Pyramid Construction Limited v Chuode General Contractors Limited (Civil Appeal 50 of 2015) [2023] KEHC 20642 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20642 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 50 OF 2015

RN NYAKUNDI, J

JULY 21, 2023

BETWEEN

PYRAMID CONSTRUCTION LIMITED ..... APPELLANT

AND

CHUODE GENERAL CONTRACTORS LIMITED ..... RESPONDENT

(Being an appeal from the Judgment/Decree of the Honourable Tom Mark Olando (RM) delivered on 18th March, 2015 in Eldoret CMCC No. 285 of 2011)

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Annasi Momanyi & Co. Advocates for the Respondent

Nyabena Nyakundi & Co. Advocate

1. This is an appeal arising from the decision of Honourable Tom Mark Olando (RM) delivered on 18/3/2015 in Eldoret Chief Magistrate's Court, Civil Suit No. 285 of 2011. By a Plaint dated 17/5/2011, the Respondent herein sued the Appellant seeking damages of Kshs.150,000/= plus costs and interest of the suit. The Appellant filed a Defence and Counter-Claim dated 21/6/20211, denying vehemently the Respondent's claim and in the alternative blamed Respondent for breach of contract and demanded a refund of Kshs.20,000/=

2. The case then proceeded for trial and by its Judgment delivered on 33/11/2018, the Court found that on a balance of probability the Respondent had proved his case and proceeded to enter judgment in his favour in the sum of Kshs.130,000/=.

3. The Appellant was aggrieved with the decision. He accordingly filed this appeal vide a Memorandum of appeal dated 8/4/2015, and raised six grounds that:

1. The learned Magistrate erred in law and fact in finding that there existed a contract between the Appellant and the Respondent.

2. The learned Magistrate erred in law and fact by considering the second defence which he had earlier rejected and thrown out.

3. The learned Magistrate erred in law and fact in finding that the Plaintiff had proved the case as the evidence given by the Respondent's witness was contradictory.

4. The learned Magistrate erred in law and fact in failing to take the evidence of the Defendant into account as Court has got to look at the evidence as a whole.

5. The learned Magistrate erred in law and fact in failing to pronounce, date and sign the judgment in open Court at the time of delivering it.

6. The learned Magistrate erred in law in his evaluation and analysis of the evidence adduced and not in appreciating it properly, equitably, judiciously and sufficiently or at all therefore drawing the wrong inference against the Appellant.

4. It was then directed that this Appeal be canvassed by way of written Submissions. The Respondent filed its submissions on 23/1/2023 while the Appellant did not file any.

The Respondent's Submissions

5. Counsel for the Respondent submitted the Appellant and the Respondent herein entered into a contract wherein the Respondent was to undertake the construction of a building at Sigor Youth Polytechnic Pokot Central. That the contractual sum was Kshs.850,000/= and that a sum of Kshs.20,000/= was paid as deposit to the Respondent. Counsel maintains that the 1st payable instalment was to be Kshs.150,000/=. Counsel maintains that the Respondent undertook the 1st phase of the work which was to cost Kshs.150,000/= out of which only Kshs.20,000/=was paid leaving a balance of Kshs.130,000/= which the Respondent claimed together with interest and costs for the suit.

6. On whether there existed a contract between the parties herein, Counsel submitted that the Respondent produced an agreement entered into and signed by the parties herein on 10/10/2010. That the same proved the existence of a contractual agreement between the Respondent and the Appellant. Further that the Respondent also produced photographs evidencing the progress in the ongoing construction. Counsel maintained as evidence in the agreement the 1st instalment was payable upon construction reaching the foundation level. Further that work was undertaken by the Respondent as seen from the photographs in the Court record. Counsel further argued that the contract produced is undisputed and that the contact that was entered into by the parties herein is valid, legal and enforceable.

7. With regard to whether the Respondent deserved to be paid for the work done and was the payment ever made, Counsel submitted that the Respondent was entitled to be paid for the work done. That to prove that work was done, the Respondent provided photographs and even called two witnesses who testified that they were hired by the Respondent to work on the construction, however they were never paid by the Respondent since it had not received payment from the Appellant.

8. Counsel argued that the agreement that was entered into by the Respondent and the Appellant was not vitiated by any factor. Counsel maintained that the Respondent fulfilled its obligations by completing the foundation but the Appellant failed to pay what it owed the Respondent pursuant to the agreement

that was entered into on 10/10/2010. Being in default, the trial Magistrate found that the Appellant owed the Respondent Kshs.130,000/= which amount has never been settled to date.

9. With regard to costs, Counsel urged the Court to dismiss the appeal herein with costs.

Analysis and Determination

10. As the first appellate Court, 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. v 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 v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).

Issues for determination

11. In my view the following issues arise for determination:

    a. Whether was a valid contract between the Appellant and the Respondent

    b. Whether the Appellant owed the Respondent

Whether was a valid contract between the Appellant and the Respondent

12. The Black's Law Dictionary defines a contract as follows: -

> "An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."

13. In *RTS Flexible Systems Ltd v Molkerel Alois Muller GmbH & Co, KG (UK Production)* (2010) UKSC14, [45] the Supreme Court of the United Kingdom stated that: -

> "..The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

14. On implied contracts, the Court of Appeal in *Ali Abid Mohammed v Kenya Shell & Company Limited* (2017) eKLR, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court said;

> It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."

15. It therefore follows that a contract need not be in writing but can be inferred from the conduct of the parties. It must be noted that The elements of offer, acceptance and consideration must be proved, in implying a contract the conduct of the parties remain paramount.

16. In *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Limited and another* (2014) eKLR the court of appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration.

17. In this case there was a written contract between the Appellant and the Respondent herein which was produced in the trial Court as Exhibit 1.

18. PW2 Ewasi Echoto and PW3 Douglas Lukwa Muyembe also testified and confirmed that they were hired by Respondent to work at the construction site herein but they were never paid by the Respondent as it had not received payment from the Appellant. Their evidence was however not controverted by the Appellant who even admitted that it had paid the Respondent Kshs.20,000/= as mobilization fee but rather denied the existed of any agreement between them. Why then would the Appellant herein pay the Respondent Kshs.20,000/= if it had not in fact contracted it to undertake construction as was evidenced by the Respondent. The evidence in this matter clearly shows good faith on the part of the respondent on enforcement of the contract with the Appellant. When one talks about good faith some of the key aspects is adherence to reasonable, contractual standards of fair dealing and faithfulness to the agreed terms of the contract manifested in the intention of the parties. There is a presumption which can only be rebutted by cogent evidence that the decision to contract was done in good faith and each party would be obligated to observe the terms and common purposes of it in good faith. So in this appeal the approach taken by the learned trial magistrate is implicit of good faith in contract performance between the two parties. Much of the complaints labelled by the Appellant in the memorandum of appeal on relational contract with the respondent does not easily controvert the direct and circumstantial evidence presented by the respondent. The fact that the two parties whose interests are affected by the arrangement freely entered into a contract with full knowledge is in general cogent evidence in favour of its justice. What comes out clearly is that in this particular transaction the appellant and the respondent gave their consent for execution of the contract with no reservations in fulfilment of reasonable expectations that the agreement is enforcement in law. It is hard one party to escape to perform part of his obligations.

19. With the foregoing in mind, it is my finding that a valid contract existed between the Appellant and the Respondent herein. All the elements of a valid contract such as offer and accepted consideration and consent of the parties were present. The terms of the contract were also clear.

Whether the Appellant owed the Respondent

20. In the present case, the burden of proof lay on the Respondent to prove that the Appellant owed it the alleged outstanding amount. It is trite law that he who alleges must prove. The Respondent claimed Kshs.130,000/= from the Appellant being the outstanding amount.

21. To prove that the Appellant owed him Kshs.130,000/= the Respondent produced the agreement dated 10/10/2010 that was entered into by the parties herein.

22. I have keenly perused the agreement dated 10/10/2010 on record and from its contents it is evident that for the 1st Instalment the Respondent herein was to be paid Kshs.150,000/= with Kshs.20,000/= being the down payment.

23. I also note from the evidenced adduced at the at trial that said evidence was uncontroverted by the Appellant and thus are *prima facie* evidence that the Appellant owes the Respondent Kshs.130,000/

=. What I find rather stranger is that during the trial DW1 Henry Leleli, denied knowing the existence of the contract herein whereas in the Appellant's Defence and Counter-Claim, the Appellant claimed that the Respondent had in fact breached the terms of the contract dated 10/10/2010. The Appellant further alleged that the Respondent after receiving Kshs.20,000/= as mobilization deposit, it went away but left its workers on site. The Appellant further prayed for a declaration that the Respondent herein was in breach of contract, damages for breach of contract and a refund of Kshs.20,000 by the Respondent.

24. After going through pleadings, evidence and parties submissions on record, it is my finding that the Respondent successfully discharged its evidentiary burden of proof in proving its case against the Appellant on a balance of probabilities. I accordingly find that the Appellant is liable to pay the Respondent Kshs.130,000/= being the amount owed. In the present case there is not only and assent to the contract but an actual promise and an undertaking to pay for it and that promise was founded on a good consideration in law. That alone is sufficient ground to support the action brought by the respondent against the appellant. Being persuaded as I do our heritage on contract law is grounded in the English law of contract. Therefore, making reference to the principle in *Rann v Hughes* (1765) 4 Brown P.C 27.7. T. R, 350, is judiciously right. Thus:

> "It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this county supplies no means, or afford any remedy, to compel the performance of an agreement made without sufficient consideration."

25. Although the Appellant had initially pleaded a number of defences against the respondent's claim for the unpaid amount the same was unsupported by probative evidence. Therefore, the respondent was able to prove a *prima facie* case on enforcement of the contract. The respondent vested with the burden of proving his case from the text of the judgement of the trial court a balance of probabilities required is never in doubt even on appeal. With respect none of the arguments made in favour of the appellant on both the text and context of the contract is persuasive enough to afford this court's exercise of discretion to achieve the result intended by the appellant.

26. In the present case there is no evidence of coercion, mistake, fraud, misrepresentation or duress as valuable signals to end the legal contract entered by the appellant and respondent. It is clear from the law that is a no go zone whichever the option the court elects to take as invited by the appellant. That would be a radical proposition by an Appeals Court viewed from the lens of the content and on a factual determination arrived at by the learned trial magistrate.

27. From the totality of evidence, pleadings and legal arguments advanced by the parties, it is safe to conclude that the appeal herein lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY 2023

In the Presence of:

Mr. Wainaina for the Respondent

.....

R. NYAKUNDI

JUDGE