Sainad Limited v Kairu & another (Civil Appeal E030 of 2023)
[2024] KEHC 12828 (KLR) (Commercial and Tax) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12828 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E030 OF 2023

FG MUGAMBI, J

OCTOBER 18, 2024

BETWEEN

SAINAD LIMITED ..... APPELLANT

AND

LUCY KAIRU ..... 1ST RESPONDENT

OCS CENTRAL POLICE STATION ..... 2ND RESPONDENT

(Being an Appeal from the Judgment & Decree of the SCC [Hon Mrs Judith P. Omollo] at Nairobi in SCC No. E3532 of 2022 delivered on 8th February, 2023)

JUDGMENT

Background and Introduction

1. The 1st respondent herein was the claimant at the small claims court. In her claim dated 10/6/2022, she contends that she and the appellant were business partners. The parties entered into various agreements between March and April 2022. Pursuant to the agreements the 1st respondent was to provide employment consultancy, source for employment and arrange for travel of some of the appellant's clients to middle east countries. The 1st respondent contends that the appellant breached the said agreement by amongst others failing to pay the required balances and provide information required by the 1st respondent.

2. The 1st respondent further contended that the appellant made it difficult for her to perform the contract to completion. She stated that instead, the appellant made claims for a refund of payments made, yet the 1st respondent had already made progress with the travel arrangements, which the appellant declined to pay the balance towards. She sought an order compelling the appellant to pay the balance due so as to enable her complete the agreement.

3. The appellant filed a counterclaim demanding a refund of Kshs. 400,000/=. The same was based on money that was forwarded to the 1st respondent on account of services that were never rendered. The appellant claims that out of Kshs. 500,000/= that was paid to the 1st respondent, only Kshs. 100,000/= had been accounted for.

4. The 1st respondent's claim was dismissed by the trial court on account of non-attendance and want of prosecution. The counterclaim proceeded to hearing and was dismissed. This forms the basis for the appeal before this court, along the grounds as particularly set out in the Memorandum of Appeal dated 21/2/2023.

5. The appellant faults the trial court for dismissing its counter claim yet the court found that there was evidence that the appellant had paid the monies by way of mpesa statements. This was not controverted by the 1st respondent and as alleged by the appellant, the 1st respondent actually confirmed having received the money.

6. The appellant also contends that the trial court erred in not finding that there was breach of contract as the said breach was the basis for refund of the Kshs. 400,000/=. It is the appellant's case that in the absence of any evidence controverting their claim from the 1st respondent, the court ought to have found in their favour.

Analysis

7. I have considered the pleadings, submissions and authorities filed by the respective parties herein. It appears that the 2nd respondent did not take part in these proceedings. That said, I have looked at the grounds raised in the Memorandum of Appeal and in summary, the appellant seeks to challenge the dismissal of their counterclaim.

8. The first issue is whether the trial court erred in finding that there was no evidence of a contract between the parties. According to the *Halsbury's Laws of England* Vol 9(1) at paragraph 606, the promises of any contracting party may be express or may be inferred by implication from his conduct. This general rule of contract law is further buttressed at paragraph 620 in the terms that a contract may be validly made either orally or in writing or partly orally and partly in writing.

9. With this in mind, I have reviewed the record of appeal. The 1st respondent's statement of claim runs from page 5 to 8. At page 6 of the statement, the 1st respondent acknowledges that the claim at the trial court was based on 'a contract on various dates between March and May 2022 in the sum of Ksh. 500,000/='. At paragraph 4 of the same page, the 1st respondent again confirms that 'on various dates between March and April 2022, the respondent entered into an agreement....'. The terms of the oral contract have been spelt out by both parties, the subject of which was consultancy and services relating to logistics and travel.

10. I note that the 1st respondent, as the claimant in the trial court and the appellant, who was the respondent in the lower court, both acknowledge that they were in a contractual relationship. It is trite law that a contract does not have to be written and can be made orally and by conduct of the parties. In the judgment of 8/2/2023, the Learned Adjudicator finds that the 1st respondent has not annexed any evidence of a written agreement or contract entered into between them.

11. Had the adjudicator considered the fact that the contractual relationship between the parties did not need to be in writing, she would have come to a different finding as I hereby do.

12. The next issue is whether the adjudicator erred in dismissing the counterclaim filed by the appellant. The trial court made a finding of fact which is that there were mpesa statements showing that the

appellant had forwarded money to the 1st respondent on diverse dates in the year 2021. This alone was not sufficient to prove that there was a breach of the agreement or that the appellant was entitled to a refund.

13. The basis for seeking and granting the refund was supposed to be on account of proof that the 1st respondent had not done her work. That she had breached their contract by providing the appellant with fake reservations. It is on record that the appellant acknowledged that only 1 reservation was genuine.

14. The question is, had the appellant proved this fact? The trial court, in correctly applying the law and particularly section 107 of the *Evidence Act* to the facts, found that the appellant had not discharged the burden of proof to the required standards. This is because they did not prove that the reservations forwarded by the 1st respondent were fake so as to warrant a refund claim. I am convinced that the trial court correctly applied and interpreted the law in concluding that:

> " Although the 1st respondent alleges that the reservations were fake, there is no evidence to support the assertion either from the State of Qatar or Qatar Airlines. The 1st respondent also averred that the matter was reported to the police. There is no outcome of the investigation provided for the court to find that the claimant made fake reservations."

15. I do therefore agree with the trial court that the appellant had been able to prove that they sent money to the 1st respondent but had not proved that there had been breach of the agreement and that they were entitled to a refund of Kshs. 400,000/=. It was within the trial court's right to satisfy itself of the veracity of the claims even if the 1st respondent had not participated in the trial. That of its own was not enough to allow the appellant's claim.

Disposition

16. I therefore see no basis for interfering with the lower court's finding. The appeal is dismissed but with no orders as to costs, noting that the respondents did not file any submissions to the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 18TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE