



Oceanic Bunkering & Oil Products Ltd v Awal Limited (Civil Appeal 31 of 2020) [2023] KEHC 2108 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 31 OF 2020
F WANGARI, J
MARCH 10, 2023**

BETWEEN

OCEANIC BUNKERING & OIL PRODUCTS LTD APPELLANT

AND

AWAL LIMITED RESPONDENT

(Being an appeal against the Judgement delivered by Honourable E.K. Makori Chief Magistrate Mombasa on the 20th February, 2020)

JUDGMENT

1. This is an appeal against the judgement delivered by Honourable EK Makori, Chief Magistrate (as he then was) on February 20, 2020. The Appellant being dissatisfied with the said judgement has preferred this appeal. The Appellant preferred a total of nine (9) grounds of appeal in urging this court to set aside the judgement delivered on February 20, 2020 amongst them that the Learned Magistrate erred in fact by failing to take into account the Appellant's submissions.
2. Directions were taken and the appeal was disposed off by way of written submissions where both the Appellant and the Respondent duly complied and relied on various decisions in support of their rival positions.
3. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano vs Associated Motor Boat Co Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni versus Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and *Kiruga versus Kiruga & Another* (1988) KLR 348).



4. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise I will carefully revisit the record.
5. The Respondent vide a plaint dated October 13, 2003 and filed on March 22, 2004 sought for judgement against the Appellant for a sum of Kshs 6,688,620/= plus costs and interests thereon. The same was filed before this court but by an order dated March 30, 2017, the case was transferred to the Chief Magistrates' Court. The matter was defended. I note that several interlocutory applications were made in the course of the matter. The court having heard the parties delivered its judgement in favour of the Respondent on February 20, 2020. It is this judgement that precipitated the present appeal.

Appellant's Submissions

6. The Appellant in its submissions isolated three issues which it submitted on. It submitted that the Respondent did not discharge its burden of proof. It stated that the unavailability of documents and witnesses on its part ought not to have been the ground to uphold the Respondent's case. The case of *Charterhouse Bank Limited (Under Statutory Management) v Frank N Kamau* [2016] eKLR was cited for the proposition that failure to call witnesses on the defence side is not fatal as the onus of proving the case lies with the Plaintiff. The second issue was that there were several contradictions on the Respondent's case. The Appellant contended that in the pleadings, the Respondent had pleaded that there was an agreement to supply 700,000 litres of automotive gas at the price of Kshs 21,000,000/= . However, in evidence, the Respondent produced an invoice for supply of 2,000,000 litres of fuel at a total cost of Kshs 60,000,000/= . Therefore, the Appellant concluded that there was variance between what was pleaded and what was proved. To that extent, the Appellant submitted that the Respondent did not prove its case.
7. On the third issue, the Respondent submitted that the Respondent did not prove existence of the terms of contract between the parties. The Appellant stated that the sale agreement was never produced but was only marked for identification. Reliance was placed on the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR. The Appellant therefore urged that the appeal be allowed and the Lower Court judgement be set aside with costs.

Respondent's Submissions

8. For the Respondent, it was submitted that six (6) exhibits were produced among them a sale agreement dated December 20, 2001. Citing the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR, the Respondent submitted that its case was uncontroverted. Even if the Appellant had called witnesses, the Appellants had admitted the debt through a letter dated 30th June, 2003. A cheque of Kshs 5,775,000/= had also been issued in favour of the Respondent. On the issue of failure to prove existence of an agreement, the Respondent submitted that an agreement between parties can either be written or oral and the terms can be adduced from the conduct of the parties. The case of *Mamta Peesh Mahajan (Suing on behalf of the Estate of the Late Peesh Premal Mahajan) v Yashwant Kumari Mahajan (Sued personally as Executrix of the Estate and Beneficiary of the Estate of the Late Krishan Lal Mahajan)* [2017] eKLR was cited for this proposition.
9. On whether there was contradiction in their testimony, the Respondent submitted that in their own witness statement, their witness had stated that after the agreement dated December 20, 2001, parties continued to trade based on the said agreement. A further 2,000,000 litres of automotive gas was ordered by the Appellant. Therefore, the Respondent urged the court to dismiss the appeal with costs.



Analysis and Determination

10. After considering the pleadings, evidence, submissions and the law, I find that there are two (2) issues for determination: -
 - a. Whether the appeal is merited;
 - b. What is the order as to costs?
11. From the onset, I note that there is contention on whether the sale agreement dated December 20, 2001 was produced. I entirely associate myself with the holding in Kenneth Nyaga Mwige (*supra*) that the mere marking of a document for identification does not dispense with the formal proof thereof. From the Trial Court's judgement, I note that the Learned Magistrate (as he then was) stated that the sale agreement had been produced as exhibit number 1. However, from the court proceedings of March 25, 2019, I note that five (5) exhibits were produced with no objection. However, the sale agreement which had been marked as MFI – 1 was objected to and the same was never produced. I thus agree with the Appellant that the said agreement was never produced and it is thus my finding that the Trial Court was in error to rely on the same.
12. Be that as it may, was the Trial Court in error in finding in favour of the Respondent for a sum of Kshs 6,688,620/= ? In answering this question, the conduct of the parties would be key. It is not in dispute that the Appellant issued a cheque dated March 28, 2003 for a sum of Kshs 5,775,000/= in favour of the Respondent. Similarly, upon being served with a demand letter dated June 9, 2003 from the Respondent's Counsel, the Appellant vide a letter dated June 30, 2003 responded to the same. In its response, the Appellant admitted the sum of Kshs 6,688,620/= as demanded and undertook to pay the same by end of July give or take one (1) week. This confirms beyond any iota of doubt that indeed the Appellant and the Respondent had a relationship. I therefore proceed and hold that failure to produce the sale agreement dated December 20, 2021 was not fatal to the Respondent's case. Based on the documentation, an implied contract giving rise to the claim could be inferred.
13. On implied contracts, the Court of Appeal in [Ali Abdi Mohamed vs. Kenya Shell & Company Limited](#) (2017) eKLR referred to the following persuasive decisions: -

... In *Lamb v Evans* [1893]1 Ch 218, Bowen LJ stated:

“...The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes you to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile.”

Bingham LJ in *The Aramis* [1989] 1 Lloyd's Rep 213 made some general observations about the circumstances in which a contract might be implied. At p 224 col 1, he said:

“As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case - and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given cases unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with the one another



in circumstances in which one would expect that business reality and those enforceable obligations to exist.”

Further,

“...I do not think it is enough for the party seeking the implication of a contract to obtain “It might” as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract...”

14. Based on the foregoing, even without the sale agreement dated December 20, 2001, an implied agreement can be deduced between parties. If indeed there was nothing between the parties, why was the Appellant admitting to paying the amount demanded? What was the purpose of issuing a cheque for Kshs 5,775,000/= ? From the proceedings, it came out clearly that the Appellant at one point proposed to settle the matter out of court. All these circumstances point to one thing, the Appellant was owing. Thus on the first issue, I have no reason to impeach the Lower Court’s judgment.
15. On the issue of costs, it is trite that the same follows the event. That is the import of section 27 of the Civil Procedure Act. The Respondent having been the successful party herein is entitled to costs and I so hold.
16. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -
 - a. The Appeal is hereby dismissed.
 - b. Costs are awarded to the Respondent.
 - c. The amount owing shall attract interests from the date of filing the suit, that is, March 22, 2004.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

N/A for the Appellant

Odipo Advocate for the Respondent

Guyo, Court Assistant

