REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 6 OF 2016

THE BOARD OF MANAGEMENT ST. PAUL GEKANO BOYS HIGH SCHOOL..APPELLANT

=VRS=

JOHN KIYAKA OSORO T/A OJOHN JOHN'S WELDING TOMBE.....RESPONDENT

Being an appeal against the Judgement & Decree of the Hon. N. Kahara - RM

in Keroka PM Civil. Case No. 98 of 2013 dated and

delivered on the 22nd day of January 2016

JUDGEMENT

The appellant being dissatisfied with the judgement of the trial court allowing the respondent's claim against it filed this appeal and has cited the following grounds: -

> **"1. The Learned Magistrate erred in law and fact by awarding the plaintiff against doctrine governing special damages which dictates that the same should not only be pleaded but proved.**
>
> **2. The Learned Magistrate erred in law and fact by not taking into account that there was no contract between the plaintiff and the defendant whatsoever or at all.**
>
> **3. The Learned Magistrate erred in law and fact by awarding damages to the plaintiff despite the plaintiff's miserable failure to prove his case on a balance of probability.**
>
> **4. The Learned Magistrate erred in law and fact by passing judgement against the defendant after having found that the plaintiff had not proved his claim as required by law.**
>
> **5. The Learned Magistrate erred in law and fact by awarding the plaintiff solely on a document produced by the defendant and yet this was a special damage claim.**
>
> **6. The Learned Magistrate erred in law and fact by giving a judgement in favour of the plaintiff despite the absence of a local purchase order from the plaintiff."**

The appeal is vehemently resisted and the respondent has filed a notice of motion seeking to strike it out on grounds that it is incurably defective and incompetent as the record of appeal and the supplementary record of appeal exclude much of the evidence and pleadings and does not therefore conform to **Order 42 of the Civil Procedure Rules**. It is contended that these were left out intentionally.

The appeal was canvassed through written submissions. This court gave directions that it would determine the application seeking to strike out the appeal and the appeal together.

On the application I would find that to dismiss the appeal on the grounds raised would be an affront to **Article 159 of the Constitution** which enjoins this court to administer justice without undue regard to procedural technicalities. I shall therefore overlook the procedural technicalities more so given that any prejudice that may have been occasioned to the respondent by the omission referred to is cured by the fact that the lower court record is before this court.

On the merits I am guided first by the principle that as a first appellate court I have a duty to reconsider and evaluate the evidence before the trial court so as to arrive at my own conclusion and to bear in mind that I did not hear or see the witnesses giving evidence and make provision for that (**See Selles Vs. Associated Motor Boat Company Ltd (1968) EA 123).**

Secondly, I am guided by the principle that an appellate court should be slow to interfere with the trial court's findings of fact unless the same are based on no evidence or the trial court has misdirected itself. In **Onyango & another V Luwayi [1986] KLR** the court put it as follows: -

> **"1. The Court of Appeal would not interfere with the findings of fact of the two lower courts unless it was clear that the magistrate and the judge had so misapprehended the evidence that their conclusions were based on incorrect bases….."**

The respondent's claim against the defendant was for a sum of Kshs. 370,110/= allegedly for goods supplied and services rendered to the school between 1st January 2006 and 30th July 2007. After hearing testimonies from both sides the trial Magistrate found that the respondent had not proved its case at all but that because the appellant had admitted it owed him a sum of Kshs. 243,970/= then it was only just that judgement be entered for the respondent for that sum admitted, costs of the suit and interest from the date of judgement. A perusal of the record shows that the appellant called a witness who indeed produced the exhibits referred to in the trial magistrate's judgement and which I agree with her did not prove the respondent's case on a balance of probabilities. I am however unable to agree with the trial magistrate's finding that the witness admitted that the appellant owed the respondent the amount awarded in the judgement.

In his testimony the witness stated inter alia: -

> **"It is not true that in 2006 the plaintiff supplied goods worth Kshs. 470,000/= (sic). The handing over report from my predecessor shows as at 2005 sundry creditors summary shows the plaintiff was owed Kshs. 2,310/= only. In 2006 he was owed Kshs. 2,320/=. In 2007 sundry creditors shows someone called John K. Osoro is owed Kshs. 24,660/=. The plaintiff has not produced original documents are (sic) needed to prove his claim that he supplied goods. No contract document has been produced. The position of the school is we do not owe the plaintiff any money for goods he alleges he delivered. I wish to rely on documents filed P exh 1 (sic) and my statement."**

In cross examination the defence witness is quoted as admitting that the plaintiff was not paid money owed to him in 2006 and 2005 and that their records indicated one John K. Osoro was owed Kshs. 24,660/=.

I have perused the documents tendered by the appellant in evidence and I do agree with the trial Magistrate that they do not prove the sum claimed. I just like the trial Magistrate describe the documents as mere papers that are neither local purchase orders or delivery notes and the same cannot be evidence that goods were supplied or that services were rendered to the appellant by the respondent. As for the documents produced by the respondent even were they an admission they would be for a sum of Kshs. 2,310/= in respect of 2005, Kshs. 2,320/= for 2006 and Kshs. 24,660/= for 2007 making a total of Kshs. 29,290/=. The trial Magistrate's finding of an admission of indebtedness to the tune of Kshs. 243,970/= was based on no evidence at all. It is instructive that in the plaint the plaintiff does not lay claim to sums owed in 2005. The claim as set out in paragraph 3 (a) of the amended plaint is for goods supplied and services rendered between 1st January 2006 and 30th July 2007. I have also combed the lower court record, the record of appeal and the supplementary record and I am unable to find any evidence that the appellant admitted it owed the respondent Kshs. 241,660/= in respect of the year 2007. The proceedings only have the appellant's witness referring to a sum of Kshs. 24,660/=. Be that as it may it is also my finding that the trial Magistrate erred in principle in entertaining this claim in the first place. The claim being one based on contract was barred by the statute of limitation. Indeed, the record shows that the suit was filed out of time pursuant to leave of the court granted on 21st June 2013 in Keroka Miscellaneous Application No. 4 of 2013. **Section 22 of the Limitations of Actions Act** does not make provision for extension of time in respect of claims based on contracts.

In the upshot I find merit in the appeal and it is allowed. The judgement of the lower court and the subsequent decree are set aside and substituted with an order dismissing the respondent's suit. The appellant shall get the costs of the suit in the lower court as well as those of this appeal. It is so ordered.

Signed, dated and delivered in Nyamira this 30th day of May 2019.

E. N. MAINA

JUDGE