



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 131 OF 2013

ELGON ROAD DEVELOPMENT CO. LIMITED.....APPELLANT

- V E R S U S -

CENTRE FOR DEVELOPMENT CONSULT LIMITED.....RESPONDENT

(Being an appeal from the judgement and decree of Hon. Cheruto C. Kipkorir Resident Magistrate in Milimani CMCC No. 3940 of 2008 delivered on 18th February 2013)

JUDGEMENT

1. Centre for Development Consult Ltd, the respondent herein, instituted a claim against Elgon Road Development Ltd, the appellant herein, before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi vide the plaint dated 3rd July 2008. In the aforesaid plaint the respondent sought for judgement in the sum of ksh.235,000/= plus costs and interest. The appellant filed a defence to deny the respondent's claim. The case proceeded for hearing before Hon. Kipkorir, learned Resident Magistrate who in turn found the case in favour of the respondent. The appellant was aggrieved hence this appeal.

2. On appeal, the appellant put forward the following grounds in its memorandum:

- 1. The learned magistrate erred in law and fact by finding that there was a valid agreement between the appellant and the respondent.***
- 2. The learned magistrate erred in law by relying on the Turquand's rule to invoke the validity of the contract.***
- 3. The learned magistrate erred in law and fact by not considering the principles of offer and acceptance in finding for the respondent.***
- 4. The learned magistrate misdirected herself in finding that the evidence of the respondent was uncontroverted due to the failure of the appellant to produce a witness in court.***
- 5. The learned magistrate misdirected herself and based his finding on unreasonable considerations.***
- 6. The learned magistrate failed to appreciate the submissions of the learned counsel for the appellant by finding in favour of the respondents herein.***
- 7. In all the circumstances of the case, the findings of the learned magistrate are insupportable in law or on the basis of the evidence adduced.***

3. When the appeal came up for hearing this court was prompted by learned counsels appearing in the appeal to issue directions to have the same disposed of by written submissions.

4. I have re-evaluated the case that was before the trial court and the rival written submissions. The history behind this appeal is short. The respondent was the initial tenant at Zep-Re (PTA Reinsurance Company) in respect of leased premises on the aforementioned building. The respondent appears to have notified the landlord that it intended to vacate the premises and went ahead to source for another tenant to take up the premises. The tenant sourced by the respondent is the appellant herein. The respondent avers that he entered into an agreement with the new tenant (appellant) in which the appellant is said to have agreed to pay the respondent ksh.235,000 as compensation and or a refund for the costs it incurred in partitioning the premises. The respondent avers that the appellant's payment of the aforesaid amount was conditional upon the respondent introducing the appellant to the landlord or its letting agent and the appellant entering into a valid tenancy agreement with the landlord or its letting agents for the office. The respondent proceeded to introduce the appellant to the landlord upon which the appellant later entered into a lease agreement with the landlord and subsequently took up possession. The respondent avers that the appellant refused to pay it the agreed sum of kshs.235,000/= prompting it to file the suit seeking to recover the aforesaid sum.

5. In the first ground of appeal, the appellant is of the submission that the learned Resident Magistrate erred when she found that there was a valid agreement between the appellant and the respondent. The appellant argued that what existed was an incomplete agreement between them to which no obligation arises. The respondent is of the view that there existed a valid agreement and that the same was enforceable. The record shows that similar arguments were made before the trial court and the learned Resident Magistrate came to the conclusion that there was a valid agreement. In fact she opined that there existed offer and acceptance thus making the agreement complete. I have considered the divergent arguments presented by the parties. The record shows that the appellant closed its case without summoning witnesses to testify in support of its defence. There is no doubt that the respondent communicated its intention to vacate the premises to the landlord. It is also not in dispute that the respondent intimated that it shall look for a tenant and went ahead to advertise, prompting the appellant to express its interest to take up the premises. It is further not in dispute that the parties herein met and that the appellant inspected the premises and subsequently agreed to take over the premise and had a lease over the same. The recorded evidence shows that the appellant, after viewing the premises, accepted to lease the premises together with the respondent's partitions. It is also apparent that the consideration of the partitions was to be reimbursed to the respondent. With respect, I agree that there was a valid agreement since there was offer and acceptance. It is evident that the parties had shown their intention to legally be bound by the agreement.

6. The other challenge raised and argued by the appellant is that since the transaction involved the disposition of an interest in land, the agreement should have been in writing as provided for under Section 3(3) of the Law of contract. The appellant argued that the learned Resident Magistrate erroneously relied on Section 3(1) of the Law of Contract but failed to appreciate the bearing of Section 3(3) of the same Act. The respondent was of the view that the agreement was in no way one of the nature over a transaction involving any disposition of land. With respect, I am persuaded by the submissions of the respondent that the agreement between the parties herein is in respect of payment of a liquidated sum and it was not an agreement to pay money over a transaction involving any disposition of land, therefore Section 3(3) of the Law of Contract does not strictly apply. The amount claimed was specifically in respect of a refund or reimbursement of the amount spent in partitioning the demised premises.

7. The appellant also complained that the learned Resident Magistrate erred when she relied on Turquand's Rule to invoke the validity of the contract. It is said that Turquand's rule was not applicable in this case since there was no valid contract giving rise to rights and obligations. It is also argued that Turquand's rule does not apply because the agreement if any, between the parties to this dispute was conditional which by its nature is not binding on any party. The respondent was of the view that Turquand's rule perfectly applied to this case hence the decision by the learned Resident Magistrate cannot be faulted.

Turquand's rule is a principle enunciated in **Royal British Bank =vs= Turquand (1885) E & B 327**.

8. The position under Turquand's rule is that under the Law of Contract, any third party may enforce a contract against a company if the obligations arising there under were assumed by the company or an officer thereof with ostensible authority. In the dispute before this court, one Daiga Muriithi, Chief liaison officer of the appellant met with the respondent's director, discussed and agreed on the terms set out in the letter dated 11th March 2008. The learned Resident Magistrate has explained in detail how she invoked the doctrine enunciated in Turquand's case. In common law, the law provides that a person dealing with a company, assuming that he or she is acting in good faith and without knowledge of any irregularity need not inquire about the formalities involving the internal proceedings of the company. It would appear, the chief liaison officer was acting as an agent of the appellant and thus his actions as an agent binds the principal. The act of viewing the premises and agreeing to accept the offer made by the respondent resulted in the respondent's representative acting in good faith. I find that Turquand's rule applies to this case, therefore the learned Resident Magistrate's decision cannot be faulted. I find and hold that the appellant was therefore bound by the agreement whether or not the directors later on did not like the premises.

9. It has also been argued by the appellant that the learned Resident Magistrate failed to take into account the principle of offer and acceptance. The respondent has on its part argued that the learned Resident Magistrate was right in finding that there was offer and acceptance in the agreement between the parties. The appellant has claimed that the agreement was incomplete and its completion depended on special conditions which would impact negatively the presence of a formal agreement. I have perused the pleadings and the evidence tendered before the trial court. It is apparent that in the plaint the only existing conditions to the agreement were subject to the respondent introducing the appellant to the landlord or its letting agents and the appellant entering into a valid tenancy agreement with the landlord or its letting agents for the premises. There is no doubt that the appellant was introduced to the landlord by the respondent as agreed and that was confirmed by the appellant's letter dated 27.3.2008 which letter was produced in evidence as an exhibit before the trial court. The appellant's purported attempt to renege on the agreement to take up possession of the demised premises is an afterthought in my view. In a nutshell the learned Resident Magistrate properly considered the contractual principles of offer and acceptance.

10. The appellant further argued that the trial magistrate misdirected herself in finding that the evidence of the respondent was uncontroverted. The appellant contends that the trial magistrate acted erroneously by holding that the respondent's evidence was uncontroverted since the appellant did not summon any witness to testify. The appellant argued that the respondent's evidence was challenged during cross-examination. The respondent is of the opinion that the burden of proof lay on the appellant to dispute the evidence produced by the respondent but he failed to do so therefore the decision of the trial magistrate cannot be interfered with. It is not in dispute that the appellant did not present evidence to support its defence. It is also not in dispute that the appellant extensively cross-examined the respondent's witnesses. The question is: **can cross-examination substitute evidence?** What I know is that cross-examination is meant to test the veracity of evidence presented. In **John Wainaina Kagwe =vs= Hussein Dairy Ltd MSA C.A no. 215 of 2010** the court of appeal expressed itself in part as follows:

“However, it is the view of this court that answers in cross-examination cannot form a basis of a party's case. Parties must tender evidence in support of the allegations.”

11. It is therefore clear that the respondent's evidence was not controverted by the appellant and that the intense cross-examination mounted by the appellant's counsel did not shake the strength and veracity of the evidence presented by the respondent.

12. The appellant has also put forward two arguments to attack the manner the learned Resident Magistrate handled the case. First, it is argued that the trial magistrate failed to appreciate the appellant's submissions and secondly that the decision of the trial court was based on unreasonable consideration. I have examined the judgment of the trial court and it is apparent in page 5 of the said judgment that the trial magistrate considered and appreciated the appellant's submissions. A critical analysis of the

judgement will also reveal that the trial magistrate delivered a well reasoned decision.

13. In the final analysis I find the appeal to be without merit. The same is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent