



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 359 OF 2012

WILLIS JOHN NYANDIEKA T/A JOHN WILLIS & ASSOCIATE
CERTIFIED PUBLIC ACCOUNTANTS.....APPELLANTS

VERSUS

ZADOCK FURNITURE SYSTEMS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court Before Hon. C. Obulutsa (SPM) dated 19th June, 2012 In Nairobi, Milimani Commercial Civil Suit No. 6815 Of 2006)

JUDGMENT

The appellant was assigned some work by the respondent which entailed preparation of primary books of accounts, preparation of trial balances, preparation of final accounts, preparation of numerous and various schedules and reports. This was contained in a letter dated 17th September, 2004 the terms of which were accepted and confirmed by the parties.

The respondent after the initial undertaking, paid the appellant a sum of Kshs. 50,000/= in part settlement of a fee note dated 19th October, 2004. That was the first and only payment made by the respondent to the appellant despite the appellant's contention that work had been done as stated.

Following demand for the payment of the balance and other fees and or charges, the respondent refused to meet the same hence the filing of the case in the lower court, the prayers of which are set out in the plaint.

The respondent denied the appellant's claim of any monies due and payable and pleaded in the defence that it was the appellant who failed to perform the work as expected. It also denied that the payment of Kshs. 50,000/= was in part settlement of the fee note stated, but in full and final settlement of the appellant's fees.

After hearing the parties the lower court dismissed the appellant's claim and concluded,

“on a balance of probability, the court finds the plaintiff failed to do what they were contracted despite being paid Ksh. 50,000/= to start the audit. On a balance of probability the court finds the plaintiff has failed to prove his claim on a balance of probability (sic). The suit is dismissed with costs.”

As required of me I have made an evaluation of the evidence on record. It is an established principle that in a claim of special damages, these must be specifically pleaded and strictly proved. The plaint in the

record set out in detail the chronology of events leading to the prayers set out. Specifically paragraphs 5, 6, 7 and 12 are instructive.

The appellant ought to have demonstrated to the satisfaction of the court that work was performed to meet the terms agreed upon by the parties. The fee note raised should have had a relationship with the work so performed. It is not clear from the pleadings and the evidence adduced how the figures pleaded were arrived at.

The lower court correctly observed that the work sheets were challenged. It was also observed that P.W. 1 admitted the work sheets completed by the appellant were never signed by the respondent as required and therefore it could not be confirmed those are the hours worked. This goes against the principle stated above.

That is notwithstanding, some pleadings specifically related to money due and payable but proof was lacking and the court had no alternative but to dismiss the appellant's suit.

I have come to the same conclusion; that the evidence fell short of what it was required to achieve and therefore agree with the decision of the lower court. This appeal is therefore dismissed. On the subject of costs, considering the relationship of the parties herein and the dispute leading to the filing of the case, I am of the view that each party shall bear their own costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 30th day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE