Red Court Hotel Limited v Shamsher Limited (Civil Appeal 640 of 2019) [2023] KEHC 22633 (KLR) (Civ) (5 July 2023) (Judgment)

Neutral citation: [2023] KEHC 22633 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 640 OF 2019

DO CHEPKWONY, J

JULY 5, 2023

BETWEEN

RED COURT HOTEL LIMITED .... APPELLANT

AND

SHAMSHER LIMITED .... RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. P. Gesora (CM) delivered on 7th October, 2019 in Chief Appellants Civil Case No. 282 of 2013)

JUDGMENT

Background

1. The Plaintiff/Respondent instituted this suit before the trial court by way of a Plaint dated 23rd January, 2013 and filed in court on 25th January, 2013, wherein it sought the following prayers against the 1st and 2nd Defendant/Appellant:-

   a. The sum of Kshs.2,004,016/=

   b. Interest on (a) above.

   c. Costs of this suit.

   d. Any other/further relief that the Honourable Court may deem fit to grant.

2. In its Plaint, the Respondent pleaded that at on various dates between December, 2011 and April, 2012, it supplied to the Defendant/Appellant various goods and equipment for use in its gym at the Appellant's own request and instance at an agreed cost of Kshs. 2,004,016/=. According to the Respondent, it concluded its part of the bargain as agreed while the Appellant failed to honour its part. The Respondent then claimed for Kshs.2,004,016/= from the Appellant.

3. In response to the Appellant's claim as enumerated in the Plaint, the Appellant entered appearance and filed statement of defence dated 28th February, 2013 which was later amended on 16th June, 2016. In the amended statement of defence, set off and Counter-claim the Appellant denied the contents of Paragraphs 3 and 4 of the Plaint and further stated that it contracted the Respondent to supply gym and health club equipment and install the same. The brand of equipment required was specifically identified as "Startrac" so as to ensure that the Appellant's gym and health club met international standards.

4. It is the Appellant's contention that in violation and in breach of the express terms of the agreement, the Respondent delivered "Shadong MBH Fitness-Dezhou Strength Fitness" brand equipment that was no what the Appellant had specifically been sought by the Appellant. It was stated in the Plaint that the pricing of the contract was specific on the equipment to be delivered.

5. The Appellant denied the Respondents claim at Paragraphs 5 and 6 and stated that the Respondent having materially breached its contractual obligations and having failed to deliver the equipment specified, it rejected the equipment that the Respondent delivered. That the Respondent was asked to collect the equipment but failed. The Appellant then sought a refund of all amounts of money paid to the Respondent.

6. The Appellant denied the each and every allegation contained in the Plaint.

7. It further pleaded breach as particularized at Paragraph 14 of the Plaint as follows

   a. Supplying gym equipment that was outside the description, quality and brand required.

   b. Failure to comply with the terms of the agreement.

   c. Failure to collect the rejected equipment.

8. As a result of the Respondent's actions and omissions, the Appellant suffered loss and damage amounting to Kshs.16,506,310/= which the Respondent failed and or refused to pay despite demands for payment.

9. The Appellant asked the court to dismiss the Respondent's suit and Judgment entered in its favour for;

   a. The sum of Kshs.16,506,310/= which sum continues to accrue until the Plaintiff collects the rejected gym equipment.

   b. Interest on (a) above at court rates from the date of filing suit.

   c. Costs.

   d. Any further or other relief as this Honourable Court may deem just.

Evidence

10. The matter proceeded for hearing on 22nd October, 2018. In this testimony, PW1-Rahim Samji stated that he a Sales Director of the Respondent. He adopted his witness statement dated 22nd January, 2013 as his evidence in chief. He produced the documents as they appear in the list of documents and the supplementary list dated 20th July, 2018 as Exhibits P1-12. It was his evidence that they supplied the Appellant with fitness equipment and accessories in Phase (1) and (2). The equipment supplied was rubbers flooring 200 squares metres and 40 combination locks or lockers. They had won the tender that was floated by the Appellant and they accepted their figures. When they delivered the equipment, the Appellants signed for. However, two months after installation, the Appellants asked them to remove

the equipment and accessories saying that they did not meet the specification. This is after they had used the equipment for 8 to 10 weeks. He prayed that Judgment be entered as prayed for in the Plaint.

11. On cross examination, he stated that they were claiming two million from the Appellant. The amount was for Kshs.10,594,900/=. On phase one, they supplied them with "Startrac" as other equipments. That Cementon was the main contractor and they entered into a contract with them. He disputed the email on Page 17. On phase two they were to supply various equipment. He was asked to remove the equipment after two months. He cannot confirm that he received the email and also disputes the email on Page 20 as it does not have a header. The Appellant signed their installation report.

12. During re-examination, he stated that he could not confirm that he received the email as they do not have heads. He dealt with the Appellant in two phases and that his duty was to only install. The Respondent imported the goods.

13. DW1-Linda Mukami stated that she is a Legal Manager at the Red Cross Society which owns the Appellant. That they wrote to the Respondent that they had won the tender for a sum of Kshs.10,594,900/=. The Respondent was to submit its tender documents. The gym equipment's was "Body solid" from stractrac. She identified a document at Page 13 as an agreement between the parties and indicated that Clause 1.2 states that the same is subject to the main contract, while Clause 1.3 is for supply and installation of the gym equipment's by the Plaintiff/Respondent. She went on to state that the Appellant was particular about the brand to suit their clientele which the Plaintiff had a franchise for. That vide an email dated 18th May, 2012, they sought to know from the Plaintiffs what brand was to be supplied and they confirmed it would be "startrac". And on 29th July, 2012, the architect wrote to the Plaintiff an email asking them to remove their equipment as it was not "startrac" to which they responded saying they would not deliver "startrac". That there was a meeting and communication over the variations between the Plaintiff and contractor but there was no explanation by the Plaintiff on the same. That the Defendant went on to procure an alternative equipment at a cost of Kshs.14,506,810/= hence incurring Kshs.16,145,225/= as a result of the breach and it was her contention that the Respondent was not entitled to the amount claimed.

14. At the close of the hearing, parties filed their respective submissions in support and in opposition of the case. And upon careful consideration of the evidence and the submissions of parties, the trial court delivered its Judgment on 7th October, 2019 wherein it found that the Plaintiff had proved its case on a balance of probabilities and proceeded to enter Judgment in its favour in the sum of Kshs.2,004,016/= together with costs and interest. The Defendant's set off and Counter claim were accordingly dismissed.

15. The Appellant was aggrieved and dissatisfied with the said Judgment and decree of the Trial Court that it preffered an appeal before this court.

The Appeal

16. By a Memorandum of Appeal dated 4th November, 2019, the Appellant has raised the following grounds of appeal in support of its appeal;

    a. The learned Magistrate erred in law and fact in failing to appreciate that the Respondent was bound by the terms of the contract entered into between the parties herein to provide Body solid startrac gym equipment.

    b. The learned Magistrate erred in law and fact by failing to find that the Respondent breached the terms of the contract by providing Shamdong MBH Fitness gym equipment instead of Body solid Startrac gym equipment.

c. The learned Magistrate misdirected himself in finding that the Appellant consented to the supply of Hsmdong MBH fitness gym equipment yet the Appellant presented documentary evidence demonstrating its express rejection of the same.

d. The learned trial Magistrate erred in law and fact by failing to consider evidence by the Appellant demonstrating that the Respondent was paid over and above the contractual amount, including the sums claimed.

e. The learned Magistrate erred in law and fact in filing to appreciate and hold that the Respondent had not proved its case on a balance of probabilities as required by law.

f. The learned Magistrate erred in law and fact in ignoring and failing to decide the case on the facts and evidence presented and adduced before him and in arriving at the decision based on assumptions that were not supported by evidence.

g. The learned Magistrate erred in law and fact by utterly disregarding the Appellant's set off and counterclaim in its entirety.

h. The learned Magistrate erred in law in failing to consider and determine substantial and material issues and questions of law and fact that he was called upon by the parties to consider and determine.

i. The learned Magistrate erred in law and misdirected himself by failing to consider the Appellant's written submissions on the law and evidence and thereby arrived at an erroneous and or wrong decision.

j. As a result, the learned Magistrate erred in allowing the Respondent's suit and dismissing the set off and counter claim.

17. The Appellant asked the court for the following reliefs: -

a. This appeal be allowed.

b. The Judgment delivered on 7th October, 2019 in Chief Magistrate's Court Civil case No.282 of 2013 be set aside in its entirety.

c. The Appellant's prayers in the set off and counter claim filed in Chief Magistrate's Court Civil Case No.282 of 2013 be granted.

d. Costs of the appeal be awarded to the Appellant.

18. This appeal was heard by way of written submissions. The Appellant filed its submissions dated 26th September, 2022 while the Respondent filed its submissions dated 11th November, 2022. The same to be factored in the determination of this appeal.

Analysis and Determination

19. This is a first appeal arising from the decision of the lower court in exercise of its original jurisdiction. Thus this court must consequently constantly remind itself of its obligations as a first appellate court. The duty is well settled. In the case of Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013]eKLR, the court 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 reanalyze 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."

20. Also, this court will not normally interfere with a finding of the lower court unless the same is based on wrong principles of fact or law. A similar position was enunciated in the case of Mbogo & Another –vs- Shah [1968]EA 93;

> "I think it is well settled that this Court will not which an appellate court should interfere in the exercise of the discretion of a judge with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

21. This court has considered the grounds of appeal by reading through the record of appeal and the parties' rival submissions and the cited authorities and finds that the issues commending themselves for determination are as follows;

    a. Whether there was any breach of contract by either of the parties.

    b. What remedies are available to the parties?

22. On the first issue, this court will begin by defining what a breach of contract is. The Black's Law Dictionary 9th Edition defines it as;

> "A violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is certainly, he has at least a claim of nominal damages."

23. A breach of contract occurs when, without legal justification or reason, a party ignores, refuses to fulfill, or fails to comply with any provision of the written or verbal contract. It is contended that the Respondent in breach of the terms of the agreement delivered to the Appellant "Shandong MBH Fitness-Dezhou strength Fitness" brand of gym equipment in blatant violation of the agreement. Consequently, the Appellant rejected the equipment and asked the Respondent to collect it. The Respondent refutes this argument and contends that it was not bound by the terms of supply of a specific brand in the subject contract of 23rd April, 2010. The issue of the brand name only arose after the parties had executed the contract document and as such, the brand name did not form part of the terms. The brand of the gym equipment to be supplied was not an express condition of the contract but arose after the contract had already been executed.

24. A perusal of the agreement dated 23rd April, 2010 reveals that in Clause 1.3 thereof, parties did not specify the model of gym to be supplied. Clause 1.3 of the Agreement specifically provides as follows;

> "WHEREAS the contractor is desirous of sub-letting to the sub-contractor.......supply and installation of gym and health club equipment........"

25. This fact is admitted by the Appellant in its submissions that the agreement did not expressly specify that the gym equipment to be the Body Solid-Strartrac Gym Equipment, but it did make reference to specifications and Bills of Quantities agreed upon by the parties together with letter of award which specified that the gym equipment ought to be Startrac.

26. Therefore, when parties attempt to introduce into a agreement a stipulation as to the type of gym to be supplied in respect of which the contract itself is silent, they not only contravene the terms of Clause 1.3 of the agreement but also the parol evidence rule that bars extrinsic evidence meant to contradict, vary, alter, or add to the express terms of the agreement which is generally inadmissible. In other words, any information leading up to or during a contract that is not included in writing is considered inadmissible evidence (See Halsbury's Laws of England, 4th Edition Vol. 9(1) para 622.)

27. The parole evidence rule prevents admission of oral evidence to prove that some particular term was verbally agreed upon, but had been omitted from the contract. That specific part of evidence is inadmissible unless it is proved that there is evidence of fraud, duress or mutual mistake.

28. It is trite that the court cannot re-write a contract for the parties. The terms of the contract always reflect the intention of the parties. Therefore, the court will not improve the terms of the contract which the parties have made for themselves. In the case of Rufale –vs- Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L. J held as follows:

> " The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract."

29. The role of the court is to interpret and apply the contract made by the parties themselves. The court will not even improve the contract, which the parties have made for themselves; hence there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable. (See the case of Trollope Colls Ltd –vs- North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609.

30. In the case of Curtis –vs- Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631, Lord Denning held as follows:

> " If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation."

31. Therefore, guided by the decision in cited authorities, it is this court's considered view that the Appellant entered into an agreement with the Respondent to supply gym equipment for their hotel. The Respondent indeed supplied the gym equipment and in this particular case supplied Shamdong MBH fitness as the provision on specification was silent.

32. As earlier stated above the Appellant having admitted that the agreement did not specify the specification of the gym equipment, the Respondent was bound to supply any type it would wish. Again, after the alleged wrong specification of gym equipment had been supplied, the Appellant accepted it only to turn later and reject it after completion of the contract. According to the Respondent, this was after the equipment had been installed and been in use for about 8 – 10 weeks.

33. It is therefore not in dispute that the dispute that the contract between the Appellant and Respondent was silent as to the specification of the gym equipment to be supplied by the Respondent. It is also not in dispute that the Appellant accepted, had the equipment installed and had a change of mind as to its specification eight (8) to ten (10) weeks later, when the contract had been executed in the terms of "offer" and "acceptance" principle. Therefore, it cannot be said that the Respondent was in breach of any agreement dated 23rd April, 2010.

What remedies are available to the parties?

34. Having made a finding on issue that the Appellant did not establish that the contract was breached by the Respondent in any way, this appeal fails in its entirety.

35. In the upshot of the foregoing, the Appellant's appeal dated 4th November, 2019 lacks merit and is hereby dismissed. However, this court makes no orders as to costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 5TH DAY OF JULY , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Akech Aluoch counsel for Respondent

Court Assistant - Martin