REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 40 OF 2018

KENYA POWER & LIGHTING CO. LIMITED .....APPELLANT

VERSUS

PLAN "B" HOLDINGS LIMITED .....RESPONDENT

[Being an appeal from the Judgment and Decree of the Honourable Yalwala PM

in KISUMU CMCC NO. 291 OF 2016 delivered on 15th May 2018]

JUDGMENT

The appeal arises from the Judgment dated 15th May 2018, wherein the learned trial magistrate found the Appellant liable to pay to the Respondent the sum of Kshs 2,703,277.29. The trial court also ordered the Appellant to pay interest on the principal sum, at court rates, from the date when the suit was filed.

1. Finally, the trial court ordered the Appellant to pay to the Respondent, the costs of the suit.

2. In its Memorandum of Appeal, the Appellant raised the following **4** grounds of appeal;

> ***"1. THAT the Hon. Trial Magistrate erred in law and fact, in shifting the burden of proof to the Defendant.***
>
> ***2. THAT the Trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions.***
>
> ***3. THAT the Hon. Trial Magistrate failed to consider that at all material times the Respondent was not prequalified to offer services to the Appellant.***
>
> ***4. THAT the Hon. Trial Magistrate erred in law and fact in not finding the Respondent's claim not proved."***

3. When canvassing the appeal, the Appellant submitted that the Respondent failed to prove that there was any agreement between the parties herein.

4. The Appellant submitted that it was incumbent upon the Respondent to produce the document allegedly embodying the agreement, because it was only then that the court would know *"the rules of contract"* that should have guided the parties in their agreement.

5. In that respect, it is well settled, by virtue of **Section 107** of the **Evidence Act** that;

> **The legal burden of proof normally rests upon the person who;**
>
> ***"…. desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts…."***

6. In this case, the Respondent had asserted that on diverse dates between the year 2009 and the year 2014, upon the request of the Appellant, it carried out the specified tasks assigned to it.

7. The Respondent had further asserted, in the Plaint, that it performed the tasks to the satisfaction of the Appellant.

8. The alleged satisfaction was said to have been expressed through the inspection, approval and valuation of the tasks which the Respondent

had carried out.

9. According to the Respondent, it was entitled to receive payment from the Appellant, as it had discharged its obligations under the contracts between the 2 parties herein.

10. Notwithstanding demands made to the Appellant, for payment of the sums due, the Respondent had refused to make any payment.

11. But the Appellant submitted that the Respondent never produced evidence of the alleged contract.

12. It was the Appellant's contention that the Respondent only produced evidence of a contract pre-qualification between the 2 parties.

13. This court's attention was drawn to the express wording of the letter dated 8th August 2012, in which the Appellant had made it expressly clear that the Respondent was required to;

> ***"Please convey acceptance in writing within 14 days from the date hereof."***

14. In the absence of such written acceptance, the Appellant submitted that no contract came into being.

15. I find that when parties have made it clear that the offer made should be accepted in writing, ordinarily a contract only comes into being upon the execution of the written acceptance.

16. However, even when parties had indicated the intention that the acceptance be in writing, I hold the considered opinion that there was no bar to any of the parties leading evidence to prove to the court that there was actual acceptance.

17. I understand the phrase *"actual acceptance"* to mean the demonstration that the offer made by the one party, (although not accepted in writing), was carried out in accordance with the terms of the offer.

18. When there was no written acceptance, the burden of proof rests upon the person who allegedly accepted the offer, to prove such acceptance.

19. Pursuant to **Section 3** of the **Law of Contract Act**, there are specified contracts which must be in writing. When the said specified contracts were not in writing, no suit can be brought upon them.

20. The contract between the parties herein does not fall within the category of contracts upon which suits cannot be brought, if the contracts were not in writing.

21. It was thus open to the Respondent to bring the suit, even though there appears to have been no written acceptance of the offers from the Appellant.

22. The Respondent has demonstrated that in respect to each of the 42 Power Supply Schemes which were offered to it, the Appellant's authorized officers executed Completion & Inspection Certificates.

23. I find that the said Completion & Inspection Certificates were an express and unqualified affirmation by the Appellants, that the work so certified was duly done by the Respondent, to the satisfaction of the Appellant.

24. Whereas a signed contract may constitute a contract, that cannot be an end to itself.

25. The parties become entitled to claim if the contract has been performed or if there has been failure to perform either in part or in full.

26. Where the Respondent has demonstrated that it performed, and that the Appellant issued Completion & Inspection Certificates, the Respondent was entitled to sue for the payments, in respect to the services it had rendered.

27. The Appellant failed to call any evidence, to respond to the evidence tendered by the Respondent. By holding that the Respondent's evidence was uncontroverted, the learned trial magistrate did not err. He did not shift the burden of proof to the Appellant.

28. I have re-evaluated all the evidence on record, and I find that the Respondent adduced sufficient evidence to prove its claim.

29. I have also given consideration to the submissions which the Appellant rendered before the trial court, (even though the learned trial magistrate made it clear that no such submissions were on record at the material time). I find that neither the said submissions, nor the submissions made in this appeal, diminish the probative value of the evidence tendered.

30. Accordingly, the appeal has no merit: it is therefore dismissed with costs to the Respondent.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **12th** day of **March** 2020

FRED A. OCHIENG

JUDGE