



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Hamptons Hospital Limited v Gilfields Services Limited (Civil Appeal 019 of 2023)
[2025] KEHC 250 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL 019 OF 2023
H NAMISI, J
JANUARY 23, 2025**

BETWEEN

HAMPTONS HOSPITAL LIMITED APPELLANT

AND

GILFIELDS SERVICES LIMITED RESPONDENT

*(Being an appeal against the Ruling and Orders of Hon. S.G. Gitonga
(Mrs) Senior Resident Magistrate delivered on 22 August 2023 in Nairobi
SCCCOMM No. E5757 of 2022 at Milimani Small Claims Court)*

JUDGMENT

1. In the Small Claims Court, the Respondent instituted proceedings against the Appellant seeking:
 - i. Judgement in the sum of Kshs 269,451/=
 - ii. Costs of the claim;
 - iii. Cost and interest at court rates on (i) and (ii) above;
 - iv. Any other remedy that the Honorable Court may deem fit to grant
2. The Respondent's claim was that on 28 August 2019, pursuant to the Local Purchase Order (LPO) dated 24 August 2019, the Respondent supplied goods and services to the Appellant. It was agreed that the credit term would be 45 working days from the date of delivery. Upon lapse of the credit term, the Appellant neglected, failed and/or refused to settle the amount.
3. On 3rd October 2022, the Appellant filed a Notice of Motion seeking:
 - i. (spent)



- ii. There be a stay of all proceedings herein pending the hearing and determination of the Application;
 - iii. The dispute between the parties be referred to an Arbitrator as per clause 17.1 of the LPO P06641001, P0661002 and P0661003 all dated 24 August 2019;
 - iv. The Respondent be at liberty to apply for such or other orders and/or directions as this Honourable Court may deem fit and just to grant in the circumstances;
 - v. The Respondent be awarded cost of this Application and of the suit
4. The Application was premised on the grounds that the suit was filed in breach of the mandatory requirements of section 10 of the *Arbitration Act* which states that no Court shall intervene in a matter governed by the Act except as provided under the Act. It was the Appellant's contention that the parties had agreed in writing that in case of a dispute arising out of the LPOs all dated 24 August 2019, then the parties would at an agreed location and attempt to resolve the dispute in good faith through Arbitration as provided at Clause 17.1 of the LPOs, which provides as follows:
- “In the event of any dispute, controversy or claim rising out of or relating to this PLO, the complaining Party shall notify the other Party in writing thereof. Within 60 days of such notice, both Parties shall meet at an agreed location and attempt to resolve the dispute in good faith. Should the dispute not be resolved within 60 days after such meeting, the complaining Party shall seek remedies exclusively through arbitration administered under the *Arbitration Act* of Kenya, 1995. The number of Arbitrators shall be one. The place of Arbitration shall be in Nairobi, Kenya.”
- 5. The Respondent filed Grounds of Opposition as well as Replying Affidavit in which they denied entering into a written and binding contract as claimed by the Appellant. The Respondent averred that the contract was non-existent and fraudulently created by the Appellant to mislead the court. Further, the contract did not fulfil the requirements of a valid and binding enforceable contract which goes to depict the unilateral intention of the Appellant. It was the Respondent's contention that they had, on numerous occasions, attempted to resolve the dispute in good faith but the same bore no fruit. The Respondent referred to various email correspondence between parties and averred that the application is designed to delay the course of justice and frustrate the Claimant's claim.
 - 6. Parties canvassed the Application by way of written submissions.
 - 7. In its Ruling, the trial court identified the only issue for determination as whether there exists a valid arbitration agreement between the parties that would warrant a stay of proceedings and reference of the matter to arbitration. The trial court observed that the agreement presented by the Appellant bore only one signature, that of the Appellant. The same was not signed by both parties so as to constitute a legally binding agreement, neither was there an implied intention from the correspondence for parties to be bound. In dismissing the Application, the trial court held that the arbitration agreement relied upon by the Appellant was not legally binding on the parties.
 - 8. Aggrieved by the Ruling, the Appellant lodged an appeal on the following 12 grounds, some of which are repetitive:
 - i. That the trial Magistrate erred in law and in fact in refusing to refer the suit to arbitration as per the Arbitration clause, clause 17.1 contained in the LPO dated 24 August 2019;



- ii. That the trial magistrate erred in law and fact and failed to give effect to the intention of the parties to refer any dispute to arbitration as was clearly expressed in clause 17.1 of the LPO dated 24 August 2019 which was a mandatory duty on the part of the court;
- iii. That the trial Magistrate erred in law and fact in rewriting the contract between the parties which was manifested through the LPO that was duly accepted by the Respondent herein without objection;
- iv. That the trial magistrate erred in law and fact in refusing to appreciate that the LPO issued to the Respondent ran from pages 1-10;
- v. That the trial magistrate erred in law and fact in failing to appreciate that by the Respondent accepting the terms of the LPO, the Respondent accepted all terms of the document running from page 1 to page 10 which included the arbitral clause therein;
- vi. That the trial magistrate erred in law and fact by applying a narrow interpretation of the law that failed to give effect to the intention of the parties as contained in the agreement vide LPO dated 24 August 2019;
- vii. That the trial Magistrate erred in law and fact by taking a strict interpretation of Section 4 of the *Arbitration Act*, No. 4 of 1995 instead of taking a broad, liberal and purposive approach that will give effect to the intention of the parties and avoid injustice;
- viii. That the trial magistrate erred in law and fact in rewriting the contract between the parties;
- ix. That the trial magistrate erred in law and fact in considering the correspondence between parties in order to ascertain the intention of parties yet no parties stated that the arbitration clause was agreed upon through arbitration clause thus arriving at a wrong conclusion;
- x. That the trial magistrate erred in law and fact by failing to abide by the express provisions of Clause 17.1 of the LPO that state that any dispute between the parties shall be referred to arbitration;
- xi. That the trial magistrate erred in law and fact by issuing a ruling that was per incuriam;
- xii. That the trial magistrate applied wrong principles of law in denying the applicant stay of execution of the judgement

9. The appeal was canvassed by way of written submissions.

Analysis and Determination

10. Section 38 of the *Small Claims Court Act* provides as follows:

1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
2. An appeal from any decision or order referred to in sub section (1) shall be final.

11. In the case of Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.

“ This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire



decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).”

12. Similarly in the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017)* [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

-“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

13. The duty of this Court when dealing with appeals from the Small Claims Court under Section 38 of the Act is equivalent to that of the Court of Appeal when dealing with a matter on a second appeal. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR the Court of Appeal distinguished between matters of law and matters of fact as follows:

“First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

14. The Appellant misguidedly submitted that this being a first appeal, the duty of the Court is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that the court did not have the opportunity of seeing and hearing the witnesses firsthand. The Appellant submitted extensively on issues of facts and law, whereas this Court can only determine appeals from the Small Claims Court on points of law.
15. In reiterating the essential elements of a valid contract, the Appellant relied on the cases *Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd & Anor* [2014] and *Karmali Tarmohammed & Anor -vs- I. H Lakham & company* [1958] E.A 567. The Appellant submitted that in interpreting the contract, the Court ought to be guided by the intention of the parties and freedom of contract.
16. It was the Appellant’s submission that the validity of the arbitration clause contained in the LPO lies with the arbitrator and that the Appellant’s request for the court’s intervention to refer the matter to arbitration is proper. The Appellant urged this Court to find that the terms of the LPOs are to be interpreted in their plain and/or literal meaning and are binding on the parties herein.
17. On the other hand, the Respondent restricted their submissions to two issues: (i) Whether the Appeal has merit and a high chance of success; and (ii) Whether the Appellant is entitled to the Orders sought.



18. The Respondent submitted that the Appellant’s intention is to delay payment owed to the Respondent for goods delivered in 2019, yet the Appellant has admitted to owing the Respondent for goods delivered. The Respondent relied on the case of *Nachang Foreign Engineering Company (K) Ltd –v- Easy Properties Kenya Ltd Civil Case No 487 of 2013*, where the Honorable Court held:

“Referral of a matter to arbitration or other alternative method of alternative dispute resolution is not intended to cause delays or deny a party who is rightly entitled to payment. Such a party ought not to await determination or resolution of the matter by an arbitral tribunal or a tribunal established with a view to reaching an amicable settlement just because there is a clause for referral of a dispute to such for a unless there is indeed a dispute... if there is no dispute which can be referred to such for the court automatically assumes jurisdiction once a suit is filed in court for its determination. Indeed, article 50 of *the Constitution of Kenya 2010* provides that every person has a right to have any dispute decided in a fair and public hearing before a court.”

19. On the existence of a contract between the parties, it was the Respondent’s submission that the LPOs dated 24 August 2019 are foreign to the Respondent. The Respondent insisted that they have never seen the said document nor was it the same document shared on email from the onset when both parties began the contractual engagement. The Respondent invited the Court to scrutinize and verify both the Respondents and the Appellants’ email and computer devices if necessary to assert and prove this position beyond any shadow of doubt.

20. The Respondent relied on the case of *William Muthee Muthami –v- Bank of Baroda Civil Appeal No.21 of 2006* where the Court of Appeal held;

“... in the law of contract, the aggrieved party to an agreement must in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach. It is elementary learning, that as a general rule, according to the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed to the parties to the contract.”

21. I have read and considered the Record of Appeal and respective submissions by the parties. This appeal can be summarised to one point, that is, whether the LPO constitutes a valid arbitration agreement between parties.

22. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 provides thus:
107.

(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.

23. In this instance, the Appellant claimed the existence of an arbitration agreement between parties, and produced copies of the same. In the said agreement, clause 17.1 clearly provides for reference of disputes to arbitration. In response thereto, the Respondent vehemently denied the existence of such an agreement, stating that the same was a fraudulent creation by the Appellant.

24. As the Respondent has invited this Court to scrutinize the documents produced in a bid to establish the veracity thereof, I have taken the time to compare the copies of LPOs produced by the Appellant and those produced by the Respondent. Other than the additional pages produced by the Appellant,



the two sets of documents are identical. But one thing caught my attention. At the bottom of each page, there is a footer indicating the page number. This footer is exactly the same in the two sets of documents produced by the parties. The footer denotes the page number as against the total number of pages, for example “Page 1 of 10”.

25. The Respondent produced pages 1, and pages 1 & 2 of the respective LPOs. The Appellant’s claim was that the Respondent did not produce the entire document, and thus took the liberty of producing the remaining pages of each LPO, that is, page 2 to page 10. The Respondent then denied the document, stating that the same were made up with the intention of misleading the Court. What is curious is that the Respondent did not produce the supposed genuine copies of pages 2 to 10 of the LPOs so as to enable the Court determine that indeed, the copies produced by the Appellant were fictitious.
26. Having said that, the question now is whether or not there is a valid arbitration agreement between the parties. Based on the foregoing, and without any evidence to contradict the authenticity of the other pages (3-10) of the LPOs, I find that there was an existing arbitration agreement between the parties contained in the LPOs that were prepared by the Respondent and signed by the Appellant. That being the case, the Appellant’s Notice of Motion was properly before the trial court, pursuant to the provisions of section 6(1) of the *Arbitration Act*.
27. It is the considered view of this Court that the evidence on record does not reasonably support the conclusion made by the trial court, thus this Court’s intervention is warranted.
28. Accordingly, the appeal is allowed and the ruling of the trial court rendered on 22 August 2023 is hereby set aside. The Notice of Motion dated 3 October 2022 is allowed as prayed. The Appellant shall have costs of the appeal, assessed at Kshs 40,000/=.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

..... for the Appellant

..... for the Respondent

.....Court Assistant

