



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 93 OF 2006

DALWART SINGH MATHARU

NEETA MATHARU JOINTLY T/A

BEES ELECTRICAL CONTRACTORS & REWINDERS.....APPELLANTS

-VERSUS-

SHARKISH FLORA LIMITED.....RESPONDENT

(Being an appeal from the judgment/decree of Hon. Gilbert Mutembei, Chief Magistrate, Nakuru, delivered on 10th March, 2005 in Nakuru CMCC No.1883 of 2004.)

JUDGMENT

BACKGROUND

1. By plaint dated 22nd August 2004 the Respondents filed a claim for Kshs.1,157,764.00 against the Appellants on account of electrical installation done by Plaintiff on Defendants Plot Number 9770/6 Salgaa.
2. The Defendants/Appellants in defence dated 22nd September 2004 denied the claim and sought dismissal of Plaintiff/Respondent's case.
3. After hearing, the trial magistrate found that the Plaintiffs had failed to prove claim against the Defendant and dismissed the suit in judgment delivered on 7th June 2006.
4. Being aggrieved by determination by the trial court, the Appellants/Plaintiffs filed this appeal on the following grounds:-
 - i. That the learned trial magistrate erred in law and fact in finding that the appellants had not proved their case on a balance of probability and dismissing the same on the basis of inconsequential and the issues which had nothing to do with the essence or substance of their case.
 - ii. That the learned magistrate erred in law and fact in holding case was not proved when in fact there was no serviceable defence raised against the claim beyond mere denial and when the essence and substance of the appellants' case was not challenged at all by contrary evidence or at all.
 - iii. That the learned trial magistrate erred in law and fact in misapprehending and or failing to properly deal with the evidence adduced in court, and misapprehending the law of evidence in so far as the same applied to the appellants' case and the consideration of the appellants' evidence thereby reaching finding of fact which were totally unwarranted and unreasonable.
 - iv. That the trial magistrate erred in law in finding the respondent not liable to pay consideration under contract which undeniable existed between the parties hereto and which the appellant had undeniably performed.
 - v. That the trial magistrate erred in law and fact in dismissing the appellants' case when there was overwhelming, plausible and corroborated evidence proving the case in as far as parties to the contract and the performance by the appellants.
 - vi. That the judgement of the trail court is unreasonable and contrary to law, principle and facts of the case presented before that trail court.

5. Parties agreed to proceed with the appeal by way of written submissions. The Appellants filed submissions on 28th January 2019. Despite being given opportunity to file submissions, the Respondent/Defendant failed to file submissions.

APPELLANTS' SUBMISSIONS

6. On finding that the plaintiffs failed to prove their case on a balance of convenience, the Appellants submitted that the Plaintiffs failed and availed various documents to support their case and called 3 witnesses. They submitted that PW1 who is the wife of PW3 and a partner in the business named **Bees Electrical Contractors and Rewinders** (3rd Plaintiff) testified that the 3rd Plaintiff and the Defendant's Director **Navinda Singh Kandola** entered into an oral agreement to undertake electrical installation at respondent's premises.

7. That acceptance of Appellant's offer was accepted by Respondent as evidence by acceptance letter dated 6th July 2001. Appellant further submitted that PW2 a KPLC employee confirmed that power was connected to Respondent's premises; that he further confirmed quotation produced as exhibit by Appellants; that the witness confirmed that before power was connected to the Respondent's premises, wiring had to be done and he confirmed that the Appellants' firm was contracted to do wiring as confirmed by notice of commencement of work and certificate of completion produced as exhibit 17 and a test certificate produced as exhibit 18.

8. Appellants submitted that the evidence adduced confirmed that electrical installation works were done; that there is overwhelming evidence that the works were probably done by Appellant's firm.

9. On commencement and completion date being the same, Appellants submitted that PW2 testified that it happens in normal in the usual working procedure and that it is not fraud and it was wrong for the magistrate to impute fraud on part of the appellant.

10. That variance of plot numbers 9970/6 indicated by Appellants and 9770/6 by PW2 is typographical error which should go to the root of the of the suit; that the court should be alive to the fact that the plot which wiring was to be done was flower farm known as **Sharkish Flora Limited**

11. That in **Nahashon Oluma Okombo Vs Migori Land FDispute Tribunal & Another[2010]eKLR** the court held that:-

"It is therefore my view that there were fewer typographical errors in referring to the land in dispute as North Sakwa/Kanyamkango/1134 instead of North Sakwa Kanyamgony/1134. This error cannot disentitle the exparte applicant from seeking any appropriate remedy if his application is otherwise competent and merited. In any event, section 159 of the Constitution of Kenya states that justice shall be administered without undue regard to procedural technicalities. The property that is in dispute is clear to all the parties as well as the court. I therefore overrule the technical objection raised by the interested party."

12. Appellants submitted that they submitted sufficient evidence on a balance of probabilities but trial magistrate failed to deal with it.

13. Appellants cited the case of **D.T Dobie & Compant (K) LTD VS Wanyonyi Wafula Chebukati** where the court cited with approval the case of **Denning J in Miller Vs Minister of Pensions[1947]** where the court held that:-

"The degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think it is 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 which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

ANALYSIS AND DETERMINATION

14. This being the first appellate court, I am required to evaluate evidence on record and arrive at an independent determination. Upon perusal of trial court record and documents filed, what I find to be in issue is whether the Appellants proved their case on balance of probabilities in the trial court.

15. Plaintiffs' evidence is that the agreement between them and the Respondent was oral. I note from description of parties that the two Appellants traded as **Bees Electrical Contractors and Rewinders**.

16. The trial court looked at three issues; dates of commencement, completion and inspection which he said had variance on plot numbers 9970/6 and 9770/6.

17. What is the test of prove of a case on balance of probabilities. My view is one is required to look at evidence adduced and see if there is probability that what is alleged to have been done was done. It does not require prove beyond reasonable doubt. PW2 confirmed that wiring was required in the Respondent's premises before power could be connected. He confirmed that power was connected by his employer **Kenya Power and Lighting Company** and that it was connected after wiring was done. He confirmed that the works commenced and they were completed. He also confirmed that the works were done in Respondents premises. PW2 is an independent witness; an employee of Kenya Power and Lighting Company Limited.

18. Appellants testified that they entered into an oral agreement and he could not therefore have an agreement to produce.

19. The Defendant never availed any witness to rebut Appellants evidence in the lower court neither have they filed submissions in this appeal. The Plaintiffs' evidence therefore remain uncontroverted. In my view, the Plaintiffs' evidence proved on a balance of probabilities that the Appellants carried out electrical installation works in the Respondent's premises.

20. I am of the view that the trial court should have looked at substantive issues and avoid technicalities or issues, which do not go into the core of the matter before it.

21. I see merit in this appeal

22. **FINAL ORDERS**

1. Determination by trial court set aside.

2. Judgment entered for Appellants against Defendants/Respondents for kshs 1,157,764.00.

3. Interest on the above from the time of filing suit.

4. Costs to be paid by Respondent to the Appellants.

Judgment dated, signed and delivered at Nakuru this 27th day of February, 2020

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

Jeniffer/Schola – Court Assistant

M/s Obura holding brief for Mr. Kisila Counsel for the Appellants

No appearance for Counsel for the Respondent