Questworks Limited v Treboruamak Investment Management Company Limited (Civil Appeal E001 of 2020) [2024] KEHC 1583 (KLR) (Commercial and Tax) (19 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1583 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E001 OF 2020

JWW MONG'ARE, J

FEBRUARY 19, 2024

BETWEEN

QUESTWORKS LIMITED .... APPELLANT

AND

TREBORUAMAK INVESTMENT MANAGEMENT COMPANY LIMITED .... RESPONDENT

(Appeal from the Judgment and Decree of the Chief Magistrate's Court at Nairobi (Honourable G. A. Mmasi, SPM) dated 31st January, 2020 in CMCC No. 444 of 2017)

JUDGMENT

1. By a Memorandum of Appeal filed on February 14, 2020, the Appellant being dissatisfied with the decision of the trial magistrate, Honourable G. A. Mmasi, SPM in Nairobi CMCC No. 444 of 2017 moved this Honourable Court on the following 13 grounds of appeal:-

    1. The learned trial magistrate erred in law and fact and misdirected herself in finding that the Respondent had proved its case.

    2. The learned trial magistrate erred in law and fact and misdirected herself in holding that the Appellant was liable to pay the Respondent the sum of Kshs.5,981,250/= despite overwhelming evidence to the contrary.

    3. The learned trial magistrate erred in law and fact and misdirected

    4. herself in finding that the Applicant was liable to pay the Respondent interest of Kshs.107,916/- with effect from November ,2016.

5. The learned trial magistrate erred in law and fact and misdirected herself in failing to find that there was no legally binding and enforceable agreement between the Appellant and the Respondent.

6. The learned trial magistrate erred in law and fact and misdirected herself in finding that there was an agreement between the Appellant and the Respondent entered into on April 5, 2016 despite evidence to the contrary

7. The learned trial magistrate erred in law and fact and misdirected herself in failing to find that the Appellant was not indebted to the Respondent at all.

8. The learned trial magistrate erred in law and fact and misdirected herself in failing to find that the issues between the Respondent and the Appellant could not be resolved otherwise than by the parties settling accounts between each other.

9. The learned trial magistrate erred in law and fact and misdirected herself in failing to appreciate that the real issues in controversy between the Appellant and the Respondent.

10. The learned trial magistrate erred in law and fact and misdirected herself in failing to appreciate that the Respondent could not sustain the suit for want of verification as well as being instituted without company resolutions.

11. The learned trial magistrate erred in law and fact and misdirected herself in failing to due regard and consideration to the evidence given by the appellant.

12. The learned trial magistrate erred in law and fact and misdirected herself in failing to give due regard and consideration to the submissions by the Appellant.

13. The learned trial magistrate erred in law and fact and thereby arrived at wrong and erroneous decisions by failing to appreciate, find and hold that the Respondent failed to prove its case.

14. The learned trial magistrate wholly erred in failing to dismiss the suit against the defendant.

2. In addition to the above grounds of appeal, the Appellant also filed a supplementary Record of Appeal dated May 8, 2023. The Appellant prays that the Court allows its appeal with costs and costs of the suit and for orders to have the judgment of the lower court set aside and to have it substituted with a finding that the Respondent's suit be dismissed with costs.

3. On its part, the Respondent filed grounds of opposition dated March 16, 2023 and a supplementary Record of Appeal dated March 17, 2023. In brief, the Respondent's contentions are that the dispute between the parties emanated from a loan agreement that was first negotiated through a series of email correspondences between the parties and was duly executed by the respective directors of the parties; that the Appellant admitted having received the loan;

4. The Respondent further avers that the Appellant defaulted on the loan repayment and that there was provided overwhelming evidence by way of email correspondences filed in court demonstrating promises made by the Appellant to repay the loan; that the Appellant has not demonstrated that the interest charged was unconscionable or a bad bargain; that therefore, the parties are bound by the terms of the contract and the Court cannot interfere unless there is proof of coercion, fraud or undue influence; that the Appellant did not avail any variation agreement; that there was no valid counterclaim that could give rise to a claim of set off on record to be considered and that the resolution ratifying filing of the Respondent's suit was filed on 13th March, 2017 together with its notice of motion of even date.

Analysis and Determination

5. Both parties herein filed their respective submissions which I have considered carefully. In addition, i have analyzed the Record of Appeal and the Supplementary Records of Appeal. In my view and from a careful consideration of the grounds of Appeal as set out in the memorandum of appeal, the following issues arise for determination: -

   1. Whether the suit was unsustainable for lack of verification and company resolutions.
   2. Whether the Respondent proved its case on a balance of probabilities and was entitled to the amount awarded.
   3. Whether there was a basis laid for the set off of the debt.

6. Before delving into the issues, I do recognize this Court's duty as the first appellate court, that was succinctly captured by the Court of Appeal in *Peter M. Kariuki v Attorney General* Civil Appeal No. 79 of 2012 [2014] eKLR, as follows:-

   > "We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui v Republic*, (1984) KLR 729 and *Susan Munyi v Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported)."

7. For good order, I shall first address the issue of lack of verification and authorization of the suit through a company resolution. The Appellant contended that the suit was filed without the authority of the company as the verifying affidavit was sworn by Mr. Anyiko who was not an officer of the company. The Appellant relied on order 4 rule 1(4) of the *Civil Procedure Rules*, which reads as follows: -

   > "(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

8. I note that the verifying affidavit at page 9 of the Record of Appeal is sworn by Mr. Jude Anyiko, the Respondent's consultant, on January 26, 2017. I also note that at page 30 of the record, there is a letter of authority dated 25th January, 2017, signed by the Respondent's director, Mr. Robert Njuguna confirming that Mr. Anyiko was authorized to swear any and all documents and represent the Respondent in the suit.

9. The Respondent submitted that it was in compliance with the above provision, highlighting that before the hearing of the primary suit, it filed the copy of its resolution to sue and appoint Mr. Jude Anyiko to draw, sign or otherwise execute any such documents, depositions, pleadings and deeds necessary for the proceedings, at page 13 of the Respondent's supplementary record of appeal dated March 17, 2023.

10. In *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited* (High Court Civil Case No. 192 of 2015) [2016] eKLR, the Court, faced with similar circumstances, held that:-

    > "I associate myself with the viewpoint taken by Kimaru, J in *Republic v Registrar General and 13 others* Misc. Application No. 67 of 2005 [2005] eKLR that such a resolution by the

Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit."

11. Accordingly, guided by the above authority, I am not persuaded that the suit before the lower court was filed without compliance with Order 4 Rule 1(4) or without the authority of the company.

12. On the second issue, the Appellant faulted the trial court for finding that there was sufficient evidence of that the parties entered into the loan agreement of April 5, 2016. The Appellant also faulted the trial court for failure to take its evidence into consideration.

13. The Appellant pinpointed that at para. 14 of Mr. Njuguna's statement, he stated that he disbursed the loan of Kshs. 7,000,000/- as he was waiting for the Appellant to forward the signed agreement. To buttress their case, the Appellant cited the decision in *Independent Electoral and Boundaries Commission & no v Stephen Mutinda Mule & 3 others* [2014] eKLR and *Raila Amolo Odinga & another v IEBC & 2 others* [2017] eKLR and maintained that parties are bound by their pleadings and evidence which varies with pleadings must be disregarded by a court, in determining a matter before it.

14. On the other hand, the Respondent asserted that the trial court was correct in its findings as it had met the required standard of proof to establish that there was a loan agreement and the loan was disbursed to the Appellant.

15. From the record, I note that the Respondent pleaded at para. 3 of the plaint, at p. 5 of the record of appeal, that there was an express loan agreement made on 5th April 2016. Looking at para. 14 and 17 of Mr. Njuguna's statement, at pp. 14 and 15 of the record of appeal, it is clear that he disbursed the loan of Kshs.7,000,000/- to the Appellant on 29th April 2016 before he received the signed copies of the loan agreement, which Mr. Kipchumba indicated that he would forward on May 23, 2016.

16. It is also clear that there was email correspondence between Mr. Njuguna, Mr. Kipchumba and Mr. Anyiko in the month of April 2016, preceding the execution of the loan agreement. I also note that the loan agreement at p. 20-23 of the record of appeal, signed by Mr. Kipchumba for the Appellant, stipulates that the issue date was 1st May 2016 and the maturity date was 1st November 2016. The Respondent's account statement at pp. 24-27 of the record of appeal reflects a transfer of Kshs.7,000,000/- to the Appellant on 29th April 2016 and loan repayments made by the Appellant. Therefore, I cannot agree with the Appellant's contention that the trial court erred in finding that there was a loan agreement.

17. I now move to the third issue regarding the Appellant's contention that the trial court erred by failing to consider its evidence showing that it was the Respondent owed it Kshs.13,681,000/-, following a joint venture agreement between the Appellant and Mr. Anyiko. From a perusal of the record, it is clear that the trial court considered the Appellant's evidence at para. 2 of the impugned judgment. However, the trial court concluded that the Appellant's directors conducted themselves in a manner to show that the terms of the contract was binding.

18. I agree with the trail court on the findings on this issue. The Appellant's assertion that Mr. Anyiko and the Respondent are one and the same cannot stand. This is due to the well-founded principle of corporate personality, that a company is a separate and independent legal entity from its members, directors or agents, established by the House of Lords in the *locus classicus* case of *Salomon & Co Ltd v Salomon* [1897] A.C. 22 H.L. This principle applies unless there are factors that allow for lifting of the corporate veil such as fraud or if the company is a mere façade concealing the true facts and on a formal application, the corporate veil can be pierced. This was the finding by the court in the case of Kikambala Housing Estate Limited v Samuel Nyamu Kamau (Misc App. No. 199 of 2017) [2021] eKLR.

19. Again, in this matter, it was the Appellant's position that Mr. Anyiko fraudulently engaged with it with a view of utilizing the Appellant's services and expertise for gain with no intention of honouring his part of the bargain. The Appellant claimed to have suffered loss and damages from the purported fraud. The trial court expressed the view that this was an allegation that could be better dealt with in the criminal court. However, it is my considered view that fraud may be pursued in civil court. The requirements are that fraud must be specifically pleaded and particulars of the fraud alleged must be stated on the face of the pleading and that fraud must be distinctly proved by evidence and cannot be inferred from the facts.

20. In *Demutila Nanyama Pururmu v Salim Mohamed Salim* (Civil Appeal No 138 of 2018 [2021] eKLR, the Court of Appeal cited with approval the following excerpt by Tunoi, JA. (as he then was), in *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR:-

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

21. In light of the foregoing, I find that in the instant matter, the Appellant did not specifically plead and particularize the fraud. The Appellant also did not put in a counterclaim. The Appellant merely relied on Mr. Kipchumba's statement and the email correspondence dated February 25, 2016 and WhatsApp messages to argue that the joint venture was between it and Mr. Anyiko. The evidence by the Appellant fell way below the legal threshold required to establish and prove the allegations of fraud, which is higher than on a balance of probabilities as was held by the court in the case of *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* [2013] eKLR.

22. Therefore, it is my considered view that the trial court was correct in finding that it was manifest from the evidence tendered by the Respondent that the agreement was entered into and breached by the Appellant; that the Appellant was liable to pay the Respondent the sum of Kshs.5,981,250/- and that the Appellant was liable to pay the Respondent interest of Kshs.107,916/= per month with effect from November, 2016.

23. In conclusion, I find no good grounds to interfere with the judgment of the trial court dated 31st January, 2020. The same is hereby upheld and the appeal before me fails for lack merit. The same is hereby dismissed with costs to the Respondent.

    It is so ordered,

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 19th DAY of FEBRUARY, 2024.

J.W.W. MONG'ARE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of:-

1. Mr. Gode holding brief for Kingati for the Appellant.
2. Mr. Mwangi Ndirangu holding brief for Mrs. Muriithi for the Respondent.
3. Amos - Court Assistant