



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 440 OF 2017

MAU WEST LIMITED.....APPELLANT

-VERSUS-

CONARCH SERVICES LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable M.Chesang (Mrs.)

(Resident Magistrate) delivered on 5th April, 2016 in MILIMANI

CMCC NO. 8207 of 2016)

JUDGMENT

1. At the onset, the appellant lodged a suit against the respondent through the plaint dated 20th December, 2013 and sought for the sum of Kshs.400,000/ plus costs of the suit and interest on the same arising out of a claim for breach of contract.
2. In its plaint, the appellant pleaded that sometime in the year 2011 the respondent had contracted it to undertake repair works to leaking concrete gutters and flat roofs of a residential house situated on Riverside Drive in Nairobi area (“the subject property”) at an agreed cost of Kshs.1,500,000/.
3. The appellant further pleaded in its plaint that upon undertaking the said works, the respondent paid it the sum of Kshs.1,100,000/ leaving an outstanding balance of Kshs.400,000/ which the respondent consequently sought in the claim.
4. The respondent entered appearance on being served with summons and filed its statement of defence on 18th June, 2014 to deny the appellant’s claim.
5. At the trial of the suit, the appellant called a single witness whereas the respondent closed its case without calling any witnesses.
6. Upon close of submissions, the trial court by way of the judgment delivered on 5th April, 2016 dismissed the appellant’s suit with costs.
7. Being aggrieved by the dismissal order, the appellant has now sought to have the same set aside by filing the memorandum of appeal dated 4th August, 2017 featuring a total of 10 grounds.
8. The appeal was canvassed through written submissions.
9. In its submissions, the appellant faulted the trial court for relying on the pleadings filed by the respondent in the absence of any evidence to back such pleadings.
10. The appellant is of the view that pleadings do not constitute evidence and hence the trial court fell into error by drawing guidance from the respondent’s pleadings, thereby citing the case of **Ndirangu Githuga v Sophie Musembi Njue, HCCC No. 2412 of 1987** in which the court reasoned that pleadings do not constitute evidence.
11. The appellant also faulted the trial court for not holding that its evidence remains uncontroverted and for not finding in its favour on that basis.

12. The respondent by way of its submissions dated 17th July, 2020 argues that whether or not it called any evidence is of little consequence, but that it remained with the appellant to prove its case on a balance of probabilities, which it did not.

13. To buttress its point above, the respondent quotes the case of **Gichinga Kibutha v Caroline Nduku [2018] eKLR** where the court determined thus:

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

14. The respondent urges this court to dismiss the appeal and to uphold the decision of the trial court in the absence of evidence to support its claim.

15. I have considered the rival submissions and authorities cited on appeal.

16. It is noted that the appeal essentially lies against the decision by the learned trial magistrate to dismiss the claim. I will therefore address the 10 grounds of appeal contemporaneously.

17. Paul Muchiku Muriuki who was PW1 adopted his witness statement as evidence and the appellant’s list and bundle of documents as exhibits as part of his examination in chief. The witness then stated that he is a director of the appellant.

18. In cross-examination the witness stated that it was a term of the agreement between the parties herein that the balance of the works done would be paid on completion and that in the present instance, the work was certified as having been completed.

19. The witness further stated that nevertheless, no certificate of completion was issued since there was no independent contractor.

20. The witness testified that at no point did the respondent did not give communication that the work done was shoddy.

21. In re-examination, it was the evidence of PW1 that the appellant is demanding the outstanding balance of Kshs.400,000/ for the work done on the basis that the work was satisfactorily done.

22. In her judgment, the learned trial magistrate reasoned that no certification of work was given by the appellant and therefore found that it had not proved its case.

23. Upon my re-examination of the pleadings and evidence, it is not in dispute that the respondent did not call any evidence at the trial.

24. Suffice it to say that the law is clear that the onus is on a plaintiff to prove its case against a defendant, whether or not the claim is defended. In this respect, I turn to the proviso of **Section 107** of the **Evidence Act** which stipulates that a person who desires judgment on liability must prove that the facts pleaded exist.

25. As the learned trial magistrate correctly noted, it remains uncontroverted that the parties herein entered into an agreement whereby the appellant was to undertake repair works for the respondent and that the respondent was to pay for the said works.

26. Upon my re-examination of the evidence which was tendered at the trial, it is apparent that 70% of the total cost of the works (Kshs.1,500,000/) would be paid upfront while the balance of 30% would be paid upon completion of the works, payable in three (3) instalments namely a down payment of Kshs.500,000/; Kshs.500,000/ upon completion of 50% of the works and the remaining Kshs.500,000/ upon completion.

27. The evidence shows that the works were to be completed within 30 days beginning 14th March, 2011 and according to the letter dated 23rd February, 2010 the outstanding balance would be paid on completion and certification.

28. Upon my further re-examination of the evidence, it is apparent that the sum of Kshs.1,100,000/ was paid by the respondent to the appellant by way of three (3) cheques.

29. From my study of the record, I did not come across anything to indicate that certification had taken place or that the works agreed upon had been completed in order to warrant payment of any outstanding balance by the respondent.

30. Furthermore, from my study of the impugned ruling I am of the view that whereas the learned trial magistrate made mention of the averments made in the pleadings by the respondent, she did not necessarily place reliance on them as claimed by the appellant.

31. In view of the foregoing circumstances, I am satisfied that the learned trial magistrate adequately considered the evidence and submissions which were placed before her and arrived at a proper finding. I therefore concur with the finding of the learned trial magistrate that the appellant did not prove its case against the respondent on a balance of probabilities.

32. The upshot therefore is that the appeal lacks merit the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent