



Kenya Power and Lighting Company Limited v Manson Hart Kenya Limited (Civil Appeal E706 of 2021) [2024] KEHC 7221 (KLR) (Civ) (4 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7221 (KLR)

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

CIVIL

CIVIL APPEAL E706 OF 2021

REA OUGO, J

JUNE 4, 2024

BETWEEN

KENYA POWER AND LIGHTING COMPANY LIMITED APPELLANT

AND

MANSON HART KENYA LIMITED RESPONDENT

(Being an appeal against the judgment and Decree of the Honourable A.M. Obura (Mrs) delivered on the 27th August 2021 in CMCC No. 6992 of 2014)

JUDGMENT

1. The respondent instituted a suit at the subordinate court against the appellant seeking judgment for Kshs. 4,123,135.82 being the amount due to the respondent regarding goods supplied. The case against the appellant was that on diverse dates between 2009 and 2011, the appellant ordered and the respondent supplied the appellant with stay blocks in their Nairobi South and Mount Kenya stores. The appellant made a payment leaving the amount of Kshs 4,123,135.82 unpaid.
2. The appellant in its defence admitted to having entered into a contract with the respondent but denied that it did not owe it any money. The appellant pleaded without prejudice that the respondent was in breach of contract as it failed to deliver the stay block as per the required specifications.
3. The matter was set down for hearing and in the end, the trial court considered the evidence on record and found that the respondent had proved its case on a balance of probabilities. The trial magistrate entered judgment in favor of the plaintiff.
4. The appellant is dissatisfied with the holding of the subordinate court and has preferred an appeal against the judgment on the following grounds:



1. The Honourable magistrate's decision shows open bias against the appellant and in favour of the respondent.
 2. The Honourable trial court erred in law and in fact to find that there was no plaintiff before it and therefore the suit before the court was irredeemably defective.
 3. The Honourable magistrate misdirected herself in law and fact in disregarding the weight of evidence adduced by the appellant.
 4. The Honourable magistrate erred in law in shifting the burden of proof to the appellant when the respondent had failed to satisfy the burden of proof required of it.
 5. The learned magistrate erred in law and in fact in failing to find that the claim made by the respondent was not supported by the evidence adduced.
 6. The learned magistrate misdirected herself in law awarding interest from the date of filing suit.
5. The appellant submits that a company can only commence and instruct advocates through company resolution. In its absence, any proceeding is fatally defective. At the time of the hearing and even before judgment was entered there was no resolution provided and the respondent did not regularize the position. He cited the case of *Ibacho Trading Company Limited v Samuel Aencha Ondora & 3 Others* [2017] eKLR. He further submits that the trial court relied on the case of *Private Development Co. Ltd v Rebecca Ngonyo & 2 Others* [2018] eKLR to hold that the witness was properly authorized to testify. However, the case was distinguishable from the instant dispute as the directors in that case had affidavits affirming the authority to testify. The trial magistrate therefore showed bias towards the respondent as it failed to address itself on the competency of the suit where no resolution was provided.
 6. The appellant further argued that the respondent's evidence did not support the claim as the sum pleaded did not match the invoices produced. The appellant had not received some of the delivery notes and invoices relied on by the respondent. The respondent's witness confirmed that stay blocks were rejected but did not disclose the rejection to the court. The delivery notes were unstamped and their receipt was denied.
 7. They submit that invoices do not prove delivery. In *E.P Communications Limited v East Africa Courier Services Limited* [2019] eKLR the court held that:

“Therefore, invoices and LPOs alone do not prove delivery or receipt of the goods... The other invoices dated 23/20/08 and 20/08/09 were not supported by any delivery note or notes to show receipt of the goods stated therein. The Appellant may have supplied the goods, but courts of law act on hard evidence not sympathy or speculation. In the absence of a delivery note or evidence of receipt of the goods, it becomes doubtful whether the goods were delivered....

...Personal statements authored by the Appellant is not sufficient evidence to prove liability especially considering the supporting documentation relied on is invoices and LPOs without the evidence of delivery of the goods. The appellant failed to prove on a balance of probability the extent to which the respondent was liable.”
 8. The respondent confirmed that some stay blocks amounting to Kshs 1,229,442.24/- and Kshs 598,560/- had been returned as defective. In the circumstances, the respondent failed to establish the claim for special damages as the evidence did not meet the threshold required for proof of special damages.



9. The respondent opposed the appeal. It submits that the appellant's allegation of bias imputed against the learned trial magistrate was unsubstantiated. The trial court considered the question on the competency of the respondent's suit and found it unmerited.
10. The respondent submits that there was no evidence to demonstrate that the respondent's director had no authority to swear the verifying affidavit. In *Private Development Co. Ltd v Rebecca Ngonyo & 2 Others* [2018] eKLR the court held as follows:

“On whether or not there is on record a proper verifying affidavit, I have seen that the plaint was accompanied by a verifying affidavit sworn by one Hosea Kimotho Gitonga, who stated that he is a director of the plaintiff company, and has authority to swear the said affidavit. Now, I have nothing displayed by the applicant, that Hosea Kimotho Gitonga, was not a director of the plaintiff company at the time the suit was instituted and that he had no authority to swear the verifying affidavit. That to me would have been an internal matter in the company and I do not see how an outsider would want to contest that authority, when the company, which is the named plaintiff, has no issue with it. I find the contention that the suit is not accompanied by a proper verifying affidavit to have no substance.”
11. The respondent submits that there is *prima facie* evidence that it delivered stay blocks to the appellant's stores. The respondent produced delivery notes, invoices, credit notes, stock return notes and statements of account which ultimately proved the indebtedness of the appellant. The appellant's witness DW1 conceded that he could only testify about goods supplied in the Mt Kenya region. He was therefore not competent to challenge the respondent's claim regarding goods supplied to the appellant in Nairobi. Despite the appellant conceding to receiving the stay blocks from the respondent, it failed to provide evidence showing payment. They submit that the appellant was indebted to the respondent and support the judgment of the magistrate.

Analysis And Determination

12. This being the first appellate court, I am required to reevaluate evidence adduced before the trial court and make an independent determination. Unlike the trial court, I did not get the benefit of taking evidence first-hand and observing the demeanour of the witness. For this reason, I will give due allowance. The principles guiding the first appellate court were set out in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
13. Patrick Mugambi (PW1) adopted his witness statement dated 21/11/2014. He reiterated the averments contained in the plaint. He testified that the respondent raised invoices for settlement after which the appellant became indebted to the respondent in the sum of Kshs. 3,558,229.76/- and Kshs. 564,906.06/- being the amount owed from the deliveries made to the appellant's Nairobi South store and Mt. Elgon region branches. On cross-examination, she testified that the plaintiff is a limited company and that he did not provide any authority or resolution to institute the suit.
14. Joseph Wachira Mureithi (DW1) testified that he is a senior supply chain officer at Mt. Kenya region. He adopted his witness statement as his evidence in chief. He testified that the respondent entered



into an agreement with the appellant for the supply of Kshs 25,500 stay blocks. The respondent only supplied it with 23,233 stay blocks and all stay blocks were paid for in full. The respondent failed to supply the remainder of the stay blocks. On cross-examination, he testified that he could only testify as to the goods supplied in the Mt. Kenya region. He testified that they paid for all the stay blocks supplied in the region and have no outstanding sum.

15. Before delving into the merits of the respondent's suit at the subordinate court, I must first consider the competency of the suit before the subordinate court because the respondent did not produce a resolution authorizing the filing of the suit and authorizing PW1 to testify. The appellant cited the case of *Ibacho Trading Company Limited v Samuel Aencha Ondora & 3 Others* [2017] eKLR where the court found that failure to tender the company resolution authorizing the case dealt a fatal blow.
16. The respondent in his submissions opposing the appeal on this ground cited the Court of Appeal decision in *Meya Agri Traders Ltd v Elgon House (2010) Ltd* (Civil Appeal 15 of 2020) [2023] KECA 574 (KLR) (26 May 2023) Judgment) where the court held that "once the deponent swore that he is a director of the respondent, and that he was duly authorized, the judge could not rule otherwise in the absence of evidence to counter or contradict him".
17. I am constrained to agree with the argument of the respondent as there was no evidence produced by the appellant that the respondent's director was unauthorized. The Court of Appeal in *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR commented on the essence of filing the resolution giving the authority and the consequence of such failure.

"It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

18. The trial magistrate in her judgment invoked the provisions of Article 159 (2) (d) of the *Constitution*. The subordinate court's decision could not be faulted because the failure to file the resolution was a mere procedural defect that did not go to the core of the suit. The court in *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling) was of the view that failure to file a board resolution giving a person the authority to file suit can be cured under Article 159 of the *Constitution*. The court stated:

"41... The Respondents' contention that the appellant failed to attach a Resolution or authority to swear an affidavit is true. However, such omission was not fatal to the suit. This is because the deponent of the verifying affidavit stated on oath that he was authorized by the appellant and being the Director General of the appellant corporation, unless the contrary was shown that he had no such authority to swear the verifying affidavit, which evidence the Respondents did not adduce, I find that there was no basis upon which the trial court dismissed



the appellant's suit, having found that the appellant had proved its case against the respondents on a balance of probabilities.

42. In my view, the dismissal of the plaintiff's suit was on a technicality which was easily curable by application of the principle in the *Makupa Transit Shade Limited (supra)* case, a mere procedural defect which does not go to the core of the suit which the trial court found that the appellant had proved on a balance of probabilities. That defect is and was further curable by application of Article 159(2) (d) of the Constitution which enjoins courts to administer justice without undue regard to procedural technicalities.
 43. Moreover, the court has discretion on whether or not to strike out any pleading that is non-compliant but Article 159 of the Constitution of Kenya, 2010 obliges the court to deliver justice without undue regard to procedural technicalities.”
19. Patrick Mugambi stated on oath that he is a director of the respondent and therefore competent to make the affidavit. He had the authority to act for the company and the appellant having failed to produce any evidence showing that he had no such authority to swear the affidavit, I find that the suit was competent.
 20. I shall now turn to whether the respondent proved its case to the required standard. I agree with the appellant's submissions that invoices are not proof of delivery. However, in this case, the respondent produced several delivery notes indicating that goods had been received by the appellant. Concerning stay blocks supplied to the Nairobi South stores, the respondent availed 31 delivery notes (Nos. 0005, 0006, 0008, 0013, 0039, 0040, 0045, 0046, 0047, 0056, 0088, 0089, 0090, 0091, 0092, 0093, 0094, 0096, 0096, 0097, 0022, 0023, 0024, 0025, 0026, 0027, 0033, 0034, 0035, 0036, 0037 and 0038). The delivery notes were stamped by the appellant as received and were goods worth Kshs 3,711,072/-.
 21. The appellant vide their letter dated 17/11/2009 advised the respondent to pick weak stay blocks so that the respondent could re-work them and redeliver the same for re-inspection. The respondent availed the Credit Note for the sum of Kshs 598,560/- issued to the appellant on 27/3/2010 for the goods returned to the respondent via stock return notes no. 8516, 8517, 8518, 8519 and 8521. On the same date, the respondent further gave the appellant a Credit Note for the sum of Kshs 1,229,442.24/- for the goods returned to the respondent via stock return note nos. 8529, 8530 and 8532. Therefore, the difference between the goods delivered to the appellant and the ones that were returned for being defective is Kshs 1,883,069.76/-. This is the amount owing to the respondent in respect of the goods they delivered to the Nairobi South stores.
 22. I now turn to consider the appellant's indebtedness for the goods supplied to its Mt. Kenya stores. The respondent produced invoices No. 16555, 16564 and 16564 for the corresponding delivery note nos. 0112, 0113, 0114. However, delivery notes 0013 and 0014 were not stamped or received by the appellant and there was no proof that the goods captured therein were delivered. The amount due to the respondent as per invoice no. 0012 is Kshs 191,425/- for the Mt. Kenya region.
 23. The appellant did not provide any evidence showing that it had paid the respondent. In the circumstances, I find that the respondent had proved its case against the appellant save for the amount as discussed above.
 24. In conclusion, I find that there is merit in the appeal. I hereby set aside the finding of the trial magistrate on special damages. The respondent is awarded Kshs 2,074,495.76/- as the amount due from the appellant. The appellant shall have the costs of the appeal. Orders accordingly.



**DATED, SIGNED, AND DELIVERED ONLINE AT BUNGOMA ON THIS 4TH DAY OF JUNE
2024**

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Mr. Mwai Muthomi h/b Miss Kariuki For the Respondent

Wilkister/ Daina -C/A

