



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 453 OF 2019

TRISHCON CONSTRUCTION COMPANY LIMITED. APPELLANT

-VERSUS-

VIKASH ENTERPRISE LIMITED..... 1ST RESPONDENT

LANDMARK HOLDINGS LIMITED..... 2ND RESPONDENT

i. THAT the learned magistrate erred in law and fact by finding that the appellant was indebted to the 1st respondent in a sum of ksh.4,391,388.48 when the said finding was not supported by the weight of the evidence and documentation tendered.

ii. THAT the learned magistrate erred in law and fact in failing to consider in its totality the defence to the 1st respondent's claim in the lower court as tendered and put forth by the appellant.

iii. THAT in holding the appellant wholly liable the learned magistrate erred in law and fact in failing to apportion liability between the appellant and the 2nd respondent as third party on in the alternative to hold and find the 2nd respondent wholly liable.

iv. THAT the finding by the court in the sum of ksh.4,391,488.48 entered in favour of the 1st respondent was not only proven but was manifestly excessive and in the circumstances unwarranted and consequently the learned magistrate fell into error.

v. THAT the learned magistrate erred in law and fact in failing to hold and find that there was a relationship between the appellant and the 2nd respondent and therefore arrived at an erroneous conclusion in her judgement.

vi. THAT the learned Principal Magistrate in denying the appellant an opportunity to tender oral evidence fell afoul of the principle of "audi alteram partem" and by failing to honour the time honoured dicta set out in judicial precedent including Mutiso vs Mutiso (1984) e KLR that all parties should be heard before a decision is made thereby erred in law and fact thus rendering her judgment to be unsustainable and in violation of Article 50 of the Constitution of Kenya, 2010.

vii. THAT the learned magistrate erred in law and fact when she stated that the appellant did not file replying submissions in opposition to the 1st respondent's submissions whereas the court record demonstrates that the appellant filed and presented its submissions which were duly stamped as received by the court registry on the 8th May 2019.

viii. THAT the learned magistrate erred in law in failing to consider the facts of the matter, the appellant's submissions as tendered by counsel and the authorities in support of the appellant's arguments in arriving at her finding.

12) Learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court and also considered the rival written submissions.

13) Though the appellant put forward a total of 8 grounds of appeal, I am of the view that the main ground which should be considered first is the sixth ground which is to the effect that the appellant was denied an opportunity to tender oral evidence.

14) The record shows that the learned considered the evidence of the 1st and 2nd respondents in arriving at her decision. The record also shows that the learned Principal Magistrate ordered for all documents filed by the appellant to be expunged from record and further proceed to close the appellant's defence for lack of evidence.

15) It is the submission of the appellant that the learned Principal Magistrate erred when she denied it an opportunity to tender evidence in support of its defence. The appellant further pointed out that its witness was denied to testify despite the fact that he was present in court.

16) The 1st respondent is of the submission that the learned Principal Magistrate's decision to deny the appellant leave to file a witness statement cannot be faulted because the appellant had been given a chance to do so through a consent order but he failed to take advantage of the opportunity.

17) The 2nd respondent on the other hand is of the opinion that the trial properly exercised its discretion by denying the appellant a right of hearing since it had been accorded enough time to file its witness statement but it choose to ignore it.

18) Having considered the rival submissions and having carefully perused the typed proceedings and judgment, it is not denied nor contested that the trial magistrate declined to allow the appellant's witness a chance to give oral evidence yet he was present in court. It is also not in dispute that the learned Principal Magistrate denied the appellant leave to file a written witness statement outside the period given in the consent order.

19) It is also apparent from the record that the trial magistrate ordered the appellant's documents to be expunged from the court record without attaching any reasons. With a stroke of the pen, the trial magistrate made drastic orders which were prejudicial to the appellant. First, the appellant's documents which had been lawfully filed were ordered expunged from the court file by trial magistrate without attaching any reasons.

20) Secondly, the appellant was not allowed to file a witness statement despite the appellant's advocate beseeching the court.

21) Thirdly, the appellant's witness who was present in court was not allowed to give oral evidence.

22) The trial magistrate could have been justified to deny the appellant to file a written witness statement outside their agreed timelines.

23) However, the right to be heard by presenting oral evidence under article 50 of the Constitution cannot be causally denied as the learned Principal Magistrate did.

24) Even if the learned Principal Magistrate felt it would prejudice the 1st respondent's case, such prejudice or inconvenience could have been addressed by granting the 1st respondent more time to prepare itself to cross-examine the appellant's advocate. The appellant's constitutional right to be heard was therefore breached. It is therefore pointless to re-evaluate the evidence presented before the trial court in the absence of the evidence of the appellant. On this ground alone the appeal succeeds.

25) In the end the appeal is allowed. Consequently, the judgment/decree of the trial court is set aside. The suit to be heard afresh before any other magistrate of competent jurisdiction other than Hon. A. Makau, learned Principal Magistrate. In the circumstances of this case a fair order on costs is to order which I hereby do that each party bears its own costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 27th day of November, 2020.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent