Makokha t/a Khamidi Skytech v Board of Management St Michael's Secondary School (Civil Appeal 50 of 2022) [2024] KEHC 17254 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 17254 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 50 OF 2022

DO OGEMBO, J

JUNE 20, 2024

BETWEEN

VICTOR MALALA MAKOKHA T/A KHAMIDI SKYTECH .... APPELLANT

AND

BOARD OF MANAGEMENT ST MICHAEL'S EMAKHWALE SECONDARY SCHOOL .... DEFENDANT

(Being an appeal from the Judgment and defence of the Senior Principal Magistrates Court at Mumias, given on 20/7/2022, by the Hon. W. K. Cheruiyot, (SRM) in SPMCC No. E72/2021)

JUDGMENT

1. The Appellant herein Victor Malala Makokha t/a Khamidi Skytech, sued the Respondent herein, Board of Management, St. Michael Emakhwale Secondary School in the above case before the lower court, basically for breach of contract. In the plaint dated 4/8/2021, the Appellant sought the following reliefs:-

    a. A sum of Ksh146,120/=.

    b. Interests on the said sum [a] above.

    c. Costs of the suit.

2. The case of the Respondent went through trial and in a judgment of the court delivered on 20/7/2022, the trial court made a finding that the appellant had failed to prove his case on a balance of probabilities. The case of the appellant was accordingly dismissed with costs. The appellant has now appealed to this court against the said judgment of the trial court.

3. In the Memorandum of Appeal filed herein and dated 11/8/2022, the appellant has listed the following grounds of appeal:-

1. That the learned magistrate erred and misdirected himself in law and in fact by failing to appreciate sufficiently or at all, consider and correctly analyze the evidence tendered by the parties to determining the merits of the appellant's claim against the Respondent.
2. That the learned trial magistrate erred and misdirected himself in law and in fact in failing to appreciate at all or properly appreciate that on the evidence before him. There existed a contract between the appellant and Respondent which the latter had breached by receiving services rendered by the appellant and failing to pay the attendant fee/charges thereof.
3. That the learned trial magistrate erred and misdirected himself in law and fact by imposing a heavier burden of proof to the appellant than that which is required in civil cases.
4. That the learned trial magistrate erred and misdirected himself in law and in fact by failing to consider or sufficiently consider the appellant's position as set out in his pleadings, written submissions and the judicial authorities cited therein thus reaching a manifestly erroneous finding that his claim against the Respondent had not been proved.
5. That the learned trial magistrate erred and misdirected himself in law and in fact in finding that the appellant's claim against the Respondent had not been proved during the trial and dismissing the same with costs which was against the weight of evidence and therefore manifestly erroneous.

4. The appellant pleads that this appeal be allowed, the judgment and decree be set aside and that his suit against the Respondent be allowed with costs. He also prays for costs of this appeal. The appeal of the appellant is opposed by the Respondent.
5. This court is seized of this matter as a first appellate court. The jurisdiction of the first appellate court is well settled. In the case of Sielle and ano. v Associated Motor Boat Co. Ltd [1968] EA 123, it was held that it is to re-evaluate, re-assess and reconsider the evidence adduced and to come up with its own conclusions bearing in mind that the appellate court did not have the opportunity to hear the witnesses testify in the first instance. It is therefore imperative for this court to relook at the whole evidence before the trila court and to make own conclusions.
6. From the record of the proceedings, the appellant was PW1. His evidence was that in 2019, the Respondent advertised for tender for supply and he applied for the same and his bid was successful. That the relevant documents were signed by one Mr. Stephen, Dorcas, the store keeper, and acknowledged by the Principal who also stamped and signed the same who also noted that the items were received. And that the school is actually using the services.
7. On being cross examined, this witness confirmed that the report form he refers to was generated from the school and not from his office in Nairobi, and that he got the same from one of the students. He could not confirm how the email address used the same or whether the integrated system is still in use or not. Further, that the computer supplied had a server number, but that he did not indicate the same in the invoice. He conceded that one can only ascertain a computer by its serial number. He also confirmed that he had not produced the relevant advertisement, nor evidence of purchase of the tender. And that they did not sign any contract with the school as none was provided for signing.
8. And PW2, Samwel Otieno, relying in his record statement testified that the parties partnered to work in stages and not on one day as stated in the statement. And that they went to the school once on 29/12/2021. He added that he was not in a position to know if the tender was advertised since he was not the one sent to collect the same. Neither was he involved in the evaluation of the tender. He

otherwise confirmed that the system was installed by Victor and Patricia whom we only assisted with manual work.

9. Patricia Shitundu Khatesi [also identified as PW2] gave evidence that she also accompanied the appellant to the school out of a working arrangement with him. That she was not paid any money by the school and she later contacted a student on instructions of the appellant.

10. For the defence case, Dorcas Wekesa was DW1. She works at St. Michael Emakhwale Secondary School. She denied ever receiving any supply from the appellant as a store keeper. That the demand note was brought to her already stamped by the principal and she also stamped the same.

11. On cross examination, she answered that the store keeper, when supply is brought, she checks on the delivery together with the goods, then rubber stamps and sign. That in this case, she never confirmed any goods before rubber stamping having got instructions from the principal who had already stamped same. She denied ever seeing the computers physically.

12. Allen Musa Amukoya, a teacher and Director of Studies was PW2. He denied ever seeing the alleged system supplied to the school. And Peter Emutulwa, the Principal of the school was DW3. His evidence was that the appellant bided and was given a tender. That appellant did the work and asked to be paid. The witness paid him 500/=via Mpesa. That he had not seen the system the appellant claimed to have installed at the school. And when he invited the appellant to the board on 14/7/2020, the appellant never appeared saying he had instructed his advocate. Appellant also never gave the relevant serial number.

13. This is basically the evidence produced by the parties. This appeal was canvassed by way of written submissions.

14. The submissions of the appellant were that there was documentary evidence demonstrating transaction between the parties even though no formal contract was shown. That not all contracts need to be in writing Mamta Peersh Mahajan [2017].

15. That to confirm supply and provision of the items and services, the appellant presented delivery notes which were duly receipted and stamped. That the appellant even generated term 2 report forms for the students. That the delivery notes were of Kshs.146,120/=.

16. Appellant further submitted on the fact of appellant signing the visitor's book and the Respondent sending him 500/= to recharge the account to enable the sending of students' results to parents.

17. To Respondent, on the other hand, submitted that there was no valid contract between the parties as required by *the constitution* and the *public procurement and Asset Disposal Act*, 2015. That the appellant did not participate in any tender, never showed having been issued with any quotation, local purchase order or even the advertisement by the Respondent and relying on the case of Kenya Airways Ltd -v Satwant Singh Flora [2013] EKLR, on the illegality of the contract, counsel observed;

> " Ex turpi causa no oritor action. This old and well known legal maxim is founded on good sense and expresses a clear and well recognized legal principal which is not confirmed to indicatable offences. No court ought to enforce an illegal contract or allow itself to be an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not.....if the evidence adduced by the plaintiff proves illegality, the court ought not to assist him."

18. That the school Store Keeper [DW1] produced the ledger book in which there was no entry of such goods. The court was urged to dismiss the appeal.

19. I have considered the evidence herein as given by the two sides. I have also considered the submissions filed. As I understand it, it was the case of the appellant that following an advertisement by the Respondent he won a tender and was awarded a tender of supply. That he duly made the supply, but the Respondent has failed to pay him the sum owed of Ksh146,120/=.

20. The Appellant's claim is therefore based on the existence of a binding contract between him and the Respondent. The first issue for determination is therefore the appellant has proved the existence of such contract of supply and installation. A number of factors can aid the court in determining this issue.

21. The burden of proving the existence of the said contract lies with the appellant. He who alleges bears the burden of proving the fact. In this case, if the appellant responded to a tender advertised by the Respondent, he ought to have exhibited the tender. He ought to have exhibited the bid he placed in response. He ought to have exhibited the tender documents spelling out the terms of the said contract eg price, units and specifications of the items to be supplied and subject of the contract. Unfortunately the appellant showed none of these.

22. The appellant did not even show or indicate the serial numbers of the items he claimed to have supplied. And the ledger book kept by the school store keeper DW1 did not show any entry of any such goods supplied by the appellant ever being received at the store.

23. The appellant has submitted that this was a contract that was not reduced to written form. With respect, this is unbelievable. If the Respondent advertised for the tender, then the intentions of the respondent would be clearly shown. That the intention was to enter into a formal written contract. Otherwise how would the entity put up an advertisement only to enter on oral informal agreement.

24. The appellant's claim is further based on the fact that representatives of the Respondent, being the former Principal and DW1 duly signed the delivery notes he presented. DW1 has given a cogent testimony that she stamped the same on instructions of the Principal who had already signed the same, not that she received the items in question. One would expect that in case the delivery was made at the time the delivery note was signed, a corresponding entry would be made on the ledger kept by the store keeper.

25. And whereas the Respondent denies receipt of the alleged items from the appellant, it is worth noting that when invited to meet the management board of the school, the appellant failed to turn up. In the process, the appellant missed the opportunity to physically show the Board the items he had supplied and installed.

26. And with regard to the generation of the student report card, the Respondent's evidence is that the same was generated from the office of the appellant and not at the school. This is a fact the appellant has not denied.

27. The appellant has further not denied the submissions of the Respondent that the Respondent is a public entity whose procurement process are guided by the *public procurement and Asset Disposal Act*, 2015, if at all, the alleged contract of supply and installation between the appellant and the Respondent, did not follow any procedure as stipulated in the law. And this renders the said contract, if at all void and unenforceable Kenya Airways Ltd –v Satwant Sing Flora [2013] EKLR.

28. Considering the above circumstances, this court is not convinced that the appellant has proved on a balance of probabilities the existence of any or any enforceable contract between it and the Respondent.

Having failed to establish the existence of any contract with the Respondent, the appellant's claim for Ksh146,120/= is without any merit and must fail. I accordingly find no merit in this appeal of the appellant filed herein on 11/8/2022. I dismiss the same wholly. Costs of this appeal are awarded to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE, 2024.

D. O. OGEMBO

JUDGE

20/6/2024

Court

Judgment read out in Court Virtually in presence of Mr. Lungwe for Appellant and in absence of the Hon. Attorney General for Respondent.

D. O. OGEMBO

JUDGE

20/6/2024