



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 584 OF 2018

BHATTI PANEL BEATERS LIMITED.....APPELLANT

VERSUS

SURJIT SINGH DHIMAN.....1ST RESPONDENT

MUCHANGI NDUATI NGINGO.....2ND RESPONDENT

(Being an appeal against the decision and judgement of Hon. D. A. Ocharo (Mr) Senior Resident Magistrate delivered on 13th November, 2018 in CMCC No. 1352 of 2016)

JUDGEMENT

INTRODUCTION:

1. The appellant commenced its claim vide a plaint dated and filed on 7th March 2016 claiming Kshs.171,650/= together with interest from 19th March 2015. The cause of action as stated in the plaint is that on 19th March 2015 the 1st respondent contracted the appellant to take for repair and service a motor vehicle registration number KAA 171N a Mercedes Benz owned by the 2nd respondent for a quoted price of Kshs.244,238/=.
2. The appellant further states that in the course of carrying out the repairs he realised the engine was defective and the parties agreed that the same be replaced at a cost of Kshs.171,650/= which the appellant did but the respondents refused/failed to pay, thus this suit.
3. The respondents filed a joint statement of defence and counterclaim on 26th April in which they denied the appellant's claim and counterclaimed for the sum of Kshs.131,900/= aggravated damages and costs.
4. At the hearing all the appellant's director and the two defendants testified.
5. The case was heard and dismissed together with counterclaim. Thus appeal lodged vide grounds of appeal:-
 - a. That the learned magistrate erred in law and fact and abdicated his judicial function by failing to determine the real dispute between the parties.
 - b. The learned magistrate erred in law and fact by failing to give due weight and attention to submissions by the appellant which clearly demonstrated the appellant had proved his case to the required standards.
 - c. That the learned magistrate erred in law and fact by failing to find the 2nd respondent had admitted indebtedness to the appellant.
 - d. That the learned magistrate erred in law by failing to find that there was a valid sale of goods and service contract between the appellant and the defendant.
 - e. That the learned magistrate erred in law and fact by failing to find that the evidence presented by the 2nd respondent was conjured to deny the appellant's just dues under the law.
 - f. That the learned magistrate erred in law and fact by failing to find that the appellant had a lien for fees upon repairs to the 2nd defendant's motor vehicle and could not therefore be liable for delays (if any) in delivering the vehicle to the respondent who had not paid his fees.

g. That the learned magistrate erred in law and fact by failing to find that by taking delivery of the vehicle fitted with a new engine and failing to pay for the engine and services rendered, the 2nd respondent was unjustly enriched at the expense of the appellant.

DUTY OF THE FIRST APPELLATE COURT:

6. In *Selle & Another vs Associated Motor Boat Co. Limited & Others [1968] EA 123* stated the duty of the court in a first appeal to be as follows:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily accept the findings of fact by the court below. An appeal to this from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif vs Ali Mohamed Sholan [1955], 22 EACA 270.”

EVIDENCE ADDUCED:

7. PW1 testified that on or about December 2014 the 2nd defendant took the 2nd defendant’s motor vehicle for repairs and the same was repaired and the engine replaced and on 19/3/2015 they agreed on the cost of Kshs. 171,650/=. He stated that the motor vehicle was collected on 30/3/2015 by the 1st defendant.

8. The 1st defendant stated that he introduced the 2nd defendant to the appellant’s father one Jaswinder Singh Batty and the two had an agreement whereby the 2nd defendant who had a defective motor vehicle being registration number KAA 171N Mercedes Benz agree with the appellant’s father a motor engine dealer to fit a different engine into the 2nd defendant’s motor vehicle at a cost of Kshs.80,000/=.

9. He stated that PW1 was not in the negotiations. He stated that the said motor vehicle was delivered to the appellant’s place but when it was collected it would not start. He stated that he was not party to the agreement between the two.

10. The 2nd defendant confirmed that there existed the said contract where the appellant was to change his motor vehicle’s engine at an agreed cost of Kshs.91,650/= which he was not paid because the appellant owes him Kshs.30,000/= in a separate account and because of his counterclaim of Kshs.131,900/= which arises as a result of costs he incurred to hire a taxi during the period that motor vehicle registration number KAA 171N was in the appellant’s garage.

11. DW3 stated that he know the 2nd defendant as a customer. He did know him before the commencement of this suit. He carried him by his taxi on 22/12/2014 and then between 5/1/2015 to 27/1/2015. He told him that his motor vehicle had a mechanical breakdown.

12. He used to pick him in the morning from Ongata Rongai area and drop him to his office in Industrial area. He used to drop and pick his children in school at Ongata-Karen. He would pay him 1,700/= in the morning and 1,700/= in the evening making it Kshs.3,400/= per day.

13. For the period of 21 days. He picked and dropped him. He paid him a total of Kshs.71,400/=. Taxi and travel services are an association. He did not know if it is registered. The motor vehicle he used were multiple. He is only a driver. He produced the bundle of taxi receipts as D exhibit 16.

SUBMISSIONS BY APPELLANT:

14. The appellant submits that, the facts of the matter are that the appellant runs a garage at Industrial area within Nairobi. The 1st respondent approached the appellant’s director on 15th March 2015 with a request for the appellant to service and repair a vehicle registration number KAA 171N belonging to the 2nd respondent.

15. Following examination of the engine the director formed opinion that the same could not be serviced and that it was necessary to fit a new engine into the said vehicle. The appellant got a go ahead from the 1st respondent to fit a new engine into the said motor vehicle.

16. The appellant had an engine which he valued at Kshs.80,000/= and following approval of the 1st respondent he fitted the same into the motor vehicle registration number KAA 171N.

17. For the said engine to function properly, it costed the appellant Kshs.91,650/- for spares labour and engineering works.

18. When the vehicle was repaired and then running, the same was collected and delivered to the 2nd respondent by the 1st respondent.

19. For the new engine and service, the respondents did not pay any money. Not even a deposit was paid by the respondents.

20. Instead, the 2nd respondent engaged the appellant in unnecessary correspondences where he came up with excuses not to settle the owed to the appellant.

21. The respondents had to date of filing suit not raised any complaint about the engine or the servicing thereof.
22. Delivery of the new engine was accepted by the 2nd respondent and under section 49 of Cap. 31 the 2nd respondent was legally bound to pay for it.
23. Based on the trust the appellant had on the 1st respondent the appellant released the vehicle to the 2nd respondent unconditionally.
24. The 2nd respondent agreed to pay the servicing of the engine at Kshs.91,650 but the said respondent refused to pay for the engine valued at Kshs.80,000/=. The defendant on the other hand negotiated for the costs of new engine which was agreed at Kshs. 80,000/=.
25. With such glaring admission it was submitted that, it was absurd that the court dismissed the appellant's suit. The court did not make any finding on the issue of the legal fees rendered to one of the directors in personal capacity qualified for set off.
26. Again since the respondents did not deem it necessary to cross appeal that is not a matter for this court to determine. They however submit that the said set off is not available to the respondents as there is a legal mechanism for collection by a lawyer of legal fees against his client.
27. This was a suit where despite clear evidence of supply of goods and service rendered, facts which were unequivocally admitted, the court refused to look at the evidence and enter judgment in favour of the appellant who was justly entitled to payment for the new engine and servicing thereof.
28. The respondents admit receiving the new engine and the services rendered by the appellant but deliberately refused to pay for the same.

RESPONDENTS' SUBMISSIONS:

29. It was their submissions that for the court to determine the real issue in controversy, the first thing it needs to consider is whether any cause of action has been disclosed. And for it to be able to do this, it must first establish whether the parties before it are the correct parties.
30. In this case, the real issue for determination was whether there existed a contract between the parties to the suit.
31. From the evidence submitted in court during the hearing it became evident that the contract in issue was between individuals – One Jaswinder Singh Batty and the 2nd defendant and not between the appellant's company and the defendants.
32. Also the learned magistrate after analyzing the evidence placed before him came to the judicious finding as follows:-

“I have read the submissions of the parties, the issue for determination is whether there existed a contract between the appellant and the defendants and whether the counterclaim was merited.”

33. The learned magistrate further observed that:-

“PW1 did not produce any documentary evidence to show that there was any contract as he alleges between the appellant and the defendants.”

34. It was the appellant's duty to produce or adduce evidence of existence of the contract which it failed to do and the trial court cannot be faulted in its finding.
35. It also important to mention that before bringing any suit a limited liability company must pass a resolution through its Board of Directors. In this case 'PW1' expressly admitted that no resolution had been passed and he did not have the authority of the company (appellant) to commence the suit.

36. Reliance is made in the case of *Affordable Homes Africa Ltd vs Ian Henderson & 2 Others HCC 524 of 2004*, where the court held:

“As an artificial person, a company can only take decision through the agency of its organ, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorise the use of the company's name in litigation so that the company can properly come to court.....”

37. It is common ground that in the instant case, there was no authority from the board of directors to institute this suit even though PW1 alleged to have obtained the authority.
38. On failure to consider appellant's submission, this ground is misconceived as the trial court clearly stated in its judgement that it had read the submissions filed by the parties in arriving at the decision. The sword of justice cuts both ways.
39. On admission of indebtedness by the 2nd defendant, this ground is clearly misapprehended as at no time did the 2nd defendant admit the debt.

40. Though there was an attempt to try an out of court settlement, it did not materialize and this cannot be construed as an admission of the debt by the 2nd defendant. This is why the matter was taken to court for trial. And from the evidence adduced no such admission of the debt was made.

41. Importantly also, the court having found that there was no privity of contract between the appellant and the defendants, based on the evidence tendered in court, the issue of the 2nd defendant's admission of indebtedness to the appellant could not lie. No cause of action was disclosed as between the appellant and the defendants.

42. On existence of a valid sale and service contract, this ground is covered above. It is submitted that it cannot be correct to allege the existence of a valid sale and service contract between the appellant and the defendants where the privity of contract had not been proved to exist.

43. As per the evidence on record, DW2 is the one who negotiated with Jaswinder Singh Bhatti for the sale of the engine in issue, as individuals. The appellant was not involved. No evidence was tendered in court to show the appellant company was involved or that the said person was acting on behalf of the appellant company.

44. DW2 testified that the contract was between himself and Mr. Bhatti and PW1 who testified in the case was never involved in the negotiations.

45. On whether appellant had a lien for fees upon repairs to the 2nd respondent's car and was not liable for delay, it is submitted that this ground is not well founded and is irrelevant as this issue was not one of the issues during trial. Moreover, the 2nd respondents counterclaim was also not granted.

46. On whether taking delivery and failing to pay for the engine and services, the 2nd respondent unjustly enriched himself to the appellant's prejudice, from the foregoing submissions in the other grounds above, it is submitted that this ground is misconceived and it must fail.

ISSUES

47. After going through pleadings, evidence adduced and submissions on record, I find the issues are; ***whether the appellant proved case on balance of probabilities? Whether absence of resolution by appellant to sue could defeat the suit? Whether the appellant is entitled to costs of the appeal?***

Analysis and determination:

48. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

49. This position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others vs Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be case on the person who wishes the court to believe in its existence.”

50. The facts of the matter are that the appellant runs a garage at Industrial area within Nairobi. The 1st respondent approached the appellant's director on 15th March 2015 with a request for the appellant to service and repair a vehicle registration number KAA 171N belonging to the 2nd respondent.

51. Following examination of the engine the director formed opinion that the same could not be serviced and that it was necessary to fit a new engine into the said vehicle. The appellant got a go ahead from the 1st respondent to fit a new engine into the said motor vehicle.

52. The appellant had an engine which he valued at Kshs.80,000/= and following approval of the 1st respondent he fitted the same into the motor vehicle registration number KAA 171N.

53. For the said engine to function properly, it costed the appellant Kshs.91,650/= for spares labour and engineering works.

54. When the vehicle was repaired and then running, the same was collected and delivered to the 2nd respondent by the 1st respondent.

55. For the new engine and service, the respondents did not pay any money. Not even a deposit was paid by the respondents.

56. Instead, the 2nd respondent engaged the appellant in unnecessary correspondences where he came up with excuses not to settle the owned to the appellant.
57. The respondents had to-date of filing of suit not raised any complaint about the engine or the servicing thereof.
58. Delivery of the new engine was accepted by the 2nd respondent and under section 49 of Cap. 31 the 2nd respondent was legally bound to pay for it.
59. Based on the trust the appellant had on the 1st respondent the appellant released the vehicle to the 2nd respondent unconditionally.
60. The 2nd respondent agreed to pay the servicing of the engine at Kshs.91,650 but the said respondent refused to pay for the engine valued at Kshs.80,000/=. The defendant on the other hand negotiated for the costs of new engine which was agreed at Kshs.80,000/=.
61. With such glaring admission it is inconceivable that the court dismissed the appellant's suit.
62. This is a suit where despite clear evidence of supply of goods and service rendered, facts which were unequivocally admitted, the court refused to look at the evidence and enter judgment in favour of the appellant who was justly entitled to payment for the new engine and servicing thereof.
63. On balance of probabilities the appellant proved its case since the respondents admitted receiving the new engine and the services rendered by the appellant but deliberately refused to pay for the same.
64. On absence of resolution to sue I seek guidance in the case of *Mavuno Industries Limited & 2 Others vs Keroche Industries Limited HCCC No. 122 of 2011*;

“As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents, which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaintiff or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit”.

65. Also in the case of *Leo Investments Limited vs Trident Insurance Company Limited, HCCC No. 893 of 2010 Odunga J.* quoted with approval the following words of *Hewett J.* in *Nssia Pharmaceuticals vs. Nairobi Veterinary Centre limited Nairobi (Milimani) HCCC No. 391 of 2000*;

“The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified”.

66. The issue of resolution seems to have featured only during cross-examination of the appellant director. No objection to the suit had been raised nor particulars sought to enable same to be procured and produced.
67. The institution of the suit without resolution herein did not defeat suit which was for the benefit of the company. This court observes that the pw1 was the company director who negotiated the transaction for the company and was also spear heading recovery of the company debt.
68. Justice and fairness thus demand that the company be allowed to recover its debt without being hindered by technicalities .Art 159 (2) (d) dictates that substantial justice should not be defeated by procedural technicalities like the one employed herein by trial court to defeat appellant's bona-fide claim.

69. Thus the court holds that **the appeal is meritorious and thus makes the following orders;**

i) The appeal is allowed with costs in lower court and the High Court plus interests.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE