



Bonfide & Company Limited v Amarachi Enterprises Limited (Commercial Appeal E058 of 2022) [2023] KEHC 17368 (KLR) (Commercial and Tax) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E058 OF 2022**

PN GICHOHI, J

MAY 11, 2023

BETWEEN

BONFIDE & COMPANY LIMITED APPELLANT

AND

AMARACHI ENTERPRISES LIMITED RESPONDENT

(Being an appeal from the judgment of Hon. Caroline Ndumia delivered on 6th April 2022 in Small Claims Court Case No. E 1055 of 2021 and all resultant orders and decree)

JUDGMENT

1. The background of this appeal is that through the firm of MMW Advocates LLP, the Appellant filed a claim dated 9th November 2021 in the small Claims Court against the Respondent for payment of the sum of Ksh. 541,825 .05 allegedly owed from crane hiring services offered to the Respondent . The Claimant allegedly issued a quotation with the unit costs of Ksh. 8,000/= for mobilisation and demobilisation Ksh, 8,000/= per hour for hiring the crane but the Respondent failed to pay.
2. The Respondent denied the claim and pleaded that the agreed hourly rate was at Ksh. 8,000/= from 24th March 2018 to 28th March 2018 and thereafter an hourly rate of Ksh. 5,000/= from 29th March 2018. Further, the Responded pleaded that it was not issued with delivery notes and termed the delivery notes filed by the Claimant as inflated and maintained that it paid for the services at the agreed rate and for the hours worked and therefore counterclaimed that the Claimant owed it Ksh. 410,940/-
3. After hearing the testimony by both parties, the court analysed the evidence and documents before it and rendered its judgment on 6th April 2022 where it found that there was no contract between the parties and proceeded to dismiss both the Claimant's claim and the Respondents Counterclaim with orders that each bear his own costs.



4. The Appellant was aggrieved by this decision and filed a Memorandum of Appeal dated 7th May 2022 listing three grounds of appeal as follows;
 1. The learned magistrate erred both in law and in fact by finding that there was no contractual relationship between the Appellant and the Respondent
 2. The learned magistrate erred both in law and in fact in failing to take into consideration the delivery notes produced by the appellant.
 3. The learned magistrate erred both in law and in fact in failing to take into consideration hours of work tabulated in the invoice dated 30th July 2017.
5. The Appellant therefore seeks the appeal be allowed and the entire judgment delivered on 6th April 2022 by Hon. Caroline Ndumia be set aside in its entirety. That the sum of Kshs. 541,825.05 be awarded to the Appellant and the costs of the appeal be awarded to the Appellant.

Submissions

6. The Appeal was canvassed by way of written submissions. In their submissions dated 15th August 2022, counsel for the Appellant submitted that it had demonstrated that there existed a contract between the appellant and the Respondent as there was an offer and acceptance. On this issue counsel cited the case of Fidelity Commercial BANK v Kenya Grange Vehicle Industries Limited [2017] eKLR that for there to be a contract, there must be offer and acceptance.
7. Counsel therefore submitted that where there was a contract, the role of the court is to enforce the same. He therefore urged the court to find that there was a valid contract between the parties and enforce the intention of parties. Counsel further submitted that the Respondent did not adduce any evidence its claim of a varied and altered contract and therefore bare averment was of no value to court.
8. Counsel further submits that the Appellant had demonstrated that the Respondent remains liable to pay the Appellant Kshs. 555,573.04 in consideration of the Appellant's services and further costs having necessitated the prosecution of these proceedings.
9. On their part, the Respondent filed their submissions dated 7th September 2022 raising three issues for determination that is ;
 1. Whether the present appeal before this Court can lie of matters of fact
 2. Without prejudice, whether the Appellant discharged the burden of proof
 3. Whether the appeal is merited.
10. Counsel submitted that unlike the general duty of the first appellate Court to evaluate trial evidence to make independent finding, the appeal herein can arise on matters of law and not fact as provided for under Section 38 (1) of the *Small Claims Court Act* No. 2 of 2016.
11. On this issue, counsel cited the case of Commissioner of Domestic Taxes v W.E.C.Lines (K) Limited (Tax Appeal E084 OF 2020) [2022] KEHC 57 KLR that matters of law are matters of interpretation or construction of *the Constitution*, statute or regulations or their application to the facts established by the trial court. That an appellate court is generally not permitted to replace the trial court's decision with conclusions based on its analysis of facts in appeals on matters of law.



12. Counsel submits that all the grounds expressed by the appellant in this appeal fault the adjudicator on facts and the same applies to the submissions. He therefore urges the court to dismiss this appeal.
13. On whether the Appellant discharged the burden of proof under Section 107 , 108 and 109 of the Evidence Act, counsel submits that that it was undisputed that the Appellant provided services to the Respondent but what and how the contract was formed was at variance between the parties. Counsel further submitted that the Respondent maintained and still maintain that the quotation was not binding and they engaged on terms separately agreed.
14. Further, counsel submitted that the Appellant selectively relies on the Terms & Conditions from the quotation as contractual terms but conveniently conceals the first one on which it states that “1. Our quotation is to be understood without an engagement until a final service contract has been signed.” However, CW1 confirmed that parties did not sign a contract and stated in re- examination that the relationship was based on trust. Counsel submitted that the trial court even concluded that the parties did not engage on the quotation but acknowledged the service offered.
15. Counsel further submitted that the trial court needed to determine the terms of engagement between parties and while the Appellant (CW1) said the hourly rate was Ksh. 8,000 per hour from 24/3/2018 to 28/3/2018 and that he negotiated with RW1 for a lower rate Ksh. 5,000/= beginning 29/3/2018 this was corroborated by the words endorsed on the face of the Quotation “Discounted because client got a better offer & was to withdraw the carne” and this implies that the parties did not proceed on terms of the quotation.
16. It was further submitted for the Respondent that the Respondent pleaded that the cranes were sub-contracted for Savana Cement at an hourly rate of Ksh. 8.000/- . This was therefore rational to believe that the Respondent could not have subcontracted at the same rate and run at a loss . That further, the invoices produced by the Appellant were bear different rates from Ksh. 8,000/= thus presenting inconsistency. That the evidence points to the fact that the crane hire was for less that Ksh. 8,000/= per hour and this was Ksh. 5,000/- as stated by the Respondent. Further, it was submitted that the conduct of parties shows that they engaged based on rates other than the quoted ones and therefore, the Respondent urged the court to accept Ksh. 5,000/= per hour.
17. Counsel for the Respondent further submitted RW1 stated that no delivery notes were issued on him and though CW1 stated that must be signed by the customer, the delivery notes she produced were not signed by the customer who is the Respondent herein and no explanation was given by given and therefore, it can only be concluded that there were no delivery notes issued and those produced were prepared later as was concluded by the trial court.
18. Counsel further pointed out the discrepancies in the double issuance of unacknowledged delivery notes not signed by the Appellant’s drivers and no explanation offered . The invoice had extra 29 hours for the crane compared to the total of 105 from the delivery notes .That further, the Appellant pleaded for services as on 28/3/2018 but produced delivery note dated 4/3/2018. The court was urged to determine that the Appellant failed to discharge the burden of proof and therefore proceed find that this appeal in not merited and proceed to dismiss it with costs.

Determination

19. On a first Appeal, the court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions while bearing in mind that unlike the trail court, this court has



neither seen nor heard the witnesses when they testified as stated in *Selle & Another v. Associated Motor Boat Co. LTD & Others* (1968) EA 123 that ;

“...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 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...”

20. However, Section 38 of the Small Claims provides that;
- a. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 - b. An appeal from any decision or order referred to in subsection (1) shall be final.
21. The grounds of appeal herein and the submissions thereto are both on points of law and facts thus clearly falling outside the provisions of Section 38 of the Act. The question then is whether this court should disregard the matters of fact and deal with matters of law only. If the court follows that route, then what is a point of law and a point of fact ? The Blacks’ Law Dictionary, Tenth Edition at page 1345 defines the term point of law as “A discreet legal proposition at issue in a case.” Further, a point of fact is defined as “A discreet factual proposition at issue in a case.”
22. In the case of *Commissioner of Domestic Taxes v W. E. C. Lines (K) Limited* (Tax Appeal E084 of 2020) [2022] KEHC 57 (KLR) (Commercial and Tax) (31 January 2022) (Judgment) which was an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 24th July 2020 in Tax Appeal No. 137 of 2018, Majanja J when dealing with provisions of Section 56 (2) of the *Tax Procedures Act* (TPA) which provided that an appeal to the High Court or to the Court of Appeal would be on a question of law only held that;
- “An appeal limited to matters of law does not permit the appellate court to substitute the Tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts.
- What amounts to matters of law are the interpretation or construction of *the Constitution*, statute or regulations made or their application to the sets of facts established by the trial court. The court’s engagement with the facts is limited to background and context and to satisfy itself, when the issue was raised, whether the conclusions of the trial court were based on the evidence on record or whether they were so perverse that no reasonable tribunal would have arrived at them. The court cannot be drawn into considerations of the credibility of witnesses or which witnesses were more believable than others; by law that was the province of the trial court.
- When a court that is limited to dealing with matters of law had a concern regarding the issues that dealt on facts, then the court would also be limited to re-evaluation of the lower court’s conclusions and if the conclusions were erroneous and were not supported by evidence and the law, then the matter becomes a point of law.”
23. In this case the basic issue is whether there was a contract between the Appellant and the Respondent as submitted by counsel for the Respondent in that there was an offer and acceptance.



24. In order to establish it there was a contract or not, then court is limited to re- evaluation of the lower court conclusions and see if the conclusions were erroneous and not supported by evidence. That now is a point of law and in this finding , this court is guided by the Court of Appeal decision in *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* [2013] eKLR , where Court had this to say;

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- “ 31. We wish to state on the onset that in determining the three or so legal issues that arise in this appeal, some of the issues may cut across the spectrum of the factual evidence especially on the conclusions arrived at after the analysis of the primary evidence by the Election Court. We are nonetheless conscious that our jurisdiction is only limited to determination of points of law and thus, our concern regarding the issues that dealt on facts will be limited to our duty of re- evaluation of the Judge’s conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law. As it was held in the case of *Mwangi v Wambugu*, [1984] KLR 453:

A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

25. This court has perused the lower court record , the evidence, together with the submissions by the parties therein and the judgment thereof . It is noted that the Appellant and Respondent did testify before court and relied on their respective recorded statements. Each was cross examined by the other party on their evidence and documentary evidence relied on by each. In arriving at the conclusion, the adjudicator did, she had this to say;

“Upon perusal of the Claimant’s averments in total as well as the Claimant’s witnesses this court finds that there was no contract of engagement for the Claimant states that the contract engagement was the Quotation dated 28/3/2022 but the delivery notes produced begin on 4/3/3022 to sometime in April 2021 . Further invoice does not tally at all with the said quotation and neither does the statement of account which shows that the engagement between the Claimant and the Respondent began in 2016 but no invoices were provided for the same. In the circumstances the court tends to agree with the Respondent that there was no oral agreement and the quotation and invoices seem to have been raised possibly after the disputed....Upon collectively considering the all the evidence adduced for the Claimant where none of his documents seem to correspond with the invoice of statements . It seems the said evidence was just collected and placed before the court without due regard to where the same amounts to the threshold required to prove its case but the same has not been met...

In respect of the Respondent’s counterclaim ...Again as much as the Respondent has done much better job of tabulating its work done again there is no basis on which to commence the same for purposes of accounting the overpaid amounts for its not clear when the engagement began and until when the engagement accrued and as such the counterclaim fails...it seems both patties operated on casual basis.



Where there seemed to be no organised way of raising invoice s by the Claimant or payment by the Respondent ... none of the evidence on record clearly indicates who owes the other and, on that basis, both the Claimant and respondents counterclaim fail. Each party to bear its own costs.”

26. The trial court had the chance to see and hear the witness as they testified and from this judgment, it is apparent that the trial was satisfied that the parties dealt on casual basis. Even if that engagement was on causal basis and the same may be said to have been some form of contractual engagement, then it is clear that the material presented by the Appellant before the trial court not reliable to support either party’s case.
27. The court found that some documents by the Appellant appeared to the court to have been collected and placed before court. As for the Respondent the court was satisfied that it not clear as to who owed the other. That is a finding that this court cannot purport to substitute in this appeal.
28. In the circumstances this court finds the lower courts finding were based on evidence before it and there was no misapprehension of evidence or anything to show that the trial court acted on wrong principles. In the circumstances , this appeal is devoid of merit. And is hereby dismissed. Each party to bear his own costs.

DATED,SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 11TH DAY OF MAY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Njeru for Appellant

Mr. Pamba for Respondent

Aphline Owiwa, Court Assistant

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