



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 327 OF 1998

DATASCAN LIMITEDAPPELLANT

VERSUS

BASELINE TRAVEL AGENCIES LIMITEDRESPONDENT

JUDGMENT

The appellant filed a suit in the Court of the Resident Magistrate, at Sheria House Nairobi on 31st July 1995 to claim from the respondent a sum of Kshs.47,000/= inclusive of V.A.T. for work done and/or services rendered.

He alleged in the plaint that during 1992, the respondent had contracted him to conduct a feasibility study in the financial market in Kenya for the appellant's economic/financial projections. That as agreed, the appellant prepared and delivered to the respondent various financial reports/or projections to assist the respondent to obtain financial facilities from Kenya Commercial Bank.

That inspite of the work contracted having been performed, the respondent refused and/or neglected to pay to the appellant the agreed fees, hence the suit in the lower court.

The case was placed before the Resident Magistrate (N.M. Kamunyi) on 5/5/98 when it was heard exparte due to the absence of the respondent who had filed a defence denying all the appellant's allegations in the plaint.

Judgment was delivered on 24.5.98, though scheduled for 3rd June 1998 when the suit was dismissed for lack of evidence to support offer and acceptance; and this is why the appeal has been filed to this court.

The evidence of the appellant in the lower court was simply that he had prepared a cash flow for the respondent company which the director of the defendant signed. That this project was intended to enable the respondent obtain financial assistance from Kenya Commercial Bank.

In an attempt to confirm this the appellant produced a letter addressed to the Manager Kenya Commercial Bank, Moi Avenue Branch Nairobi inform of an application for financial assistance for the respondent company signed by one Kigen, named as the Chairman of the defendant.

Attached to the application were a number of documents, including certificate of incorporation, memorandum and Articles of Association, certificate of directorship and shareholding from the Registrar of Companies, Business projections together with underlying assumptions and operational report prepared by the manager.

The appellant produced the letter together with a projected balance sheet; a letter from the Accounts officer to the appellant dated 23rd August 1993 asking for certain information in order to consider the application for financial assistance, and a reply to this letter by the appellant dated 29th September, 1993

(Pl. Exhibits 1,2 &

Unfortunately for the appellant, these correspondence had nothing to do with the alleged contract between him and the respondent.

The application for financial facilities as well as the projected balance sheet were signed by one M.K. Kigen, Chairman for the respondent while the letters dated 23rd August and 29th September 1993 were exchanges between the respondent and the bank regarding the financial facilities. They had nothing to do with the contract between the appellant and the respondent wherein the latter was to pay the former Kshs.47,000/= for any work done or services rendered.

There was no communication between these two parties wherein the respondent contracted the appellant to prepare a projected balance sheet for the purpose of the former using it to obtain loan facilities from Kenya Commercial Bank.

That the respondent did not appear to testify in the lower court did not lower the onus placed upon the appellant to prove his claim against the respondent on a balance of probabilities.

To my mind the standard of proof was not attained in the case subject to this appeal and I am satisfied this is why the learned magistrate dismissed the suit before him. He was right and I find no proper cause to upset his finding. I dismiss this appeal with costs. Dated this 12th day of June, 2002.

D.K.S. AGANYANYA

JUDGE