



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 894 OF 2003

NENO ENTERPRISES LIMITED.....APPELLANT

VERSUS

ELECTRONIC & INFOTEC SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The appellant, *Neno Enterprises Limited* was the respondent in a suit instituted in the lower court in which the respondent, then the plaintiff was claiming a sum of KShs. 195,218 from the appellant being the cost of transport services allegedly rendered to the appellant between October and December 1999. The respondent also prayed for costs of the suit and interest at the rate of 30%.
2. In its amended defence dated 5th October 2000, the appellant totally denied the respondent's claim and averred that it was a stranger to the same. The appellant specifically denied having been provided with any services by the respondent as alleged or at all and put the respondent to strict proof thereof.
3. After a full trial, the learned trial magistrate *Hon. M. Kaikai (Esq)* in a short judgment delivered on 10th October 2003 found that the respondent had proved its case against the appellant to the required legal standard and entered judgment against the appellant for the sum claimed together with costs and interest at court rates.
4. The appellant was aggrieved by the decision of the trial court hence this appeal. In its memorandum of appeal dated 8th December 2003, the appellant advanced ten grounds of appeal in which he primarily challenged the judgment of the learned trial magistrate on grounds that it was not supported by the evidence on record and that the trial court erred by failing to appreciate that the respondent being a body corporate was a distinct legal entity separate from its directors; that failure to make that distinction made the learned trial magistrate arrive at the wrong decision.
5. By consent of the parties, the appeal was prosecuted by way of written submissions. Those of the appellant were filed on 6th June 2018 while those of the respondent were filed a day earlier on 5th June 2018.
6. I have carefully considered the grounds of appeal; the pleadings; the evidence presented in the lower court; the written submissions filed on behalf of the parties and the authorities cited.
7. This being the first appeal to the High Court, it is an appeal on both facts and the law. I am fully alive to the duty of the first appellate court which is to consider and re-evaluate all the evidence adduced before the trial court to arrive at its own independent conclusions bearing in mind that it did not have the benefit of seeing and hearing the witnesses who testified in the trial - See: ***Peters V Sunday Post Limited* [195] EA 424; *Williamson Diamonds Limited V Brown* [1970] EA 1.**
8. It is however important to note that though the mandate of an appellate court is wide in scope, it is not unlimited. It is now settled law that an appellate court will not interfere with a finding of fact made by the trial court unless it is satisfied that such finding was based on no evidence or on a misapprehension of the evidence; or that in reaching the finding, the trial court took into account irrelevant factors or failed to take into account relevant facts or acted on the wrong legal principles – See: ***Jabane V Olenja, (1986) KLR 661; Sumaria & Another V Allied Industrial Limited (2007) 2 KLR 1; Mwangi V Wambugu [1984] KLR 453.***
9. Having considered the record of appeal, I find that the only issue that arises for my determination is whether given the pleadings before the trial court and the evidence on record, the learned trial magistrate erred in his finding that the respondent had proved its claim against the appellant to justify entry of judgment in its favour against the appellant.
10. In order to determine the above issue, it is important to appreciate the evidence that was before the trial court. The record of the trial court reveals that both the appellant and the respondent called one witness in support of their respective cases. *Mr. Gilbert Kipsang Choge*, a director of the respondent testified in support of the respondent's case while the appellant's director *Mr. Gerald Wamwangi* testified on its

behalf.

11. In his evidence, PW1 testified that the appellant operated a shell petrol station in Athi River; that the two companies had a verbal agreement to the effect that two lorries registration numbers KAB 401X and KAH 224C would be fueled in the appellant's petrol station on credit and in return, the lorries would deliver limestone to East Africa Portland Cement Company (EAPCC) on the appellant's behalf. He produced a letter dated 24th February 2000 as proof of the alleged agreement.

12. According to PW1, he delivered 541 tonnes of limestone at a cost of KShs.430 per tonne which translated to KShs.267,550 including Value Added Tax (VAT) of KShs.34,898; that as the aforesaid lorries had consumed fuel worth KShs.114,422 on credit as reflected in the bundle of invoices produced as Exhibit 2 and 3, the amount due to the respondent from the appellant was KShs.163,638 and not KShs.195,218 as pleaded in the plaint. In cross examination, PW1 conceded that the amount charged for VAT was held by EAPCC.

13. To counter the respondent's claim, DW1 denied that the appellant had any business dealings with the respondent. He testified that he only had a business relationship with PW1 in his individual capacity and that he was supplying fuel to PW1 on credit and not to the respondent; that he only came to learn of the existence of the respondent when it filed suit against the appellant.

14. The above being the summary of the evidence adduced in the lower court, can it be said that the respondent had proved its case against the appellant to the required legal standard?

15. It should always be remembered that the burden of proof rests on the party who alleges the existence of facts on which any legal right or liability is claimed. Put differently, he who alleges must prove. This is a cardinal principle of the law of evidence which is codified in Sections 107-109 of the Evidence Act. The principle of the burden of proof goes hand in hand with the standard of proof and cannot be considered in isolation. In civil cases, the standard of proof is proof on a balance of probabilities.

16. That said, in order to prove its claim, it was incumbent on the respondent to establish by credible and tangible evidence that it had indeed rendered transport services to the appellant at a total cost of KShs.195,218 which the appellant failed or neglected to pay.

17. My analysis of the evidence on record reveals that the letter dated 24th February 2000 which PW1 produced as proof of the alleged business arrangement between the respondent and the appellant was addressed to the E.A. Portland Cement Company Limited and was copied to PW1 only. The letter does not mention the respondent nor does it allude to any business relationship between the appellant and the respondent. Instead, it refers to PW1 as the owner of the motor vehicles which the respondent had allegedly used to deliver limestone to EAPCC under the appellant's name.

It is also clear from the record that all the invoices produced as Exhibits 2 and 3 except two addressed to Bilbil and Best Transporter are addressed to K. Choge not the respondent. All these evidence in my view points to a business relationship between the appellant and PW1 which was admitted by DW1. The evidence does not prove the existence of a verbal agreement for provision of transport services by the respondent to the appellant as alleged by the respondent.

18. It is apparent from the oral and documentary evidence tendered in the lower court on behalf of the respondent that PW1 was labouring under the mistaken belief that as a director of the respondent, he was one and the same person as the respondent which is not the position in law. The law as clearly expressed by *Gikonyo J* in the authority cited by the appellant, namely **Kolaba Enterprises Ltd V Shamshudin Hussein Varvani & Another (2014) eKLR** is that a company is an independent legal entity which is different from its subscribers, directors and shareholders - See also **Salomon Company Limited V Salomon, [1897] AC 22 H.L.**

PW1's business dealings in his individual capacity cannot therefore in law be said to be those of the respondent.

19. The learned trial magistrate appreciated in his judgement that the invoices produced as exhibits 2 and 3 which he wrongly described as receipts were in PW1's name but he nevertheless admitted them as evidence to support the respondent's claim that its two lorries were taking fuel on credit from the appellant in exchange for provision of transport services. He stated as follows at page 45:

“The receipts are in his name and the defendant does not question the authenticity of the said receipts. That the plaintiff's claim is different from PW1's does not arise. PW1 knew better how to make the claim. The lorries in issue are not his but the plaintiff's.”

20. The above was a serious misdirection on the trial court's part. The respondent being a limited liability company and PW1 were different legal entities and any claim that any of them had against the appellant was different and should have been treated as such. It was clearly wrong for PW1 to purport to pursue his individual claim against the appellant in the name of the respondent. The trial magistrate clearly erred when he treated the respondent and its director as one entity. The trial magistrate also erred in his finding that the lorries used in the alleged transport business belonged to the respondent and not to PW1 while there was no evidence on record to support such a finding.

21. In my view, there was no evidence on the basis of which the learned trial magistrate could have properly made a finding that the respondent had proved its claim against the appellant as stated in the plaint. The learned trial magistrate failed to correctly interrogate the evidence placed before him and failed to appreciate the cardinal principle of company law that a company is a separate legal entity different from its directors or shareholders and thereby arrived at the wrong conclusion that the respondent's claim had been proved to the required legal standard.

22. In the premises, I am satisfied that this appeal is merited and it is hereby allowed. The trial court's judgment is consequently set aside and is substituted with an order of this court dismissing the respondent's suit with costs to the appellant.

23. Since costs follow the event, the appellant is awarded costs of the appeal.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 27th day of September, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kivuva holding brief for Mr. Kimondo Mubea for the appellant

Mr. Wageni holding brief for Mr. Onyango the respondent

Mr. Kibet: Court Assistant