Shabwali Secondary School v Vwinah (Civil Appeal E103 of 2023)
[2024] KEHC 6206 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6206 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E103 OF 2023

PJO OTIENO, J

MAY 24, 2024

BETWEEN

SHABWALI SECONDARY SCHOOL ..... APPELLANT

AND

VIOLET KAGAI VWINAH ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Caroline Cheruiyot (RM) in Kakamega Civil Claim No. E175 of 2023 dated 20th June, 2023)

JUDGMENT

Background of the Appeal

1. By way of a statement of claim dated 19th April, 2023, the Respondent sued the Appellant for damages in the sum of Kshs. 250,000/-, costs of the claim and interest at commercial rates. The Respondent's case was that on 14/2/2020 she supplied furniture to the Appellant at an agreed sum of Kshs. 250,000/ which amount the Appellant refused to pay.

2. In a response to the statement of claim filed in court on 30th August, 2023, the Appellant averred that they only owed the Respondent a portion of the amount claimed and further stated that the goods were never delivered, the Respondent did not follow the procurement rules in the purported supply of goods to the Respondent as provided under the *Public Procurement and Asset Disposal Act*, 2015 and that there was no enforceable contract between the Appellant and the Respondent for the supply of goods worth Kshs. 250,000/-.

3. In a Judgment of the trial court delivered on 20th June, 2023, the trial court entered judgment for the Respondent in the sum of Kshs. 250,000/- together with interest from the date of filing the suit plus costs of the claim.

4. Aggrieved with the decision of the trial court, the Appellant's lodged a Memorandum of Appeal dated 11th July, 2023 premised on the following grounds;

   a. The learned trial magistrate/adjudicator erred in law and fact in finding that the respondent had proved her case against the appellant.

   b. The learned trial magistrate/adjudicator erred in law and fact in failing to consider that the respondent had breached the provisions of the *Public Procurement and Asset Disposal Act*, 2015 as pleaded by the appellant in their response.

   c. The learned trial magistrate/adjudicator erred in law in failing to consider that the provisions of the *Public Procurement and Asset Disposal Act*, 2015 overrides the provisions of the *Sale of Goods Act*, Cap 31 Laws of Kenya in matters public procurement.

   d. The learned trial magistrate/adjudicator erred and misdirected herself in law and fact by failing to appreciate sufficiently or at all, consider and correctly analyze the evidence and exhibits tendered by the parties in determine the suit.

   e. The learned trial magistrate/adjudicator erred and misdirected herself in law and fact by failing to consider or sufficiently consider the appellant's position as set out in their pleadings and evidence thus reaching a manifestly erroneous finding against the appellant.

5. For the above five grounds, the Appellant prays that the Judgment of the trial court be set aside, the suit be dismissed and the Appellant be awarded costs of this appeal.

6. The appeal has been canvassed by way of written submissions filed by both parties.

7. It is the submission by the Appellant that the Respondent failed to prove her case and that there was no valid contract between the Appellant and the Respondent in that their handing over report produced by the Appellant did not show that the Respondent was one of the creditors of the school. It was underscored that the store keeper, being the person in charge of receiving goods at the school, swore a statement to the effect that she never received the alleged goods from the Respondent.

8. They further submit that the Appellant being a public school, the provisions of *the Constitution* of Kenya, 2010 under articles 10 and 27 to be specific and the *Public Procurement and Asset Disposal Act*, 2015 must be adhered to in which regard they cite the case of *Muguye & Associates Advocates v Kiambu County Assembly Speaker* (2018) eKLR. It was then contended that the Respondent did not adduce any evidence to show that she entered into a contract with the Appellant for the supply of 50 sets of furniture at a price of Kshs. 250,000/ and that the delivery notes allegedly produced by the Respondent cannot create a contractual relationship as per the provisions of the *Public Procurement and Asset Disposal Act*, 2015. The Appellant further questions the trial court's reliance on the provisions of the *Sale of Goods Act*, CAP 31 Laws of Kenya arguing which they contend, that the Act is ousted by the provisions of section 5(1) of *Public Procurement and Disposal Act*, 2015 which provides that the Act shall prevail in the event of an inconsistency between the Act and any other legislation. In that regard the case of *Noa Investment Limited v County Government of Nyamira* (2021) eKLR was cited for the proposition that mere proof of supply and receipt of goods does not prove a valid contract on the face of section 51 of the *Public Procurement and Asset Disposal Act*.

9. The Respondent identify three issues for determination namely; a) whether there was supply of goods and services rendered by the Respondent; b) whether there was a contract between the parties worth enforcement and; c) whether the Respondent is entitled to the payment of the sum of money sought.

10. On whether there was supply of goods and services rendered by the Respondent, they submit that they adduced an invoice and a delivery note both dated 14/2/2020 and the delivery note was stamped and signed by the Appellant in acceptance of goods received and argue that in disputing the said stamp the Appellant did not adduce any evidence to prove that the stamp was from the school and in that regard they cite the case of Chairman BOG Goseta Secondary School v Margaret Busisa t/a Jomadi House of Design (2016) eKLR. In this decision the Court relied on Section 3 (1) *Sale of Goods Act*.

11. On whether there was a contract between the parties worth enforcement, it is their submission that the Appellant having received the goods and acknowledging that they are in good condition is estopped from denying the operation of a contract between them and the Respondent and in that regard they cite the case of *Chairman BOG Goseta Secondary School v Margaret Busisa t/a Jomadi House of Desig*n (2016) eKLR.

12. They further place reliance in the court of appeal decision in *Chase International Investment Corporation and another v Laxman Keshra & 3 other* (1978) eKLR where the court held that the principle of unjust enrichment would justify an order to pay for the benefit received.

13. The court has considered the grounds of appeal, the proceedings of the lower court and the submissions by both the Appellant and the Respondent and discerns the sole issue for determination to be whether the supply of furniture by the respondent to the appellant created an enforceable contract between the two parties.

Analysis

14. The Respondent contends that she supplied the Appellant with 50 pieces of furniture for the sum of Kshs. 250,000/ and she is therefore entitled to payment for the same. She produced a delivery note duly received by the Appellant on 14/2/2020 (see page 13 of the record of appeal). The Appellant has disputed receiving the furniture though they have notably failed to challenge the receiving stamp on the delivery note. It is unfortunate that the court proceeded under section 30 of the *Small Claims Court Act* hence did not subject witnesses to cross-examination. There having been a contestation of receipt and delivery of the goods allegedly supplied, it was important to test the credibility of witnesses by way of cross-examination. That was not done imposed upon the court to keenly consider and decide the rival positions. On that duty the trial court appears not to have addressed the all important question whether there was a valid contract on the lenses of *Public Procurement and Asset Disposal Act*. In that failure the trial court erred and that error vitiates the entire Judgment.

15. When it comes to procuring goods and services, the Appellant being a public entity is required under article 227(1) of *the Constitution* of Kenya, 2010 to carry out the procurement process in accordance with a system that is fair, equitable, transparent, competitive and cost-effective and which procedure is elucidated in the *Public Procurement and Asset Disposal Act*, 2015. The Appellant argues that the provisions under the Act were not adhered to in that there was no contract between the Appellant and the Respondent.

16. The Respondent has placed reliance on the *Sale of Goods Act*, CAP 16 Laws of Kenya and argued that since she supplied furniture to the Appellant and the Appellant received the goods, this action implied the formation of a contract. From the record, the goods were supplied by the Respondent to the Appellant on 14/2/2020 whereas the *Public Procurement and Asset Disposal Act*, 2015 came into force on 7th January, 2016. I agree with the Appellant that the provisions of the *Sale of Goods Act* does not apply in this case as the Act is ousted by section 5(1) of the *Public Procurement and Asset Disposal Act* which stipulates that the Act shall prevail in case of any inconsistency between the Act and any other legislation or government Notices or Circulars, in matters relating to procurement and asset

disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.

17. To support her argument on the existence of a contract under the *Sale of Goods Act* the Respondent has cited the case Chairman BOG Goseta Secondary School v Margaret Busisa t/a Jomadi House of Design (2016) eKLR in which the court ruled that the supply of goods by the Respondent to the Appellant and the acknowledgment of those goods by the Appellant created a contract. I have looked at the case and I have noted that the cause of action in the case arose in the month of January, 2005 whereas the Public Procurement and Disposal Act, 2005 was assented to on 26 October, 2005. The law on procurement of goods and services by public entities was not in force at the time the cause of action in the cited case arose. That decision did not address the application of *Public Procurement and Asset Disposal Act*.

18. Section 72 of the *Public Procurement and Asset Disposal Act*, 2015 obligates the Respondent, as a supplier, to comply with the provisions of the Act and the Regulations. This position was echoed in the case of Royal Media Services V Independent Electoral & Boundaries Commission & 3 others [2019] eKLR where the court held as follows;

> " 45. It is the duty of the Contractor as it is of the procuring entity to observe the provisions of Statute and the Regulations thereunder. Section 27 imposes an unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the Contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into a contract which is procured in apparent disregard of the law. For that reason, a contractor or supplier cannot find refuge in the argument that compliance was an internal matter of the public entity when s[he] has not done enough to enquire about compliance or s[he] is herself or himself guilty of infringement.
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> 46. The law on direct procurement is clearly expressed in both the substantive and subsidiary provisions of the PPD Act, 2005. RMS knew that IEBC was a public entity. RMS was expected to know the law on public procurement because as the old adage goes, ignorance of the law is no defence. It would be apparent to RMS that the meeting of 11th December 2012 were not negotiations required by the statute. It would further be apparent to RMS that it was offering services when the contract required by Section 75(c) had not been concluded. These two aspects of the transaction were not matters internal to IEBC only. Negotiations and entering of a formal contract were matters that required the participation of RMS. RMS knew or ought to have known that certain facets of direct procurement were being overlooked. Non-compliance could easily be seen. For this reason this Court is unwilling to hold that RMS should be excused from the flawed process.
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> 47. But an argument had been made that not to allow the claim would be to hurt RMS and to allow IEBC to get away with services without paying for them. This Court is not unsympathetic to this argument yet there is a greater public good in a Court declining to enforce a transaction that is contrary to statute. Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of Ex lurpi causa non oritur action, that is from

a dishonorable cause an action does not arise. There may be good reason not to resolve such argument in favour of a contractor or supplier who is partly to blame or who is not entirely blameless. I reasoned as follows in *Centurion Engineers & Builders Ltd vs. Kenya Bureau of Standards* [2016] eKLR:-

57. The Court reaches its decision even in the face of the submissions by the Claimant's Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.

58. If the Court were to uphold such breach on the argument that to do otherwise would be to cause loss and suffering to the Contractor, then we must be ready to put up with routine and casual violation of our Procurement laws. We must be ready to allow Contractors to benefit from illegal Contracts. And such a lenient stance could encourage Contractors to happily collude in the violation of the law and then turn around to play victim so as to win the sympathy of the Court. The Law on Procurement is on the side of the Kenyan Public and it must be strictly enforced."

19. That said, it is my finding that that there was no valid contract between the appellant and the respondent that is enforceable by this court.

20. Accordingly, for the reasons set out above, I allow the appeal with costs to the Appellant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF MAY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Simiyu for Tarus for Appellant

Mr. Were for the Respondent

Court Assistant: Polycap