



**Hellen v Tulsı Construction Limited (Civil Appeal 4 of 2017)
[2023] KEHC 18753 (KLR) (Civ) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18753 (KLR)

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

**CIVIL
CIVIL APPEAL 4 OF 2017**

DO CHEPKWONY, J

APRIL 19, 2023

BETWEEN

ROSE WANJIRU HELLEN APPELLANT

AND

TULSI CONSTRUCTION LIMITED RESPONDENT

*(Being an Appeal against the Judgment and Decree of Hon. L.M. Wachira
(SPM) in Nairobi CMCC No.6974 of 2014 delivered on 5th December, 2016)*

JUDGMENT

Background

1. By a Plaintiff dated August 7, 2014 and filed in court on November 26, 2015, the appellant sought for the following prayers against the respondent;
 - a. Payment of Kshs 3,235,524.30 being the amount owed.
 - b. Interest at court rates
 - c. Costs of the suit.
 - d. Costs of this suit.
 - e. Any other relief that the Honourable Court may deem fit to grant.
2. In her Plaintiff the Appellant pleaded that between 12th December, 2011 and 5th June, 2013, the Respondent contracted her to supply it with river sand and the Appellant supplied 2,103,654 tonnes of river sand and it was agreed between the parties that 1,303,221 tonnes would be sold at Kshs 1,500/= per tonne which would amount to Kshs 1,954,831.50 and 800,443 tonnes would be sold at Kshs



- 1,600/= per tonne thereby totaling to Kshs 1,280,692.80. This then brought the total amount for the supply of sand to Kshs 3,235,524.30.
3. According to the Appellant, invoices were forwarded and the same were acknowledged by the Respondent but no payment was ever made despite a Notice of Mention intention to sue having been issued and hence the filing of this suit.
 4. In response to the Appellant's claim, the Respondent filed a statement of defence dated 16th December, 2014 wherein it denied the contents of the Plaint. In the defence, the Respondent avers that if it contracted the Appellant, which is denied, then it paid for the services or goods delivered. It further states that the Respondent is a total stranger to the averments by the Appellant.
 5. That matter then proceeded for hearing on 5th October, 2016, and PW1- Rose Wanjiru Hellen, the Appellant stated that she entered into an oral contract to supply sand for construction. She avers that they did well and the Respondent would promptly make payments as per the invoices. However, the Applicant contends that she paid in piece meal and left some balance. She goes on to aver that at one point, the Respondent called the Appellant to supply sand but she declined due to the unpaid arrears. The Respondent then stopped placing orders for supply.
 6. Sometimes in August, 2013, the Respondent asked the Appellant to sit with the accountant to reconcile the records. They did a reconciliation and the sheet was produced as evidence in her documents. He stated that the Appellant was therefore seeking Judgment as per the attached reconciliation.
 7. On cross examination by the Respondent, PW1 stated that there is evidence of a contract but did not produce any documents, except delivery books and invoices which delivery notes were signed by the people assigned that work.
 8. The Respondent closed its case on October 5, 2016 without calling any witness to testify.
 9. Both parties were directed to file their submissions in support of their respective cases and on December 5, 2016, the court delivered its Judgment, whereby the Appellant's suit as against the Respondent was dismissed.
 10. Dissatisfied with the trial court's decision, the Appellant filed this appeal for determination by this court vide a Memorandum of Appeal dated 4th January, 2016, wherein the Appellant seeks for the following orders from this Court:-
 - a. Appeal be allowed.
 - b. Retrial be ordered in alternative.
 - c. Costs of the appeal.
 11. The Appellant's appeal is anchored on the following grounds:-
 - a. The learned trial Magistrate erred in law and in fact when she entered Judgment on erroneous finding that the Appellant had not proven her case on a balance of probability.
 - b. The learned trial Magistrate erred in law and in fact when she made a finding that the Appellant had not been able to prove there was actually supply of sand contrary to fact that the Appellant had furnished sufficient material capable of proof of her case against the Respondent.
 - c. The learned trial Magistrate erred in law and in fact when she made a finding contrary to the doctrines of mercantile law and principles of accounting.



- d. The learned trial Magistrate erred in law and in fact when she failed to appreciate that the Appellant and the Respondent had running business relationship before it became sour and that parties had reconciled their accounts prior to filing of the claim by Appellant hence the finding that the documents exhibited were insufficient was wrongful.
 - e. The learned trial Magistrate erred in law and in fact when she made a Judgment which was not supported by law.
 - f. The learned trial Magistrate erred in law and in fact by misguiding herself when already the doctrine of estoppel by record was in effect since the orders made on February 17, 2016 had not been overturned and or reviewed.
12. This court issued directions that the appeal be disposed of by way of written submissions. To that end, both parties complied with the court's directions. The Appellant's submissions are dated June 30, 2022 while the Respondent's submissions are dated November 2, 2022. I have read through the grounds of appeal, the submissions in support and in opposition of the appeal alongside the cited authorities. It is my view that the submissions will be considered alongside in the final analysis and determination of the suit.

Analysis and Determination

13. It is trite that this being a first appeal, this court has an obligation to re-evaluate and re-consider the evidence adduced before the trial court afresh and arrive at its own independent conclusion. This was the position in the case of *Abok James Odera T/A A.J. Odera & Associates -vs- John Patrick Machira & Company Advocates*, [2013]eKLR, where it was held that:-
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
14. I have considered record of appeal record with regard to the grounds set out in the Memorandum of Appeal alongside the cited grounds, the written submissions by both parties and the authorities that have been relied upon. In my considered view, the issue for determination before this Court is whether the Appellant proved her case before the trial court.
15. Section 107 of the *Evidence Act* (Cap 80) provides that:-
- “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”.
16. From the aforementioned Section it is clear that any party who wishes to have the court give a Judgment or to declare any legal right dependent on a particular fact or set of facts, such a party has an obligation to provide evidence that will best facilitate the proof of the existence of those facts. It is expected that such a party must present to the court material evidence in support of the issue being litigated.
17. In the instant appeal, the Appellant testified as PW1 and closed her case. The Respondent on the other hand filed a defence but called no singly witness to testify and closed its case.
18. In the instant case, the Appellant by a statement of accounts with the Respondent who they had been trading with between 1st September, 2010 and 19th July, 2023 together with the Respondent's ledger account for the period between 1st September, 2010 and 30th July, 2013 demonstrated that as at 10th



May, 2013, the closing balance was in debit standing at Kshs 4,382,306.16 as against the Respondent. It is averred that these documents are on the court file but the trial court failed to adopt the same as exhibits. The Appellant has urged that the reconciliation of accounts contained at Pages 110 and 117 of the Record of Appeal be deemed as superseding the invoices and or ledgers as the same was furnished by the Respondent.

19. The Respondent on the other hand disputed the debt and claimed that while they provided an account statement to show all payments made to the Appellant, the Appellant failed to provide any tabulation or account statement for the alleged debt.
20. I have gone through the Record of Appeal and confirm the Appellant filed statement of accounts while the Respondents filed a ledger accounts to confirm they had been doing business between 1st September, 2010 and 19th July 2013. And indeed the conciliation of accounts at pages 110 – 117 of the Record of Appeal confirm that the Respondent owes the Appellant and the same has not been rebutted by the Respondent. Infact, these documents were authored by the Respondent and it would only have been prudent for the Respondent to either shed some light or challenge the same.
21. In my considered view, having filed a defence in a matter, a party in a case should call evidence to support its case as this will give the court an opportunity to appreciate the facts and evidence adduced in the case. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of facts with no probative value. Thus, any defence in which there is no evidence adduced in support thereof, the same cannot be used to challenge the Plaintiff's case. I am therefore convinced that failure to call evidence means that the evidence adduced by the Plaintiff remains uncontroverted, unchallenged and the Plaintiff ought to be taken to have proved its case on a balance of probability.
22. To buttress this point, this court relies on the case of *Autar Singh Babra and Another -vs- Raju Govindji*, HCCC No.548 of 1998, where it was held that:-

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

23. In the circumstances of this case, I find that the trial court erred in dismissing the Appellant's case when there was evidence availed which remains unchallenged by the Respondent.
24. The upshot of the foregoing is that the Appellant's appeal succeeds and is hereby allowed in the following terms:-
 - a. The matter is remitted back to the Chief Magistrate's Court for re-hearing and determination on each parties liability before another Magistrate of competent jurisdiction.
 - b. Mention on for directions.
 - c. No orders as to costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 19TH DAY OF APRIL 2023.

D.O CHEPKWONY



JUDGE

In the presence of;

Court Assistant – Martin/Sakina

