Abwoga & another (In Their Capacity as the Trustees of Pefa Church Donholm) v Mutunga Mbuvi t/a Audio Hearts (Civil Appeal E209 of 2022) [2024] KEHC 7005 (KLR) (Civ) (4 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7005 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E209 OF 2022

DKN MAGARE, J

JUNE 4, 2024

BETWEEN

SAMUEL OUNDO ABWOGA ..... 1ST APPELLANT

PAUL HABWE KILIOBA ..... 2ND APPELLANT

IN THEIR CAPACITY AS THE TRUSTEES OF PEFA CHURCH DONHOLM

AND

MUTUNGA MBUVI T/A AUDIO HEARTS ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Liluma Musiega (SRM) delivered on 29th November, 2022 in Milimani CMCC No. 7699 of 2018)

JUDGMENT

1. This is an appeal from the judgment of Liluma Musiega (SRM), given on 29/11/2022 in Milimani CMCC No. 7699 of 2018. The Appellant was the plaintiff in the court below. It was a claim for an alleged balance of Ksh 36,000/=. The claim in the court below is strain and the truth is evasive. The court had to rely on deductive reasoning to find who is not lying, much. The translations of the Holy Quran 2:43 warns: -

   Do not confound truth with falsehood, and Do not hide the truth.

2. The Appellant filed the following grounds of Appeal:-

   a. That the learned magistrate erred in law and in fact by totally misapprehending the facts of the suit, the oral and documentary evidence tendered and the submissions of the Appellants, thereby dismissing their suit without justification.

b. That the learned magistrate erred in law and in fact in misinterpreting the parties' contract by finding that the sale of the four (4) older HX5 line array model LA speakers initially supplied by the Respondent to the Appellant was a prerequisite to the sale and supply of the four (4) new Adams Mark line array boxes of speakers also known as Line Array model LA-212.

c. The learned magistrate erred in fact in arriving at the wrong value of the four (4) new Adams Mark line array boxes of speakers (Line Array model LA-212).

d. The learned magistrate erred in law and in fact in finding that the Appellant refused and/failed to make payments to the Respondent for the supply for the supply of the eight (8) HX5 line array model LA speakers.

e. That the learned magistrate erred in law and in fact in allowing the counterclaim.

f. That the learned magistrate erred in law and in fact in his determination by ordering an inappropriate remedy for the breach of contract.

3. The Appeal was opposed.

Pleadings

4. The suit was filed on 23/8/2018. It was for a claim of Ksh. 471,440/= for contract of 12/5/2014. The contract is said to have been performed. A deficit of Ksh. 36,000/=, was claimed for 4 line array boxes Adams Mark Brand.

5. The court found that the supply of the demanded goods was based on sale of the 4 HX5 array model LA 212, which were in situ.

Analysis

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

7. In Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR the Court of Appeal stated that:-

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

8. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

9. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

10. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

11. This was aptly stated in the case of Peters v Sunday Post Limited [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

1. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

2. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the judges of Appeal held that:

> " Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say; -
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

12. This burden is based on sections 107 -109 of the *evidence Act*.it states as follows: -

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.

(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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

13. It cannot be discharged without a specific contract to prove existence of the contract for supply at the specific price. In any case, a party to a contract must resile the whole of it or live with the consequences. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

14. It is sad that after a well analyzed judgment the Appellant chose to appeal. The Appellant cannot without proving fraud, take part of the contract and leave the other part out. A claim for Ksh. 36,000/ = was snowballed into a vicious war. It is a waste of judicial time. The agreements in situ do not support the postulations by the Appellant.

15. The good Scripture calls upon those with cases to seek to reconcile first before they are brought before the magistrate. Now they are before me.

13. I find no merit in the appeal. Accordingly, the appeal is dismissed with costs. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is

> not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

16. Costs follow the event. Consequently the appeal is dismissed with costs of Ksh. 55,000/=. The same shall be paid within 30 days in default execution do issue.

Determination

17. The upshot of the foregoing is that I make the following orders:

    a. The appeal lacks merit and is accordingly dismissed with costs of Ksh. 55,000/= payable within 30 days in default execution to issue.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 4TH DAY OF JUNE 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Jedidah