



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 187 of 2006

CITY CLOCK.....APPELLANT/ORIGINAL  
PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL

N.K. BROTHER LTD.....RESPONDENTS/ORIGINAL  
DEFENDANTS

*(Being an appeal arising from the Ruling of Hon. R Kimingi Senior Principal Magistrate in Civil  
Case No. 6414 of 2004*

*dated 7<sup>th</sup> March 2006)*

## J U D G M E N T

### **I. BACKGROUND**

1. Kenyatta National Hospital (herein referred to as the 1<sup>st</sup> respondent) wished to install a clock on their premises to commemorate 100 years of its existence. A tender to install a centennial monument clock went on the 11<sup>th</sup> May 2001, seeking quotation from the City Clock (K) Ltd (herein referred to as the appellant.)

2. The tender reference being KNH/T/8/2001-2001 whilst the contract no. Ref being KNH/MTCE/8/2001-2002.

3. What was required specifically was:-

**3.1 “A custom made tower clock with four faces whose diameter is approximately 2.0 metres. The clock faces to depict the KNH logo. Overall height to be 6 metres.**

**3.2 A tower block depicting the main KNH building constructed in reinforced concrete with surrounding.”**

4. A price indication was requested for on the three items with directions that “[the] quotation [would]

**not be binding in but it is to assist in budgeting for the project for which you may be considered alongside others to end at the time of implementation.**" (Emphasis supplied.)

5. A plan of the monument was provided.

6. The appellant gave its quotation as follows:

**6.1 Custom made tower clock inclusive of the custom made clock ... Ksh. 1,234,000/-**

**6.2 thereafter an annual rental agreement with KNH would be entered into for a period of 5 years at a charge for rental for Ksh. 186,000/- inclusive of maintenance expenses but exclusive of VAT (Value Added Tax.)**

7. The response was made until 11<sup>th</sup> September 2001 (almost 5 months later when M/s N.K. Brothers Limited (herein referred to as the

2<sup>nd</sup> respondent) building and general contractors sought for a quotation of fixing one clock at Kenyatta National Hospital.

8. The appellant agreed to a reduced rate or the price of Ksh. 431,000/- excluding VAT (1<sup>st</sup> October 2001). An invoice dated 4<sup>th</sup> October 2001 was sent to M/s N.K. Brothers being:

- i) City clock No. 213
- ii) KNH Logo on clock faces

iii) Charges Ksh. 431,000/-

18% VAT Ksh. 77,5380/-

Total Ksh. 508,580/-

9. The 2<sup>nd</sup> respondent paid the sum of Ksh. 508,590/- in installments.

Cheque No. 417819 dated 5<sup>th</sup> October 2001 Ksh. 200,000/-

Cheque No. 422214 dated 7<sup>th</sup> November 2001 Ksh.200,000/-

Cheque No. 422232 dated 14<sup>th</sup> November 2001 Ksh.108,580/-

Ksh. 508,580/-

10. The clock was installed and for six months, the appellant provided free maintenance, an agreement reached between the former director of the 1<sup>st</sup> respondent and the appellant. The charge for maintenance was Ksh. 186,000/- 18% VAT inclusive of all costs, expenses for insurance cover, exchange and replacement of parts components and regular renewal of light fittings solar panels.

11. The 1<sup>st</sup> respondent failed to make payments for maintenance.

12. The appellant filed suit on 14<sup>th</sup> June 2004 seeking payment of the all inclusive rental and maintenance fee of Ksh. 186,000/- per annum. Total due for about the two months accrued was Ksh. 438,710/-.

13. The 1<sup>st</sup> respondent filed defence which was later awarded to include the refund claim of Ksh. 508,580/- in its counter claim. (The sum paid to the appellant being M/s N.K. Brothers Limited).

14. The 2<sup>nd</sup> respondent also filed defence.

15. The contention was by the 1<sup>st</sup> respondent by their letter of 23<sup>rd</sup> April 2003 that they had bought the clock wholly from their suppliers, M/s N.K. Brothers Limited as per their need for construction and installation to the centennial monument. They did not know the appellant nor did they sub-contract to them to supply the clock. Any arguments made was wholly by M/s M/s N.K. Brothers Limited.

16. The 2<sup>nd</sup> appellant were notified by a letter of 7<sup>th</sup> may 2003 that the appellant (The City Clock (K) Ltd) were never nominated by the 1<sup>st</sup> respondent as a sub-contractor. The 1<sup>st</sup> respondent knew that it had bought the clock from the 2<sup>nd</sup> respondent and never at anytime were they renting the clock from the appellant.

17. The matters went for trial before the Hon. Magistrate in the subordinate courts at Milimani, Nairobi. The findings of the Hon. Trial Magistrate was that the appellant (original plaintiff) failed to prove his case, that in fact the clock was for hire and not for sale. The suit was dismissed.

18. Because, the clock was disabled by the appellant, the trial magistrate held that the 1<sup>st</sup> respondent was not entitled to damages for trespass and conversion. The 1<sup>st</sup> respondent, held the Hon. Magistrate was entitled to be paid the sum of Ksh. 508,580/- with interest at court's rates with effect from 26<sup>th</sup> March 2003 all payment in full.

19. The effect of this judgment was the issue of trespass and disabling the clock was dismissed but the initial costs of the clock for Ksh. 508,580/- was to be refunded to the 1<sup>st</sup> respondent that was paid to the appellant by the 2<sup>nd</sup> respondent in installments in the year 2001 with effect from 26<sup>th</sup> March 2003.

20. Being aggrieved, the appellant/original plaintiff filed appeal seeking orders to set aside the Hon. Trial Magistrate's judgment.

## **II      APPEAL**

21. The appellant stated that the Hon. Trial Magistrate erred in law and fact:

***i) ... by finding the appellant liable for trespass and conversion ... no substantial evidence to support claim.***

***ii) ... 1<sup>st</sup> respondent still in possession of goods allegedly converted.***

***iii) ... in finding that the 1<sup>st</sup> respondent failed to prove the clock belonged to them.***

***iv) ... in failing to find that the 2<sup>nd</sup> respondent hired [the] clock from the appellant and that it would maintain it at a fee.***

***v) ... in disregarding the express provision of Section 681(a) of the Evidence Act Cap 80 Laws of Kenya.***

***vi) in failing to find appellant owned the clock and respondent liable to pay maintenance charge as prayed.***

***vii) ... erred in dismissing the [appellant] original plaintiff case and allowing the 1<sup>st</sup> respondent original 1<sup>st</sup> defendant claim.***

***viii) Prayed for judgment to be entered as prayed.***

22. The appellant had all along maintained that the clock was for hire and never an outright purchase.
23. In response, the 1<sup>st</sup> respondent claimed that the persons they knew was N.K. Brothers Ltd. The appellant was a stranger to them. If at all he was a sub contractor of M/s N.K. Brothers Limited – the 2<sup>nd</sup> respondent.
24. The 2<sup>nd</sup> respondent argued that the clock was an outright purchase. It had not been for hire.
25. Whereas the appellant alleges in his memorandum of appeal that the trial magistrate found him a trespasser and liable to damages, the judgment of the Hon. Trial Magistrate actually disallowed this prayer by the 1<sup>st</sup> respondent that touched on conversion of the said clock.
26. What was allowed was the sum of Ksh. 508,580/= that amounted to a refund of the said claim of moneys paid by the 2<sup>nd</sup> respondent to the appellant.
27. The issue herein is that of a contract. The arguments by the 1<sup>st</sup> respondent was that there existed no privity of contract between them and the appellant.
28. Relying on the case law of

### **Agricultural Finance Corporation**

Vs

**Pengetion Ltd**  
(1985) KLR 765

(Hancox, Nyarangi JJA & Platt Ag JA)

A case that discussed the issue of privity of contract and who may be sued under a contract. The court held that

***“as a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to sue or to make him battle upon it.”***

29. The first respondent wished this court to uphold the findings that existed. No contract between the 1<sup>st</sup> respondent, Kenyatta National Hospital and the appellant City Clock (Kenya) Ltd. It is upon these findings, inter alia, by the Hon. Magistrate that the suit was dismissed against the 1<sup>st</sup> respondent.
30. It is therefore correct in this case to hold that no privity of contract existed between the 1<sup>st</sup> respondent and the appellant. The contract that existed was between the 2<sup>nd</sup> respondent and the appellant.
31. The appellant had been given an expression of interest to quote the price of providing the centennial monument clock in May 2011. This had not been accepted by the 1<sup>st</sup> respondent, whereas a quotation had been given by the appellant.
32. The 2<sup>nd</sup> respondent entered into his own independent contract/agreement 11<sup>th</sup> September 2001 even later visiting the offices of the appellant and came up with a contractual sum of Ksh. 431,000/- plus VAT of Ksh. 77,580/- giving a total of Ksh. 508,580/-
33. I would therefore find that a contract did exist. There was an offer, an acceptance and consideration paid in installments by the 2<sup>nd</sup> respondent.
34. I would hold that the Hon. Trial Magistrate erred in fact and law. I would enter judgment for the

appellant for the sum prayed of Ksh. 431,000/- against the 2<sup>nd</sup> respondent.

35. As to the counter-claim, if the 1<sup>st</sup> respondent states they did not know the appellant, who was a stranger to them, then they are most certainly not entitled to a refund of Ksh. 508,580/-. There being no privity of contract between the two.

36. The judgment on the counter claim is hereby set aside and orders dismissing the said claim.

37. I would hold that the agreement between the 2<sup>nd</sup> respondent and the appellant is as outlined in their original quotation, namely there would be maintenance charges. The M/s N.K. Brothers Limited, the 2<sup>nd</sup> respondent are liable to pay this and pass on this to the 1<sup>st</sup> respondent for payment.

38. If the contract is frustrated, the two parties are permitted to terminate the same.

39. I would further be guided by the 1<sup>st</sup> respondent's letter who stated that the appellant had never been engaged by them but by N.K. Brothers Ltd, the 2<sup>nd</sup> respondent herein. I would decline that this is the correct position in this matter.

40. The orders of this court in conclusion is that; this appeal is allowed. The orders of judgment of the trial court is hereby set aside and substituted with orders that there be judgment for the appellant against the 2<sup>nd</sup> respondent for the sum of Ksh. 431,000/- as prayed in the plaint.

41. That the counter claim is hereby dismissed.

42. There will be costs in this suit against the respondent as follows:

**42.1 The 2<sup>nd</sup> respondent to pay costs to the appellant on the main suit in the magistrate's court and costs in the appeal.**

**42.2 The 1<sup>st</sup> respondent is to pay costs on the counter claim in the magistrate's court.**

**Costs in the counter-claim in the appeal.**

**The costs of the main suit would be borne by the 2<sup>nd</sup> respondent for the 1<sup>st</sup> respondent.**

43. There will be interest on the decretal sum from the date of judgment in the subordinate court case.

DATED THIS 16<sup>TH</sup> DAY OF MARCH 2012 AT NAIROBI

**M.A. ANG'AWA**  
**JUDGE**

*Advocates :*

i) *C M Khasiani instructed by M/s Wandabwa & Co Advocates for appellant/original plaintiff*

ii) *E Odhiambo instructed by Cheptumo & Co Advocates for 1<sup>st</sup> respondent/original 1<sup>st</sup> defendant*

iii) *W A Mutubwa instructed by Lubullellah & Co Advocates for 2<sup>nd</sup> respondent/2<sup>nd</sup> original defendant*