REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 153 OF 2011

THE ADMINISTRATOR OSHWAL ACADEMY …….. APPELLANT

V E R S U S

BERESA LIMITED …… RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Mombasa Hon. Mrs. R. Mutoka, CM made on 21st July 2011 in CMCC No. 67 of 2008)

JUDGMENT

1. Beresa Limited the Respondent in this Appeal filed suit in the chief Magistrates Court Mombasa against the Administrator of Oshwal Academy the appellant in this appeal. The Respondent sought in that suit judgment for Kshs. 1,820,000/- as special damages and general damages for breach of contract. By a judgment dated 20th May 2011 but delivered on 21st July 2011 the Respondent was awarded special damages for Kshs. 1,820,000/-. No award was made for general damages.

2. Appellant being aggrieved by that judgment filed the present appeal. This is the first Appellant Court and I am guided in that regard by what is stated by the Court of Appeal in the case **ABOK JAMES ODERA T/A ODERA & ASSOCIATES –Vs- JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013]eKLR** as follows-

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-**
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> > **'On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.'"**

3. The evidence adduced before the learned trial Magistrate was simple and straight forward. The Managing Director of the Respondent Company stated in evidence in chief that she had contracted with the Appellant for one year to provide transport for its students and teachers. The contract

began from 23rd May 2007. She stated that Mr. Ahmed Kana signed that contract as the Administrator and on behalf of the Appellant. That she was contracted to transport the students and teachers at the cost of Kshs. 6,500/- per term per person. That the Respondent was transporting 140 students. The Respondent company had 4 buses for that purpose namely; KAP 684G, KAK 197R, KAH 995M and KAN 913E. Those buses were only used for transporting the students and staff exclusively. The witness referred to the Appellants letter dated 27th November 2007 by which the Appellant cancelled the parties contract. She stated that the cancellation only gave three days notice. That the notice period was contrary to the provision in the contract which provided for one terms notice. Accordingly she stated that the contract should have ended on 23rd May 2008 but the Appellant cancelled it on 30th November 2007. The witness further stated-

> **"I would have earned Kshs. 910,000/- per term times 9 months. As per my plaint dated 31st July 2008 I'm claiming Kshs. 1,820,000/- plus interest and costs of this suit."**

4. On being cross examined the witness acknowledged that the Respondent received appellants letter dated 11th September 2007 by which the Appellant informed the Respondent that the Respondent's bus KAK 197R had on that day used the wrong gate to access the school compound which the driver of the bus explained was caused by a faulty steering of the bus. Further the letter informed the Respondent that its bus KAP 576G had developed mechanical problems which resulted in the students and teachers arriving late at the school. The witness then referred to the Respondents letter dated 12th September 2007 by which letter the Respondent stated that the entry of the bus through the wrong gate was due to the mistake of the driver who had been reprimanded. Further that bus KAP 576G had only a minor mechanical problem which led to the late arrival at the school of students and staff. The witness in further cross examination was referred to a letter by the Appellant dated 6th November 2007 by which letter the Appellant complained that the Respondent's bus KAK 197R failed to pick up students and teachers from Makupa, Tudor and VOK area and that the Respondent's bus KAK 197R had twice dropped the students outside the school compound because it had mechanical problem and further that the bus KAH 995J had mechanical problems and was moving slowly whilst emitting a burning smell from the front tyre. In that letter the Appellant stated as follows-

> **"Unless this issues are addressed immediately and not repeated we will have no alternative but to cancel our contract with you as you are not living up to your terms."**

5. When those letters were referred to the witness the witness stated as follows-

> **"I addressed the issues and the motor vehicles run upto the end of term. I discussed verbally with Mr. Kana."**

   The witness therefore denied that the Respondent buses had caused inconveniences.

6. On being re examined the witness said that the Appellants complaints were "**minor problems**".

7. In evidence in defence the then Administrator of Oshwal Academy stated he had been employed by that School in the year 2009 which was a period after the contract with the Respondent had been cancelled. He stated that the contract had been cancelled by way of correspondence which correspondence showed the concern about the services the respondent was rendering to the Appellant. In his evidence he stated that the Respondent having failed to address those complains the contract was cancelled on 27th November 2007.

8. When he was cross examined he confirmed that the Appellant had not given the Respondent notice to terminate the contract.

9. The Appellant has presented the following grounds of appeal-

1. **The learned Chief Magistrate erred in law and in fact in holding the Defendant liable to the Plaintiff and entering judgment as against it for Kshs. 1,820,000.00 without properly and adequately weighing the evidence on record.**

2. **The learned Chief Magistrate erred in law and in fact in holding that there was privity of contract between the Defendant and the Plaintiff having found as a fact that the contract in issue was entered into between and for the benefit of "… Oshwal Academy … The Administrator of Oshwal Academy is the one, who executed the contract on behalf of Oshwal Academy. He did so in his capacity as the Administrator and not in his personal capacity ….".**

3. **The learned Chief Magistrate erred in law and in fact, having made the above finding, in failing to recognize or hold that the Defendant could not incur any personal liability in respect of a contract that he was not a party to.**

4. **The learned Chief Magistrate erred, in fact, in holding that the Defendant had failed to prove or adduce evidence that the Plaintiff failed to perform its obligations in providing roadworthy motor vehicles fit for the intended purpose when in fact, she set out in her judgment, the evidence actually adduced to prove this fact.**

5. **The learned Chief Magistrate erred in law in holding that the contract in issue was terminated wrongfully and/or unlawfully having already accepted that the vehicles had mechanical defects and the drivers provided were at fault.**

6. **The learned Chief Magistrate erred in failing:-**

a. **To appreciate the significance of various facts that**

emerged in the evidence of both the Plaintiff and Defendant's witnesses;

b. **To consider or properly consider all the evidence**

before her; and/or;

c. **To make any or any proper findings on the evidence**

placed before her.

7. **The learned Chief Magistrate erred in law in awarding the Plaintiff the sum of Kshs. 1,820,000.00 by way of damages (being two academic terms notice payment) having accepted that the Plaintiff was entitled to only one term's notice.**

10. The above grounds in my view can be considered in a cluster.

11. In that regard grounds (1), (2), (3) and (4) will be considered

together. In my view those grounds relate to issues-

(a) **Whether the appellant was the right party to be sued;**

(b) Whether there was privity of contract between the Appellant and

the Respondent and;

(c) Whether the Respondent should have been awarded Kshs.

1,820,000/- in special damages.

The right party to be sued

12. The Appellant submitted that the Respondent had no cause of action

against the Administrator of Oshwal Academy because as submitted by the Appellants "**the Administrator Oshwal Academy was only acting as an agent of a disclosed principal and had no locus standi**" That submission was not supported by the defence filed in the Chief Magistrate's Court by the Appellant. The Appellant in a very simple defence denied the contract was entered between the parties and it is on that ground that the Appellant's above submission is rejected.

13. Appellant further argued that the contract was between Oshwal

Academy and the Respondent and that there was no privity of contract between the Administrator and the Respondent. The Appellant's learned Counsel in support of that submission cited the case of **MWANGI -Vs- BRAEBURN LTD (2004) KLR 419** where it was stated-

> **"As a general rule, a contract affects only parties to it, and cannot be enforced by or against a person who is not a party even if the contract is made for that benefit and purports to give him the right to give or to make him liable upon it."**

14. Appellant in that regard submitted that the Administrator only signed

the contract on behalf of Oshwal Academy and that the learned Trial Magistrate had therefore erred to find the Administrator liable to the Respondent in special damages.

15. In my view the Respondent sued Administrator Oshwal Academy. That

did not mean that the Respondent sued any Administrator in particular that is the Respondent did not sue either John or James Administrator Oshwal Academy. The Administrator was not identified by name. It follows therefore that it was superfluous for the Respondent to have used the word '**Administrator**' before the title Oshwal Academy. I agree that the Respondent ought to have taken care to ensure that the parties before Court were parties that it sought relief from. In this regard I do refer to the book **A PRACTICAL APPROACH TO CIVIL PROCEDURE BY STUART SIME** where the learned author stated as follows-

> **"As the remedies granted by the courts are generally effective only as between the parties, it is important to take care when drafting proceedings that no mistakes are made over the parties to be brought in. Although it is possible to correct most mistakes by amendment at a later stage, the passing of a limitation period may prevent this, and, in any event, avoidable amendments will be penalized in costs and may weaken the credibility of the case at trial."**

16. However I would further state that the burden was upon the

Defendant to show that the Administrator was the wrong party sued in respect of the contract. Indeed from the defence filed in the Chief Magistrate's Court and from the very brief evidence given on behalf of the Appellant there was no statement that the Defendant was the wrong party before the Court. In this regard I do refer to Section 107 of the Evidence Act Cap 80. That Section is in the following terms-

> **"(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

It is clear from the above that the Appellant bore the burden of proof which it failed to discharge that the Administrator was wrongly sued.

17. Further on this ground I refer to Order 1 Rule 9 of the Civil Procedure Rules whose provisions are as follows-

> **"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."**

The party who was before the Court was Oshwal Academy.

18. Discussing the above Rule, as it is in The Code of Civil Procedure of India which is pari materia to our Order 1 Rule 9. Ashwini Chawla in **"African Law Library**" had this to say-

> **"Difference between Non-joinder and Misjoinder**
>
> **'Misjoinder' of parties means a joinder of a party who ought not to have been joined either as a plaintiff or as a defendant. In other words, it refers to impleading an unnecessary party. It may also refer to a situation in which a plaintiff is impleaded as a defendant and vice-versa (party wrongfully impleaded). However, "Non-joinder" refers to a situation when a party who ought to have been impleaded according to the law is not impleaded. As opposed to presence of the wrong party, it refers to absence of a party. In case of non-joinder of necessary parties, the suit may be dismissed, but this is not so in case of misjoinder."**

Our case here, if at all, is one of misjoinder.

19. The question that arises is whether the Court can fairly and completely determine the issues in this suit with the parties that are before the Court. In my view as stated before the use of the term "**Administrator**" was superfluous. The action before the Chief Magistrate's Court was between Beresa Limited and Oshwal Academy. In my view that fact was clear to the parties even as they adduced evidence. For example Oshwal Academy relied on the evidence adduced by its Administrator who was then in the office in the year 2011 when the case was heard before the Chief Magistrate's Court. That Administrator was not in that office when the contract in question was entered into or terminated. I do therefore reject the Appellant's submission in that regard.

Parties to the Suit

20. Having reached the above conclusion it follows that the parties to the contract were the parties that were before the Court.

Damages

21.On whether the Respondent should have been awarded special

damages by the Chief Magistrate one would have to look at the terms of the contract. The contract provided as follows in respect of remuneration of the Respondent-

1. **Subject to the provisions of this Agreement the Carrier shall for a (sic) rental of Kshs. 6,500/- per term per child, payable by mid-term, for transport services for the students and staff of Oshwal Academy.**

2. **The Carrier shall provide transport services to and from the locations at the times stated and using the specified motor vehicles exclusively for the carriage described in Clause 1 herein.**

MOTOR VEHICLE	POINT OF DEPARTURE	TIME
KAP 684G (50 Pax)	**To be advised**	**To be advised**
KAK 197R (35 Pax)	**”**	**”**
KAH 995M (25 Pax)	**”**	**”**
KAN 913E (30 Pax)	**”**	**””**

The Respondent gave evidence which was not contradicted that she was paid Kshs. 910,000/- per school term.

22.The contract placed an obligation on the Respondent to ensure that the

buses were fit for carriage except when there was need for reasonable service and maintenance. It will be recalled that the Appellant terminated the contract on the basis that the buses were in disrepair and that there was an occasion that the students and teachers were not picked from certain localities. Once the appellant raised those concerns the burden was upon the Respondent to prove otherwise. The Respondent chose to state through its Managing Director that "**only one bus arrived in school late.**" In respect of the bus that was stated to have power steering problem the Managing Director of the Respondent stated "**I acknowledge the driver was wrong**." In regard to the bus KAP 576G she stated **"... bus KAP 527 (sic) developed mechanical problems."**

23.In my view the Respondent did not shift the burden of proof that the

buses were not having mechanical problems. Appellant by the letter dated 11th September 2007 complained as follows-

"11th September, 2007

Beresa

Mombasa

Dear Sir,

Re: Transport Buses

We refer to the above transport service you are providing to our students and staffs, and would like to point out the following:

Bus No. KAK 197R – Driver's name was Mzungu, Last week in the morning when bring (sic) the students and staff to school, the driver entered the gate and used the wrong path in the compound to drop the students off. When approached, he said the power steering of the Bus does not work, thus he had to use the wrong path.

Bus No. KAP 576G – Today the bus had mechanical problems and the students with teachers arrived late in the school at 8.35am missing lessons.

Please address these issues and reply to the undersigned.

Awaiting you prompt reply in the matter.

Thank you.

A H A Kana

<u>Administrator</u>"

24.By a letter dated 6th November 2007 Appellant addressed the following to the Respondent-

"6th November, 2007

Beresa

Mombasa

Dear Sir,

<u>Re: Transport Buses for Oshwal Academy Mombasa</u>

Reference is made to our letter dated 11th September, 2007.

Last week one of your buses (KAK 197R) did not pick up students and teachers from Makupa area, Tudor and VOC, for reasons best known to you, (you have not explained the reason to us in writing) and they arrived in school after 8.35am on another bus.

Yesterday 5th November on of you Big Bus (KAK 197R) dropped students and teachers off inside the compound, but by the gate as it could not turn comfortably.

Today, 6th November the same bus (KAK 197R) dropped students and teachers outside the compound due to its inability to turn.

Also, your yellow bus KAH 995M has some mechanical problems, can only run very slowly and a burning smell is coming out from the front tyres.

It seems, instead of improving your services to our students and teachers, the service is going down.

Unless these issues are addressed immediately and not repeated, we will have no alternative but to cancel our contract with you as you are not living up to its terms.

Awaiting you prompt reply in the matter.

Thank you.

A H A Kana

Administrator"

25.I am of the view that with those complaints the Respondent in order to shift the burden ought to have adduced evidence on the mechanical well being of the buses to counter the Appellant's contention. The Respondent did not do that and eventually the Appellant terminated the contract by letter dated 27th November 2007 which is in following terms –

> **"27th November, 2007**
>
> **Beresa**
>
> **Mombasa**
>
> **Dear Sir,**
>
> **Re: Bus Service for Students of Oshwal Academy Mombasa**
>
> **Reference is made to our letters written to you this term.**
>
> **The last letter dated 6th November, 2007 clearly indicated that we would be forced to cancel your contract unless the issues raised in the letter were addressed immediately. Unfortunately, no positive response has been made in reply to our letter, even after verbally reminding your supervisor.**
>
> **We therefore regret to inform you that we have now reached a decision where we hereby cancel the contract for all your vehicles for the bus service provided to our students with effect from the end of the term (30th November, 2007).**
>
> **We appreciate the service you have provided to us for all these years.**
>
> **Thank you.**
>
> **A H A Kana**
>
> **Administrator"**

26.It follows that the lower Court erred to have awarded the Respondent special damages when the Respondent failed to shift the burden of proof on the mechanical well being of the buses. The learned trial Magistrate erred that much more by not only awarding the amount the Respondent would have earned during the remaining contractual period but also awarded the amount representing one school term in addition as compensation. That one term according to the Trial Magistrate's judgment was one school term notice provided in the contract. Clause 7 of the contract provides as follows-

> **"This Agreement shall remain in force for a period of one year from the date hereof and thereafter until determined by one academic term's notice in writing by either party."**

27.In awarding the Respondent the amount it would have earned upto the

end of the contract and in addition awarding the amount of the notice period the trial Court gave the Respondent double compensation. Such awards were not supported by the contract of the parties. I have as stated before found that the Respondent was not entitled to the award of Kshs. 1,820,000/- because it had failed to prove that it had not breached Clause 3 of the contract which Clause required the Respondent to provide buses that were fit for carriage.

Grounds 4 and 7 of the Appeal

28.The above finding adequately deals with the above grounds of the

Appellant's appeal.

Conclusion

29.Following the above findings this appeal is hereby allowed and

accordingly the trial Courts judgment is hereby set aside and is substituted with an order dismissing the lower court suit with costs to the Appellant. The Appellant is also awarded costs of this appeal.

DATED and DELIVERED at MOMBASA this 17TH day of JULY, 2014.

MARY KASANGO

JUDGE