



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 733 OF 2017

CAPACITY BUILDING & RESEARCH COMPANY LIMITED.....APPELLANT

VERSUS

THE PERMANENT SECRETARY, MINISTER OR LABOUR.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal against the Judgment of Honourable Senior Principal Magistrate A.M. Obura (Mrs) delivered on 29th November 2016 in Civil Suit No 4721 of 2012)

JUDGMENT

INTRODUCTION

1. In her decision delivered on 29th November 2016, the Learned Trial Magistrate, Hon A.M. Ombura (Mrs), Senior Principal Magistrate (SPM) dismissed the Appellant's suit with costs to the Respondents herein.
2. Being dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 21st December 2017 on 29th December 2017. It relied on six (6) Grounds of appeal.
3. Its Written Submissions were dated 22nd July 2019 and filed on 22nd July 2017. Its List and Bundle of Authorities was dated 30th July 2019 and filed on 21st August 2019. The Respondents' Written Submissions were dated 9th August 2019 and filed on 13th August 2019.
4. The Judgment herein is therefore based on the said Written Submissions which the parties relied upon in their entirety.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. It appeared to this court that the issues that had been placed before it for determination were:-

- a. **Whether or not there was a valid and binding contract between the Appellant and the 1st Respondent?**
- b. **If so, what were the terms of the contract?**
- c. **Whether or not the Learned Trial Magistrate erred in finding that the Appellant was not entitled to interest on unpaid sums after the date for payment.**

8. This court therefore dealt with the said issues under the following distinct and separate heads.

I. CONTRACT

9. The Appellant submitted that it entered into a binding contract with the 1st Respondent to offer consultancy services after it participated in the tender process through its quotation no. MLHRD/KQS/139/2009-2010 which was successful and it was awarded the contract vide letters dated 7th June 2010 Ref: NLHRD/ADM.II on Employee Satisfaction Survey and letter Ref: ML/ADM/14/17/4 Vol VIII on Customer and Work Environment Survey.

10. It averred that the aforesaid two (2) letters dated 7th June 2010, direct transfer of payment advice and invoices confirmed the offer and acceptance and that the same confirmed its performance.

11. On their part, the Respondents contended that the 1st Respondent issued the Appellant with Local Services Orders 0605090, 0605691 and 0605692 totalling Kshs 10,500,000/= and that it made a direct transfer, which the Appellant duly acknowledged receipt.

12. This court was satisfied that there was an intention between the parties to create a legal relationship between them. The following ingredients were present:-

a. An offer;

b. An acceptance;

c. Consideration;

13. There were no vitiating factors to invalidate and/or void the contract between them. From the aforesaid, it was clear that there was no dispute that there was the Appellant and the 1st Respondent entered into a valid and binding contract between them.

14. Consequently, the question of existence of a contract between the Appellant and the 1st Respondent was not in dispute, the court did not deem it necessary to say more on this issue save to state that the parties were both agreed that the 1st Respondent's letter dated 7th June 2010 was what constituted the contract.

II. TERMS OF THE CONTRACT

15. Having said so, it was evident that there was a dispute as to what the terms of the contract were.

16. The Appellant argued that the policy of the Kenya Government in respect of contracts for consulting services on small assignments/lump sum assignments was that payments were to be made within thirty (30) days following submission of the consultant's invoice in duplicate and that where payment is delayed beyond the thirty (30) days after due date, simple interest was payable to the consultant for each day delayed at a rate of three percent points above the prevailing Central Bank of Kenya's average rate for base lending.

17. On their part, the Respondents relied on Chitty on Contract where acceptance is defined as:-

“...the final and unqualified expression of assent.”

18. It was their contention that for a party to have accepted an offer to enter a contract, the terms of the contract must be accepted. It was emphatic that the letter of offer dated 7th June 2010 did not capture the component of interest and that the document the Appellant relied upon to argue that it was entitled to interest at three (3%) per cent for delayed payments was a sample contract for contracting services.

19. It averred that the said sample contract was undated, unsigned and did not show the parties of the contract and consequently, the Learned Trial Magistrate found correctly that the same was not legally binding between it and the Appellant herein.

20. They added that Section 75C of the Public Procurement and Disposal Act, 2005 (now repealed) provided that where an entity sought to procure directly, the contract had to be in writing but that the Appellant had failed to adduce any such contract in writing to show that it was entitled to the interest as aforesaid.

21. They contended that the 1st Respondent issued the Appellant with Local Services Orders totalling Kshs 10,500,000/= and it made a direct transfer to it. They denied that the 1st Respondent owed the Appellant any monies and consequently, the Learned Trial Magistrate had arrived at the correct conclusion when she dismissed the Appellant's suit.

22. The court perused the 1st Respondent's letter dated 7th June 2010 to the Appellant and noted that it was signed on his behalf. In the said letter it had been indicated as follows:-

“I am glad to inform you that your quotation No. MLHRD/HQS/139/2009-2010 on the above application was successful.

You are therefore requested to begin the exercise immediately as other documentations are being prepared. This is because

the exercise is one of the performance targets and has to be completed and a report in place by 30th June 2010.

The amount involved in this contact is Kshs 3,500,000/= (Kshs. Three Million Five Hundred Thousand) inclusive of taxes.”

23. There was also another letter dated 7th June 2010 in which it was stated as follows:-

“The Ministry intends to carry out Customer and Work Environment Survey as part of the Performance Contract Targets.

This is therefore to kindly request your organisation to carry out the two surveys as the Local Service Order is being processed.”

24. There was no other letter which could be deemed to constitute the basis of the contract between the Appellant and the 1st Respondent herein. The Sample Contract For Consulting Services Small Assignments Lump-sum payments was undated, unsigned and bore no names of the contracting parties therein. In other words, it was blank and was a mere sample contract for consulting services. It therefore had no legal basis and bearing in the circumstances of the case herein.

25. What this court noted was that the said sample had been issued by the Ministry of State for Public Service: January 2012. There was nothing to show that the said sample was applicable to the Ministry of Labour which the Appellant had consulted for. Even if one was to assume that the sample contract was valid, it would not have been applicable in the circumstances of the case herein because it could not have applied retrospectively as the contract herein was entered into in 2010.

26. This court therefore came to the conclusion that the Learned Trial Magistrate arrived at the correct conclusion when she found and held that the said document had no legal effect and could not bind the Appellant and the 1st Respondent herein.

III. INTEREST

27. Having found that payment of interest was not a term of the contract that the Appellant and the 1st Respondent entered into, this court also agreed with the 1st Respondent that the Learned Trial Magistrate did not err when she found that the Appellant had been fully paid for the Local Service Orders in the sum of Kshs 10,500,000/= and that the claim for interest in the sum of Kshs 2,637,250/= had no legal basis. The same had to fail in its totality.

DISPOSITION

28. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged in court on 29th December 2017 was not merited and the same is hereby dismissed. As the 1st Respondent was part of the Executive in the Government of Kenya and the 2nd Respondent is counsel for all government institutions, there will be no order as to costs in respect of the Appeal herein.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of February 2020

J. KAMAU

JUDGE