

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 254 OF 2014

BRAEBURN LIMITED.....APPELLANT

VERSUS

VICTOR SWANYA OGETO1ST RESPONDENT

JANET NYANDUKO OGETO.....2ND RESPONDENT

(An appeal from the whole judgment of the Chief Magistrate’s Court at Nairobi (Milimani Commercial Court) by Hon. I GICHOBI (Ms), delivered by Hon. T. Ngugi (Mrs) SPM on 30TH May 2014 in CMCC NO. 5329 of 2011)

JUDGMENT

In the lower court the appellant brought this suit against the respondents claiming the sum of Kshs. 490,401.90 being the sum due and owing in respect of school fees and other charges. The respondents denied the claim and raised a counter claim in the sum of Kshs. 90,076/= being the sum over paid to the appellant.

After the trial, the lower court found that the appellant had failed to prove its claim against the respondents and dismissed the same while at the same time holding that the appellant was liable to the respondents for the counter claim.

In a lengthy memorandum of appeal the appellant challenged the lower court judgment and faulted it for several shortcomings set out therein. I have reviewed the evidence adduced before the lower court with a view to arriving at independent conclusions. From the evidence, it is clear that the appellant relied on some other material not contained in the contract, and the answer to that reliance is that, unless the contract expressly provides that it shall be read together with other documents eg annexures in the form of correspondence, receipts etc, no such reference may be made thereto in evidence.

The conduct of the parties may not be documented, neither can it be used to interpret an agreement that has been reduced into writing. If therefore the alleged surcharges were not provided for in the agreement between the parties, then they cannot form the basis of a claim under such circumstances. The court may not re write the contract between the parties and if I were to go by the evidence adduced by the appellant, that is exactly what it would be inviting the court to do. The court is not ready to venture into that direction.

On the other hand, for the respondents to succeed, they were duty bound to produce evidence that they actually over paid the appellant to the extent of the counter claim. With respect, no such evidence was adduced to that effect. The conclusion by the trial court that the appellant never made any response to the claim by the respondents even in the written submission, is not evidence to conclude that that claim was unchallenged. The respondent were duty bound to tender evidence to justify that claim. That evidence was lacking.

From the record the respondents drew that counter claim from the figures computed by the appellant and not from any over payment of fees. That claim cannot be sustained. I have concluded that the appellant did not prove the case against the respondents neither did the respondents prove the counter claim against the appellant. It ought to have been dismissed.

The end result is that this appeal is dismissed and so is the finding of the lower court that the respondents were entitled to judgment on the counter claim. Each party shall bear their own costs of the appeal.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE