking out the appellant's suit due to the absence of evidence of authorization to file the suit in the lower court. It was submitted that the effect of Order 2 Rule 4 (1) of the Civil Procedure Rules is that a party will not benefit in certain defences unless they are specifically pleaded. The appellant relied on the case of **Stephen Onyango Achola & Another v Edward Hongo Sule & Another** [2004] eKLR, where the court stated that it is trite law that cases must be decided on issues pleaded.
8. The appellant's Counsel further submitted that the respondent herein failed to comply with the provisions of Order 2 Rule 4(1) of the Civil Procedure Rules by failing to specifically plead in its defence that no authority or resolution was obtained and filed before the institution of the appellant's case. The appellant contended that the first time the said issue was raised by the respondent was in its submissions in the lower court, thus the respondent should not urge this court to dismiss the appellant's suit on the said basis.
9. The appellant's Counsel submitted that the aforementioned issue could only be properly raised by way of a preliminary objection or during the course of pre-trial and discovery. He also submitted that most available decisions show that when such an issue is raised at a preliminary stage, the court can then make appropriate orders as to the filing of supplementary documents. To buttress this point, he relied on several authorities. Among them was the case of **Private Development Co. Ltd v Rebecca Ngunyo & 2 others** [2018 eKLR].
10. It was submitted for the appellant that the decision to dismiss the appellant's suit was derived from Order 4 Rule 1(6) of the Civil Procedure Rules. He further stated that the drafters of the said provisions only gave courts the discretion to strike out any plaint or counter-claim which did not comply with the provisions and not to dismiss a suit that offends the said provisions. The appellant's Counsel cited the case of **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others** [2011] eKLR, where it was stated that the overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice.
11. In placing reliance on the decision in **Chandulal K. Vora & Co. LTD v Kenya Revenue Authority** [2011] eKLR, the appellant's Counsel stated that following the enactment of Sections 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution of Kenya, courts of law endeavor to sustain rather than strike out pleadings on technicalities. He further submitted that the fact that the Trial Court dismissed the appellant's suit because of a procedural technicality deprived the appellant of its right to have its case heard and determined on merit.
12. It was also submitted that the learned Trial Magistrate erred in law in determining the matter based on the respondent's submissions that had not been served on the appellant.
13. The appellant's Counsel further submitted that the Trial Court failed to accord it the right to a fair hearing as enshrined under Article 50 of the Constitution of Kenya, 2010, by proceeding to deliver Judgment without prior notification of the date of delivery of the same to the appellant.
14. The respondent's Counsel submitted that the appeal herein is defective for failure by the appellant to include the decree appealed from in the Record of appeal, as provided under Order 42 Rule 13(4)(f) of the Civil Procedure Rules. He relied on the Supreme decision in **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others** [2015] eKLR and stated that failure to attach the decree from which the appellant was appealing, goes to the root of the appeal.
15. He stated that the appellant never attempted to apply for the decree appealed from, hence the appeal is defective and ought to be struck out. He cited the case of **Ndegwa Kamau T/a Sideview Garage v Fredrick Isika Kalumbo** [2016] eKLR, where it was held that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court and that without the decree or order appealed from there is, in effect, no appeal.
16. It was submitted by the respondent's Counsel that the Constitution does not take away the rules of procedure meant to ensure orderliness in pleadings and proceedings before courts. He relied on the Supreme Court decision in **Moses Mwicigi & 14 others v IEBC & Others** (2016) eKLR. It was contended that this case is indicative of one instance where procedure is so closely intertwined with the substance of a case.
17. It was contended by the respondent's Counsel that the decision in **Foss v Harbottle** (1843) 67 ER 189 leaves no room for argument that the proper plaintiff in any proceedings or action in respect of a wrong done to a company is the company itself, based on the principle that a company is a legal personality distinct from its directors and shareholders. He drew this court's attention to the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 which provide that where the plaintiff is a corporation, the verifying affidavit must be sworn by an officer of the company duly authorized under the seal of the company to do so.
18. The respondent's Counsel indicated that the appellant had no *locus standi* to institute the suit against the respondent herein as no authority was obtained to act on the appellant's behalf. He further submitted that PW1 in cross-examination admitted that he did not have authority and he did not see the essence of filing one since the appellant company is his business. It was thus stated that the fact that the appellant failed to regularize the position makes it clear that it was not worthy of any mercy from this court.
19. It was further submitted that in the lower court, the appellant failed to meet the required standard of proof as provided under Section 112 of the Evidence Act, thus the claim for special damages failed as the same was not proved. It was stated that a cursory look at the invoices and simple addition of the same did not match with the sum that was being sought. It was further stated that during cross-examination, PW1 could not identify to the court the invoices which had been paid and the ones which had not. That he did not know the total amount of the invoices and the balance which was due the last time the alleged payments were made.

20. The respondent's Counsel relied on the Court of Appeal decision in **Douglas Odhiambo Apel & Another v Telkom Kenya** [2006] eKLR, to bolster his submission that it behoves the party claiming to produce evidence to prove special damages claimed and that such proof cannot be supplied by pleadings and submissions.

21. He indicated that they served the appellant's Counsel with submissions in court on 24th June, 2019 and the same were received on the same day. He urged this court to uphold the Judgment of 8th July, 2019 and dismiss this appeal with costs.

ANALYSIS AND DETERMINATION.

22. This court has gone through the Record of Appeal and given due consideration to the submissions by the parties' respective Counsel. This being the first appellate court, I am required to re-examine and re-evaluate the evidence adduced before the Trial Court and arrive at an independent decision. While doing so, I must bear in mind that I have not had the opportunity to observe the demeanor of witnesses. In **Peters v. Sunday Post Ltd.** (1958) EA 424, 429 Sir Kenneth O'Connor, P. said as follows in regard to the duty of the 1st appellate court-

“It is a strong thing for an appellate court to differ from the findings of fact of a judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v. Thomas (1947) AC 484....”

23. More often than not, an appellate court will not interfere with the finding of fact by a Trial Court unless it is based on no evidence, or is based on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles of fact or law in reaching his conclusion. See **Mkube vs. Nyamuro [1983] eKLR.**

24. The issues for determination in this appeal are-

- (i) Whether this appeal is defective for failure to include the decree appealed from, in the Record of Appeal,**
- (ii) Whether the Trial Magistrate erred by dismissing the suit on a technicality; and**
- (iii) Whether the appellant proved its case on a balance of probability.**

Whether this appeal is defective for failure to annex the decree appealed from.

25. The respondent's Counsel took a preliminary point of law to oppose the appeal on the ground that it is defective since the decree from which the appellant was appealing from was not included in the Record of Appeal. He contended that the present appeal was defective and contravened the provisions of Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010. This court was urged to strike out the appeal on the said ground.

26. Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides as follows-

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

- (a) the memorandum of appeal;***
- (b) the pleadings;***
- (c) the notes of the trial magistrate made at the hearing;***
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.***
(emphasis added).

27. On 11th June, 2020, the appellant filed a Record of Appeal which included a memorandum of appeal dated 6th August, 2019, certified copies of the lower court proceedings and the lower court Judgment delivered on 8th July, 2019 by Hon. S. D Sitati, RM.

28. Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010 is specific that what is required at the appellate stage is the Judgment, order **or** decree appealed from. In the present case, the appellant attached a copy of the lower court Judgment in compliance with the said provisions. It is discernible from a reading of the above provisions that it is not a mandatory requirement for an appellant to include both the Judgment and the decree of the lower court in the Record of Appeal. It would however not be useful to attach a decree and leave out the Judgment of the Trial Court.

29. In the case of **Nyota Tissue Products v Charles Wanga Wanga & 4 Others** [2020] eKLR, when addressing the issue of failure by an appellant to file a decree, the court stated thus-

"The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."

30. I am of the view that the use of the conjunction "or" means that an appellant is not mandatorily obligated to attach both the Judgment and the decree. Further, a decree is an extract of the Judgment appealed from. A decree is defined under Section 2 of the Civil Procedure Act, Cap 21, Laws of Kenya as follows:

"decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91 but does not include— (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;" (emphasis added).

31. In the present appeal, the appellant filed Kilifi Senior Principal Magistrate's Court Civil Case No. 326 of 2018. After hearing the parties, Judgment was delivered dismissing the appellant's suit, with costs to the respondent. In this court's view, the failure to include a certified copy of the decree in the Record of Appeal should not invalidate the present appeal for reasons of non-compliance as this court has had the benefit of reading Judgment which was rendered by the Trial Court.

32. It is the finding of this court that the lack of a certified copy of a decree does not in any way affect the appellant's appeal and the right to be heard as enshrined under Article 50 of the Constitution. It is thus incorrect for the respondent to assert that the appellant's appeal is defective. I therefore decline to strike out the appeal on the said ground.

Whether the Trial Magistrate erred by dismissing the suit on a technicality

33. It is not in dispute that PW1 did not produce as part of his documents an authority or resolution that allowed him to file suit and to testify on behalf of the appellant. PW1 during examination-in-chief said that he was a businessman who traded as Elizanya Investments. He further testified that he was a director of the said company. During cross-examination, PW1 said that he was testifying on behalf of the appellant, but he did not have in court evidence of directorship. He said that he did not find it necessary to produce the resolution as the appellant was his business.

34. I have gone through the lower court proceedings and found that the issue of whether or not the PW1 had been authorized by the appellant to file suit first came up during cross-examination of PW1 and in the respondent's submissions.

35. Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 provides as follows-

"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

36. It is however clear from the foregoing provision that it is not a mandatory requirement for the authority given to the deponent to file a verifying affidavit to be filed alongside the plaint and the verifying affidavit. On the other hand, Order 4 Rule 1(6) of the Civil Procedure Rules, 2010 provides that-

"The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule."

37. An incorporated company is a legal person in the eyes of the law. It has of necessity to act through agents who are usually members of its Board of Directors. This is the position which was held in **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd.** Nairobi (Milimani) HCCC No. 391 of 2000, where it was stated as follows-

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

38. Likewise, in **Szaredo Investments Limited v Chief Land Registrar & 2 others** [2018] eKLR, the court held that-

“Though the portion of the rule requiring filing of an authority under seal is couched in mandatory terms, the portion on consequences of non-compliance is not. The court therefore has discretion on whether or not to order striking out of any pleading that is non-compliant. In exercising that discretion, the court must be alive to its obligations under Article 159 of the Constitution of Kenya, 2010 to see to it that justice is administered without undue regard to procedural technicalities. In that regard, I note that save for Bactlab Limited –vs- Bactlabs East Africa Limited & 5 others [2002] eKLR, all the authorities cited by the defendants pre-date Constitution of Kenya, 2010.

I do not consider that failure to exhibit an authority under seal should result, in the present dispensation, to striking out of a plaint or counterclaim in the first instance. The court should give the litigant a chance to comply with the rules. It is only after failure to comply that such drastic consequences as striking out should come into operation”. (emphasis added).

39. In the present case, it is clear that no such company resolution was filed. However, in light of the aforementioned authorities, I find that the action of filing a suit without authority is capable of being ratified. It is noteworthy that PW1 did not have evidence of directorship and/or authority or resolution allowing him to testify. The aforesaid issue came up when he was being cross-examined and in the respondent’s submissions, thus denying the appellant an opportunity to rectify the situation. I find that the Trial Magistrate misdirected himself in finding that the appellant had enough time to rectify the situation but chose not to do so.

40. In the case of **Private Development Company Ltd. V Rebecca Ngonyo and 2 Others** (supra), the court stated thus-

“In my own view, unless there is serious contention by an insider of the company, that the company could not have issued a resolution to institute the suit, then the court ought to be slow to infer that the company which has commenced the suit, had no authority to do so.....”

41. In **Microsoft Corporation v Mitusimi Computer Garage Ltd [2001] 2 EA 460**, the court stated as follows:

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.” (emphasis added).

42. As submitted by the appellant’s Counsel, it would have been proper for the foregoing issue to have been raised at the beginning of the trial by the respondent filing a Notice of Preliminary Objection before the plaintiff’s witness testified so as to accord him a chance to rectify the situation in the spirit of Article 50 of the Constitution of Kenya, 2010,

43. It was therefore not in the interests of justice for the Trial Court to dismiss the lower court case on a technicality, on the basis that there was no authorization by the plaintiff for the filing of a suit. It was a curable omission under Article 159(2)(d) of the Constitution of Kenya 2010, that justice shall be done without undue regard to technicalities.

Whether the appellant proved its case on a balance of probabilities.

44. In the present case, the appellant called one witness, PW1, who testified that he was the director of the appellant. He also testified that the plaintiff was contacted by the respondent through a Mr. Wambua who called for supply of firewood which was delivered. It was PW1’s testimony that the firewood delivered was worth Kshs. 1,716, 628/- and invoices were issued to that effect. That out of the entire amount, the defendant paid Kshs. 1,078,072/- leaving an outstanding balance of Kshs. 638,556/- which the appellant was claiming together with interest from the respondent.

45. PW1 produced a bundle of invoices and their corresponding receiving notes that were issued to the respondent together with the appellant’s bank account statements in support of its claim before the lower court. During cross examination, PW1 confirmed that he had produced proof of supply, he went further to state that sometimes, he would receive a call from a gentleman by the name Malonza. It was his testimony that the firewood was in most cases received by Mr. Osoro who also received most of the invoices.

46. It was PW1’s testimony that the invoices he produced before the lower court comprised what was already paid, while the bank account statement shows what was and was not paid. He also stated that the amount claimed in the sum of Kshs. 638,556/- was the balance owed as at 23rd November, 2015. That the appellant however continued to supply firewood up to the end of December, 2015.

47. From the lower court proceedings it is clear that the respondent did not call any witnesses to rebut the evidence of PW1. Messrs. Wambua, Malonza and Osoro were not called to shed light on the allegation leveled against the respondent by PW1. The respondent’s Counsel stated that the total amount in the invoices did not match the amount pleaded in the plaintiff’s plaint. The respondent however did not address the said issue in its statement of defence or by calling evidence. The said issue cannot be resolved by way of submissions as the respondent’s Counsel attempted to do.

48. In **Interchemie EA Limited v. Nakuru Veterinary Centre Limited [2001] eKLR**, the court held that-

“Where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.”

49. Where a party fails to call evidence in support of his/her case, that party's pleadings remain mere statements of fact since in so doing, the party fails to substantiate his/her pleadings. In the similar vein the failure by the respondent to adduce any evidence means that the evidence adduced by the appellant remains unchallenged. The respondent filed a statement of defence on 4th December, 2018 which only contained denials. The respondent did not file witness statements and/or any documents in opposition to the appellant's case.

50. This being a liquidated claim, the burden of proof is on a balance of probabilities as was put by Lord Denning J. in **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372**, that-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

51. In light of the evidence adduced before the lower court, I find that the appellant played its role in proving its case on a balance of probability. I therefore find that the appeal is merited and I allow it on the following terms

- (i) The Judgment of the lower Court is set aside in its entirety.
- (ii) Judgment is hereby entered for the appellant as against the respondent in the sum of Kshs. 638,536/=,
- (iii) Interest is awarded to the appellant at 14% from 19th of December, 2015 until payment in full; and
- (iv) The appellant is also awarded the costs for the appeal herein and for the case in the lower court.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 26th day of February, 2021.

Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

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NJOKI MWANGI

JUDGE

In the presence of-

Ms Naliaka holding brief for Mr. Adede for the appellant

Mr. Adala for the respondent

Mr. Oliver Musundi – Court Assistant.