



Paragon Electronics Limited v Bamburi Special Products Limited (Civil Case 314 of 2015) [2024] KEHC 3678 (KLR) (Civ) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 314 OF 2015

AN ONGERI, J

APRIL 2, 2024

BETWEEN

PARAGON ELECTRONICS LIMITED PLAINTIFF

AND

BAMBURI SPECIAL PRODUCTS LIMITED DEFENDANT

JUDGMENT

1. The plaintiff in this case Paragon Electronics Limited (hereafter referred to as the plaintiff only) filed the plaint dated 6/8/2015 seeking the following remedies against the defendant Bamburi Special Products Limited (hereafter referred to as the defendant only)
 - i. Payment of kshs.9,892,300.00 in respect of scaffolding taken by the defendant from the plaintiff.
 - ii. Payment of ksh.275.00 per day for the remaining 46 sets of scaffolding from 26th June, 2014 until return of scaffolding.
 - iii. Interest on (a) above from the date of filing suit until payment in full.
 - iv. Costs of this suit.
2. The plaintiff averred in the said plaint that the plaintiff is the registered owner of property L.R. no. 330/355 on which it has erected two (2) blocks of seven (&) storey apartments.
3. That the plaintiff had at its site, scaffolding for purposes of using them for the construction.
4. That while still constructing the apartments, the plaintiff engaged the defendant to supply it with materials at the site.



5. Further, that sometimes in 2012, the defendant sent one of its officers and/or agent to collect scaffolding from the plaintiff's site without the authority or consent of the plaintiff. The defendant in collusion with the plaintiff's then site manager picked about 50 sets of scaffolding for use by the defendant.
6. The plaintiff pleads that the defendant only returned 4 sets of the scaffolding which in any event were not the plaintiff's and were of low quality than what was picked by the defendant. The defendant has never returned the 46 sets of scaffolding illegally taken from the plaintiff's site. The plaintiff pleads that it has been and continues being denied use of the scaffolding and has thereby suffered loss and damage.
7. That on 5th June, 2014 one of the defendant's officers requested for an invoice from the plaintiff in order to settle the plaintiff's claim. The invoice of kshs.9,892,300.00 was forwarded to the defendant on 11th June, 2014.
8. Despite demand and notice of intention to sue, the defendant has refused and/or neglected to settle the plaintiff's claim.
9. The defendant denied the plaintiff's claim and filed a defence on 29/10/2015.
10. A summary of the plaintiffs evidence is that the defendant took scaffolding from the plaintiff company and declined to return the same.
11. The plaintiff called two witnesses. PW1, Mr. Ebubakir Sahin and PW 2 BULENT GULBAR who was a director of the plaintiff company.
12. Mr. Ebubakir said he was not involved in the taking of the scaffolding from the plaintiff's site at Bamburi.
13. PW 2 adopted his statement as his evidence in chief. He said he was aware that the Plaintiff had at its site, about 1500 sets of scaffolding for purposes of using them for the construction.
14. While still constructing the apartments, the Plaintiff engaged the Defendant to supply it with materials at the site.
15. That sometime in 2011, the Defendant sent one of its officers and/or agent to collect scaffolding from the Plaintiff's site without the authority or consent of the Plaintiff. The Defendant in collusion with the Plaintiff's then site manager picked about 50 sets of scaffolding for use at/by the Defendant.
16. That the Defendant only returned 4 sets of the scaffolding which in any event were not the Plaintiffs and were of low quality than what was picked by the Defendant.
17. That the Defendant has never returned the 46 sets of scaffolding illegally taken from the Plaintiff's site and has denied use of the scaffolding and has thereby suffered loss and damage
18. That the daily rental amount for scaffolding in the construction industry is Kshs. 275.00 per day.
19. That through various correspondences, the Defendant admitted to having taken the scaffolding but disputed the number of scaffolding taken.
20. However, through an email dated 5 June, 2014 one of the Defendant's officers, Mr. Rex Titus requested for an invoice from the Plaintiff in order to settle the Plaintiff's claim.
21. That the invoice of Ksh.9,892,300.00 was forwarded to the Defendant on 11 June, 2014 but the defendant has refused to settle the same.



22. That the Defendant is duly indebted to the Plaintiff in the sum of Kshs.9,892,300.00 and judgment should be entered in favour of the Plaintiff for this amount.
23. That the Defendant is yet to return the Plaintiff's scaffolding and the Plaintiff is entitled to payment at the rate of Kshs. 275.00 per day for the remaining 46 scaffolding until they are returned.
24. PW 2 said he did not receive any request for the scaffolding.
25. He said he held several meetings with the defendant trying to resolve the issue of the scaffolding.
26. The parties also exchanged email on the said issue and the defendant agreed to pay for the "missing" scaffolding.
27. When the plaintiff issued an invoice for the 46 missing scaffolding, the defendant said they were a stranger to the issue and the plaintiff filed this suit.
28. The defendants called one witness, DW1 TITUS REX who adopted his statement as his evidence in chief.
29. DW1 said he has been a technical Sales Engineer at Bamburi Special Products Limited, the defendant herein until the end of August, 2015, but am now based at Lafargeholcim in France.
30. He said he was still the technical sales engineer at Bamburi Special Products Limited at the time of the transaction herein and his main job was to visit construction projects and sell ready mix concrete and therefore he is conversant with the facts of this matter.
31. DW1 said sometime in 2011, in his capacity as sales engineer, he met Mr. Bekir who represented himself as the plaintiff's representative and thus dealt with him on all matters regarding and touching on the plaintiff before later learning that he was the site manager.
32. That sometime in 2012, the defendant was undertaking repairs of the underside of a concrete mixer at our Athi River site. In order to do this, we required scaffolding.
33. That only four sets of scaffolding were required and since they did not have sets of scaffolding, a decision was made to borrow four sets of scaffolding from the plaintiff owing to the good working relationship that had been established between the plaintiff and the defendant in earlier dealings.
34. The cited site manager was on the forefront of all official dealings between the plaintiff and the defendant and thus the scaffolding was borrowed on that basis.
35. That the defendant's company driver was sent to the plaintiff's premises to collect the four sets of scaffolding that had been borrowed and Mr. Bekir, having full authority and acting on behalf of the plaintiff company consensually and legally lent them only four (4) sets of scaffolding as agreed and not fifty (50) sets of scaffolding as alleged by the plaintiff.
36. That they used the scaffolding at our Athi River site for the intended purpose. Mr. Maina made all necessary arrangements and DW1 later returned the borrowed four sets back to the plaintiff. This was indeed confirmed by Mr. Bekir in email correspondences between him and Mr. Maina.
37. That in the real sense, 46 sets of scaffolding when piled up high would measure 90 metres high which is approximately 20 floors. Thus, it is not practical that the defendant borrowed 46 or 50 sets of scaffolding as alleged just to repair a concrete mixer which is four meters above the ground.



38. That in actual fact, the said four sets were returned sometime in 2013. The plaintiff never complained of the quality then or asked for any extra sets of scaffolding except later when to its shock and dismay, the defendant received emails from the plaintiff asking for more sets.
39. Later, they received an invoice of ksh.9,892,300.00 from the plaintiff which sum they claimed to be the market value of 46 sets of scaffolding which sets were never returned.
40. That they only borrowed four sets hence no such sums are outstanding and further, the said amount of ksh.9,892,300.00 was overly exaggerated and not correct since scaffolding does not cost that much but way lesser. This is an attempt to defraud the company unjustly.
41. The defendant, in its quest to put the matter to rest and foster the already existing good working relationship, asked the plaintiff to prepare an invoice for it to settle in case it has any delivery notes or documentation stating the number of scaffolding borrowed.
42. The plaintiff never did that, but instead continued placing baseless and malicious claims and then sent a ludicrous unsupported invoice to the defendant.
43. That they later received an invoice of kshs.9,892,300.00 which sum is malicious, ill-founded, exaggerated and undeserving to the plaintiff.
44. DW1 further said that the plaintiff has not been denied use of its scaffolding, which it is in possession of, and as such, no loss or damage whatsoever has been suffered by the plaintiff.
45. DW 1 denied that they requested for the scaffolding from the plaintiff. He also denied that the defendant agreed to pay for 46 “missing” scaffolding.
46. The parties filed written submissions as follows; the plaintiff submitted that the defendant’s statement of defence filed on 29/10/2015 is utterly defective for being unsigned and undated and ought to be disregarded. That Order 7 Rule 1 of the Civil Procedure Rules, 2010 provides that:

“ Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”
47. The plaintiff submitted that the wording in the Rules as set out above are couched in mandatory terms and the intent was to ensure that there is ownership of the contents of pleadings either by an advocate of a party, a recognized agent, or the party to the suit.
48. The plaintiff submitted further that the defendant admitted that it took four (sets) of scaffolding from the Plaintiff’s site and used the scaffolding allegedly to repair its plant at Athi River. It is further not in dispute that the Defendant only returned the scaffolding to the Plaintiff after 253 days. The plaintiff argued thus that the Defendant must be held liable and ordered to pay the Plaintiff the amount of Kshs. 278,300.00, as demanded per Invoice of 25/6/2014.
49. The scaffolding was taken from the plaintiff’s site without its consent and knowledge. The Defendant under paragraph 5 and paragraph 6 of the defective Statement of Defence alleged that the scaffolding was borrowed from the Plaintiff owing to the good working relationship and that the “site manager” Ebubekir Sahin released the four (sets) of scaffolding to the Defendant’s company driver. The defendant’s witness DW1 Corroborated the same and indicated that one Moses Maina, Defendant’s logistic manager, requested the scaffolding from one Ebubekir Sahin.



50. The plaintiff argued that the act of the Defendant unlawfully taking and admittedly appropriating the Plaintiff's chattels (scaffoldings) amounts to the tort of conversion for which the Plaintiff is entitled to damages. The Court of Appeal in *Patrick Muturi v Kenindia Assurance Company Ltd* [1993] eKLR held as follows regarding a cause of action in conversion -

“In all these cases, a plaintiff who has been deprived of his chattel is ordinarily entitled to its full value, together with any special loss he may have suffered as the result of the unlawful detention or conversion or destruction or loss.”

51. The plaintiff submitted that it has made its case that the Defendant in fact took fifty (50) sets of scaffolding from the Plaintiff's site without its consent and or knowledge. The Plaintiff's witness PW2, Bulent Gulbahar, confirmed how they established the quantity taken by the Defendant with the Defendant representative during his testimony.

52. Further, that the Defendant's representative, one Titus Rex, confirmed this fact during joint visits at the Plaintiff's site and office, which is reflected in various email correspondences. As a result of the site and office visits, the Defendant's representative, and witness DW1, one Titus Rex, expressly asked and invited the Plaintiff to Invoice for “said missing scaffolding, taken by Maina”

53. It was argued that the defendant has however failed to produce any witnesses to corroborate its claim that it is implausible that it took 46 for the repair of its plant in Athi River. It is trite law that he who alleges a fact is duty bound to prove the same and where a party with special knowledge fails to adduce evidence or witnesses the court is entitled to draw a negative inference for such failure.

54. The defendants alternatively submitted that it is position that a cordial business relationship existed between it and the Plaintiff from 2011, with the Defendant supplying ready mix concrete to the Plaintiff for its construction business. DW1 testified of his interactions with the Plaintiff's site Manager, who oversaw the site, facilitating purchase orders and receiving deliveries, and PW1 and its Managing Director, PW2 who would facilitate payments for the concrete supplied.

55. The defendant submitted that based on the existence of a commercial relationship, the defendant when it needed to repair is concrete mixer, approached the plaintiff and requested for scaffolding to aid in reaching the concrete mixer. The defendant made it request to the plaintiff's site manager who had authority to grant the same.

56. The defendant submitted that the allegation that there was collusion between the site manager and the defendant was unfounded and is unsupported by extrinsic evidence.

57. Further, that PW2 during cross examination acknowledged that the site is managed by security personnel with clear visibility of incoming and outgoing vehicles, including the items transported. Surprisingly, there was no explanation as to why the security personnel did not raise an alarm if, indeed, the scaffolding was taken illegally.

58. The defendant argued that DW1 testified and explained why it is highly improbable that 50 sets were taken. He explained that stack together 46 sets of scaffolding would measure 90menteres high, approximately 20 floors yet all the defendant was looking to do was repair a concrete mixer. The defendant further submitted that the plaintiff presented no audit report, police report or any other corroborating evidence and thus relied solely on allegations.

59. The defendant contended that the statement attributed to Mr. Patrick Isiahi Isachi should be excluded form consideration as it violates the rules of evidence mandating that unless falling within specified exceptions, statements in documents must be presented in evidence by the original maker.



60. Further, that PW2 claimed that Mr. Patrick Isachu is deceased, yet no supporting evidence was provided to substantiate this assertion. While Section 35 of the Evidence Act envisions situations where the maker of a statement is deceased or untraceable, the burden lies on the party alleging the maker's demise to convincingly demonstrate this circumstance for the exception to be applicable.
61. The defendant submitted that the four sets of scaffolding borrowed from the plaintiff were promptly returned upon the plaintiff's request. In an email dated 13/2/2013 from DW1, the Defendant, after confirming the borrowing of only 4 sets of scaffolding from PW1, acknowledged delivering all 4 sets back to the Plaintiff. This fact was also admitted by PW2 during cross-examination at the trial.
62. On its defence the defendant indicated that the allegation that the defence in undated is unfounded as it is properly dated 28/10/2015 and filed in court on 29/10/2015. In any event, the said claim was considered by the court following an application dated 25/9/2018 and in a ruling dated 28/2/2020 it was found to be without basis.
63. It is the duty of the plaintiff to prove his case. The standard of prove is on a balance of probabilities.
64. The plaintiff did not deny that the issue of the unsigned defence was considered by the court following an application dated 25/9/2018 and in a ruling dated 28/2/2020 it was found to be without basis.
65. The issues for determination in this suit are as follows;
- i. Whether the defendant took 46 scaffolding from the plaintiff company.
 - ii. If so how much the defendant is liable to pay the plaintiff for the scaffolding.
 - iii. Whether the defendant is liable to pay ksh.275 per day for the scaffolding that were held by the defendants to the date of release.
 - iv. Who pays for the costs of this suit.
66. On the issue as to whether the defendant took scaffolding from the plaintiff I find that there was no evidence to support the assertion by the plaintiff that the defendant borrowed a total of 50 scaffolding.
67. PW1, Mr. Ebubakir, whom the plaintiff said gave out the scaffolding said he was not involved in the taking of the scaffolding from the plaintiff's site at Bamburi.
68. Section 107 of the Evidence Act requires the one who alleges to prove what he alleges. That Section provides as follows;
- “ 107. Burden of proof
- (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.”
69. The defendant admitted having taken only 4 scaffolding and returning the same.
70. The plaintiff did not prove that the defendant took 46 more scaffolding.
71. The email that the plaintiff is relying on to claim that the defendant agreed to pay for 46 scaffolding does not state the number of scaffolding that were being claimed.



72. Apart from the said email, there is no other evidence that the defendant admitted having borrowed 46 more scaffolding or owing the plaintiff a specific amount of money in respect of the said scaffolding.
73. On the issue as to how much the defendant ought to pay the plaintiff in respect of the value of the scaffolding, I find that they are not liable to pay any amount since the plaintiff has not proved that the defendant borrowed and/or is retaining any scaffolding belonging to the plaintiff.
74. There is no evidence that the defendant admitted to pay for the “missing” 46 scaffolding.
75. The plaintiff is relying on the words the “said missing scaffolding, taken by Maina” to claim a colossal sum of kshs.9,892,300.00 in respect of scaffolding allegedly taken by the defendant from the plaintiff.
76. The said words are insufficient to prove that the said scaffolding were taken. It is not clear what date they were taken and the manner in which they were taken.
77. The plaintiff did not show how the figure kshs.9,892,300.00 was arrived at and I find that the plaintiff has not proved its case.
78. The emails are not evidence of admission since they do not amount to signed delivery notes, neither do they clearly indicate what number was being referred to.
79. On the issue as to whether the defendant is liable to pay ksh.275 per day for the unspecified period the scaffolding were held, I find that the answer is in the negative.
80. The reason is that other than the four admitted to have been borrowed and returned; there is no evidence that any additional scaffolding were borrowed by the defendant or ever given to them by the plaintiff.
81. The defendant only admitted having borrowed 4 scaffolding which were returned.
82. The plaintiff has failed to prove its case to the required standard in civil cases and I accordingly dismiss the plaintiff’s case.
83. On the issue as to who pays the costs of this suit, I direct that each party pays their own costs of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND APRIL, 2024.

.....
A. N. ONGERI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

