



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 14 OF 2019

CALEB ONYANGO ADONGO....APPELLANT

-VERSUS-

BERNARD OUMA OGUR.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 246 of 2017 delivered on 18/12/2018)

JUDGMENT

1. The appeal subject of this judgement arose from the dismissal of **Migori Chief Magistrate's Civil Suit No. 246 of 2017** (hereinafter referred to as '**the suit**').
2. The suit was initiated by the Appellant herein, *Caleb Onyango Adongo*, against the Respondent herein, *Bernard Ouma Ogur*. It was premised on an alleged failure by the Respondent to pay for services rendered by the Appellant sometimes in 2014 to the tune of Kshs. 98,400/=.
3. The suit was defended. The Respondent denied existence of any contract for provision of services and invited proof. He pleaded in the alternative that if there was any contract then the same was between the Appellant and an outfit known as *Anyango Ouma Memorial Hospital & Community Health Project* in which the Defendant was one of its leaders. The Respondent further pleaded that the said entity paid for all services the Appellant rendered. The Respondent prayed for the dismissal of the suit with costs.
4. The suit was eventually heard. Both parties testified. None called any witness.
5. The suit was dismissed with costs *vide* a decision rendered on 18/12/2018.
6. The Appellant was dissatisfied with the judgment. He preferred an appeal. On 11/01/2019 he filed a Memorandum of Appeal. He raised 9 grounds of appeal as under: -
 1. **That the trial magistrate erred in law and fact in misapprehending the issues raised by the respective pleadings hence reaching an erroneous decision.**
 2. **That the trial magistrate erred in law and fact in holding that it is mandatory to file a reply to defence even when a defence does not raise any allegation or averment capable of being traversed.**
 3. **That the trial magistrate erred both in law and in fact in holding that the plaintiff's claim failed due to non filing of a reply to defence yet in the circumstances no such reply would be necessary.**
 4. **That the trial magistrate erred both in law and in fact in finding that the plaintiff had not proved top the required standard the existence of a valid and enforceable contract between the parties despite the fact that the plaintiff had adduced sufficient evidence to the contrary.**
 5. **That the trial magistrate erred both in fact and in law in finding that the defendant was acting on behalf of a third party hence not personally liable in the absence of evidence as to the existence of such third party and without third party proceedings having been undertaken.**

6. That the trial magistrate erred both in law and in fact in disregarding documentary evidence in the nature of an agreement and/or commitment to pay to the plaintiff the amount in dispute.

7. That the trial magistrate erred in fact and in law in failing to uphold the principle that he who alleges must prove and finding for the defendant despite no tangible proof of his allegations.

8. That the trial magistrate erred in law and in fact in reaching a decision that was not supported by the evidence adduced.

9. That the trial magistrate failed to properly evaluate the evidence adduced which indeed proved the plaintiff's case to the required standard.

10. Directions were taken. The appeal was disposed of by way of written submissions. Both parties duly complied.

7. The Appellant submitted that he proved the suit against the Respondent. He contended that there was a valid contract and that the trial court erred by not evaluating the evidence properly. The Appellant referred to Charles Mwirigi Miriti vs. Thananga Tea Growers Sacco Ltd & Ano (2014) eKLR and Kituo Services Station Co. Ltd vs. Marshalls E.A. Ltd (2010) eKLR in buttressing the position.

8. On failure to file a reply to defence, the Appellant submitted that the failure amounted to joinder of issues instead of an admission. He relied in Denmus Oigore Oonge vs. Njuca Consolidated Ltd (2012) eKLR. Lastly, the Appellant submitted that the trial court erred in dismissing the suit instead of making a finding that the Respondent was under a duty to enjoin the alleged entity as a third party. He referred to Kenya Commercial Bank vs. Suntra Investment Bank Limited (2015) eKLR.

9. The Respondent supported the judgment. He reiterated that he had no contract with the Appellant and that the failure to file a reply to defence amounted to an admission of the issues raised in the statement of defence. He further submitted that there was no evidence of any performance of the contract. He prayed that the appeal be, as well, dismissed with costs.

10. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348.

11. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

12. There are several issues for determination in this appeal. They are: -

- i. Whether there was a valid contract between the parties;
- ii. Whether the Respondent was the right party to be sued;
- iii. The legal effect for failure to file a reply to defence;
- iv. Whether the suit was proved as required in law.

13. I will deal with the issues seriatim.

i. Whether there was a valid contract between the parties:

14. The *Black's Law Dictionary* defines a contract as follows: -

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

15. I will refer to some persuasive decisions on contract formation. In G. Percy Trentham Ltd vs. Archital Luxfer Ltd (1993) 1 Lloyds Rep. 25 Lord Steyn stated as follows: -

.....it is important to consider briefly the approach to be adopted to the issue of contract formation... It seems to me that four matters are of importance. The first is that law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men..... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden v Metropolitan Railway* [1877]2 AC 666; *New Zealand Shipping Co Ltd v A M Satterhwaite & Co Ltd*, [1974] 1 Lloyd's Rep. 534 at p. 539 col. 1 [1975] AC 154 at p. 167 D-E; *Gibson v. Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd v.*

Novinex [1949] 1 KB 628 at p. 630. **The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or alternatively, it may make it possible to treat a matter not finalized in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See Trollope & Colls Ltd v. Atomic Power Constructions Ltd. [1963]1 WLR 33.”**

16. In **RTS Flexible Systems Ltd vs. Molkerel Alois Muller GmbH & Co, KG (UK Production) (2010) UKSC14, [45]** the Supreme Court of the United Kingdom stated that: -

...The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

17. In **Rose and Frank Co. vs. J R Crompton & Bros Ltd (1923) 2 KB** it was held that: -

To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.

18. Legal authors in *Cheshire, Fifoot and Formstons, The Law of Contract, 14th Edition* stated in pages 34 and 35 that: -

The first task of the plaintiff is to prove the presence of a definite offer made.... Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer.

19. Whereas the foregoing are only persuasive they set out the correct legal principles applicable in contract law generally. Therefore, the approach by a Court in considering whether a contract exists is an objective one as opposed to a subjective one.

20. Back home, the Court of Appeal in **William Muthee Muthami vs. Bank of Baroda (2014) eKLR** observed that: -

...In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.

21. In **Abdulkadir Shariff Abdirahim & Another vs. Awo Sharriff Mohammed t/a A. S. Mohammed Investments (2014) eKLR** the Court of Appeal held that: -

There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the Law of Contract Act is one such provision.

22. On implied contracts, the Court of Appeal in **Ali Abdi Mohamed vs. Kenya Shell & Company Limited (2017) eKLR** referred to the following persuasive decisions: -

.... In Lamb v. Evans [1893]1 Ch 218, Bowen LJ stated:

The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile.”

Bingham LJ in The Aramis [1989] 1 Lloyd’s Rep 213 made some general observations about the circumstances in which a contract might be implied. At p.224 col. 1, he said:

“As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case - and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given cases unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between

parties who are dealing with the one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.”

Further,

I do not think it is enough for the party seeking the implication of a contract to obtain “It might” as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.”

23. The foregone reveal several legal imperatives. They include that a contract may be in writing or implied, that whether a contract is in writing or is implied the elements of offer, acceptance and consideration must be proved, in implying a contract the conduct of the parties remain paramount, that an objective approach in contract interpretation is to be adopted, among others.

24. In this case there was no written contract. Therefore, this Court is enjoined to ascertain whether the pleadings, the evidence and the general conduct of the parties reveal any contract. If that tour yields in the affirmative, then a contract may be implied.

25. The Appellant testified and produced exhibits. He stated in part that: -

.... I deal in timber sales. I know the Defendant. I had a business deal in 2014. He asked me to split timber and transport to his home. He gave me an order in writing and signed. He was to pay Kshs. 129,000/= in total. I wish to produce the original order 24/06/2014 as P-exhibit 1.

I completed the work, he paid me on 25/07/2014 Kshs. 10,000/= and gave me a receipt. He indicated the balance on receipt and signed. This is receipt P-exhibit 2.

On 25/07/2014 he again paid Ksh.9000/= this s receipt P-exhibit -3.

On 22/08/2014 he paid Kshs. 5000/= this is receipt P- exhibit 5.

On 30/07/2014 I was paid Kshs. 6,000/= receipt P-exhibit - 4.

The defendant signed on all receipts. The balance is Kshs. 98,400 which he has not paid todate. I reported to chief but refused to attend. Chief did a letter on 06/01/2017 P-exhibit 6.

After Chief’s letter, he gave an undertaking to pay me Kshs. 98,400. He claimed he pad me 49,000/= nut I disagreed I wish to produce the undertaking by defendant.

26. The Respondent also testified. He partly stated that: -

It is not true I have refused to pay him for supply of goods. I paid Plaintiff Kshs. 129,900 which was whole sum. I don’t owe him anything. The trees were mine he cut them. Plaintiff did not work as we agreed but he promised to come finish the work but he didn’t. I issued Plaintiff with receipts which he produced. I gave receipts for Kshs. 35,000/= Receipt of 24/08/2014 was not produced by Plaintiff.

Plaintiff did not complete the work.

27. I have considered the evidence and the exhibits on record. The Order was a request made by the Respondent to the Appellant who dealt in timber business. That order was the offer. The *consideration* was Kshs. 129,000/= as stated in the order. The Respondent testified that the Appellant did the work partially. Whether that position is true or otherwise shall be dealt with later in this judgement, but suffice to say that there was performance. That performance connoted *acceptance*. I therefore note that there was an offer, acceptance and consideration. A valid implied contract hence existed.

28. The first issue is answered in the affirmative.

ii. Whether the Respondent was the right party to be sued:

29. The Respondent contended vehemently that he was wrongly sued instead of an entity known as *Anyango Ouma Memorial Hospital and Community Health Project*. The Respondent was its leader and the project manager.

30. On the other part, the Appellant contended that he dealt with the Respondent throughout the contract period and was never made aware of the alleged entity known as *Anyango Ouma Memorial Hospital and Community Health Project*. The Appellant only used to see a sign post in that name somewhere.

31. The Appellant’s position was buttressed by the Respondent in his evidence. Further, on cross-examination, the Respondent admitted that

he agreed with the Appellant on the contractual works and the consideration. He also stated that he paid the Appellant the entire consideration. The Respondent further disclosed that the said *Anyango Ouma Memorial Hospital and Community Health Project* was registered with the Social Services Department and was issued with a Certificate of Registration.

32. The said *Anyango Ouma Memorial Hospital and Community Health Project* was therefore not an incorporated entity. It was just an outfit registered under the Social Services Department. Can such an outfit be legally sued?

33. There is a plethora of binding decisions to the effect that unincorporated associations are not legal entities and cannot sue or be sued. Such have no legal persona and as such can only sue or be sued through its officials. (See *African Orthodox Church of Kenya vs. Rev. Charles Omuroka and Lagos Ministry of Orthodox Renewal (2014) eKLR*, *Matiyani Women Development Group vs. Group Four Security Limited (2005) eKLR*, *Simu Vendors Association vs. The Town Clerk City Council of Nairobi & Another (2005) eKLR*, *Lloyd vs. Loaring (1802, CH.) 6 VES. 773, 777. Accord: Pipe v. Bateman (855)* among many others).

34. The decisions settle the issue. *Anyango Ouma Memorial Hospital and Community Health Project* could not be sued in its own name as suggested by the Respondent. It could only be sued through its officials. The Respondent repeatedly admitted that he was an official of the outfit.

35. The second issue is also answered in the affirmative.

(iii) The legal effect for failure to file a reply to defence:

36. This issue was as well settled by the Court of Appeal. The correct legal position is that where a Plaintiff is served with a statement of defence and opts to file a reply to defence but does not specifically respond to factual issues raised in the statement of defence then it is deemed that the Plaintiff admitted the unrebutted issues. However, when a Plaintiff is served with a statement of defence and fails to file any reply to defence then the non-filing of the statement of the defence operates as a joinder or denial of the issues in the defence.

37. The Court of Appeal in *Denmus Oigore Oonge vs. Njuca Consolidated Ltd* case (supra) laid the correct position as follows: -

16. The proper construction of the Rule 8 (1), in my view, is the one stated in *Katiba Wholesalers Agency (k) Ltd vs United Insurance Co. Ltd., Civil Appeal No. 140 of 2002* where this court stated that-

...where a defence contains an allegation of fact, and a reply is filed,... it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations.

It is only if the plaintiff does not file any reply that there is joinder of issue on the defence which operates as a denial of all allegations contained in the defence.

In the light of the provisions of Order 6 Rules 9(1) and 10(1) and this authority, the Appellant having not filed a reply to defence, there was clearly a joinder of issues with the effect that the Appellant denied the negligence alleged against him in the defence just as the Respondent denied the negligence alleged against him in the plaint. The High Court therefore erred in deeming the Appellant as having admitted the allegations of negligence in the defence against him.

38. In this case the Appellant did not file a reply to defence. As such there was a joinder of issues which operated as a denial of the factual matters raised in the statement of defence.

39. The Respondent's position to the contrary hereby fails.

(iv) Whether the suit was proved as required in law:

40. In view of how the foregone issues have been settled, what remains to be ascertained is whether the Appellant duly performed his part of the contract. The Respondent took twin positions on the issue. First, the Respondent stated in his evidence-in-chief that '*It is not true I have refused to pay him for supply of goods. I paid Plaintiff Ksh. 129,000 which was whole sum. I don't owe him anything.*' Second, the Respondent contended that the Appellant did not complete the agreed work.

41. I am therefore at a loss on the exact stand taken by the Respondent on the issue. I have looked at the receipts which were issued by the Respondent and produced by the Appellant as exhibits. The receipts contained reducing balances. The last receipt was issued on 22/08/2014. It had a balance of Kshs. 98,400/=. It is that balance which the Appellant sought to recover from the Respondent.

42. An inevitable question therefore comes to the shore. If it is true that the Appellant defaulted in the works as alleged or if the Respondent used to pay the Appellant only for specific work done, why did the Respondent indicate the balances in the receipts? The Appellant was all along consistent on the debt. He demonstrated how the balance was arrived at and also narrated all the steps he took towards recovery. The

Respondent further admitted that he wrote the document which was produced as P. Exhibit 7. The debt was admitted therein.

43. Having regard to the evidence, the conduct of the parties and in applying the objective criterion, I am satisfied that the Appellant fully discharged his part of the contract. The Respondent only made a part payment leaving a balance of Kshs. 98,400/=. The balance was pleaded and proved. The suit was hence proved as required in law.

44. I now find and hold that upon re-evaluation of the evidence the suit was proved. Consequently, the following orders do hereby issue: -

- a. The appeal hereby succeeds and the judgment of the learned magistrate dismissing the suit is hereby set aside accordingly;**
- b. Judgment be and is hereby entered for the Plaintiff [now Appellant] as prayed for in Migori Chief Magistrate's Civil Suit No. 246 of 2017 against the Defendant [now Respondent];**
- c. The Appellant shall have costs of the suit as well as costs of the appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May, 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically: -

- 1. sonyango80@yahoo.com Messrs. Sam Onyango & Co. Advocates for the Appellant.**
- 2. advocate685@gamil.com for Messrs. Nelson Jura & Co. Advocates for the Respondent.**
- 3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.**

A. C. MRIMA

JUDGE