



Nanana Company Limited v Cmec Africa Development (Civil Appeal E016 of 2022) [2024] KEHC 16654 (KLR) (5 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E016 OF 2022
JL TAMAR, J
NOVEMBER 5, 2024**

BETWEEN

NANANA COMPANY LIMITED APPELLANT

AND

CMEC AFRICA DEVELOPMENT RESPONDENT

(Being an appeal from the whole of the judgement of Resident Magistrate court at Kajiado B. CHELOT, SRM dated and delivered on 27th February, 2022 in CMCC No 113 of 2020)

JUDGMENT

1. The appellant herein preferred this appeal challenging the judgement of the trial court rendered on 27th February 2022 in which the appellants claim before the magistrate court was dismissed. The appellants set forth the following grounds;
 1. That the trial magistrate failed to cumulatively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/ or feature on the suit before her and thus arrived at an erroneous conclusion, contrary to and in contradiction of the evidence adduced
 2. That the trial magistrate erred both in law and fact by finding that the appellant was not eligible for full payment as the machine did not work on certain days.
 3. That the trial magistrate hence arrived at slanted and erroneous judgement based on the failure to appreciate and/or discern the claim by and/or at the instance of the appellant
 4. That the trial magistrate erred in law and in fact in re-writing the contract instead of interpreting it and thus finding that the payments made to the appellants were in accordance with the lease agreement a decision that flouted the settled legal position on freedom of contract.



2. As this is a first appeal, it is my duty to analyse and re-assess the evidence on record and reach my own conclusions in the matter. As was put in reference to the court of appeal sitting as first appellate court, more appropriately in *Selle v Associated Motor Boat Co.* [1968] E A 123, thus:

An appeal to this court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270.)”

3. The Court of Appeal, further stated in *Jabane vs Olenja* [1986] KLR 661 at pg 664, thus:

More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he”

4. The facts of this case are not in dispute and neither complex. They are that on 8th August 2019 the plaintiff a limited liability company entered into a lease agreement No Kipeto/Nanana/S19050801 with the defendant a company that deals with engineering and construction business, in Kenya on the following specific terms;

- I. The defendant agreed to hire the plaintiffs 2014-2018 Tata/ashok/sharkman/Isuzu 20 Ton Tipper at a monthly rental of Ksh. 450,000 inclusive Vat and Operator
- II. 2007 Cat/hyundai 30 Ton Excavator with Breaker at hourly rental of Ksh.7000 inclusive VAT and operators overtime and salary
- III. 2008 Hyundai 18Ton Roller at monthly rental Of Ksh. 550,000 inclusive Vat and operator overtime and salary.

5. The plaintiff stated that the defendant in breach of the above agreement rescinded the agreement without notice occasioning the plaintiff great loss and damage. The particulars of breach were set out as failing to pay the plaintiff as stipulated in the agreement and refusing or ignoring to pay the considerations despite demands.
6. The plaintiff further stated that the defendant applied undue influence upon the plaintiff to ensure that the plaintiff produced and tendered to the defendant invoices corresponding to the worksheet and that if not, the plaintiff would not receive any payments for the month. This was a serious allegation of fact which the plaintiff ought to have set out its particulars and prove at the trial.
7. The plaintiff as a consequence, sought for judgement against the defendant for ksh. 2,785,001, general damages for breach of contract, cost plus interest of the suit.
8. The defendant filed defence to the appellant claim and admitted that indeed the parties had entered into a lease agreement for provision of machinery at the proposed Kipeto Wind Farm in Kajiado County and that it made payment to the appellant as per the lease agreement. The defendant stated that the rental payments were calculated on the monthly basis on the number of days worked as provided



for by clause 1(1:1) of the lease agreement. It was further a term of the agreement that the defendant would not pay for the time lost on machine breakages, routine service maintenances, workers strike, community issues among other occurrences and the parties had also expressly agreed that the lessor shall have its person in-charge at the site who shall then sign afresh the previous month time sheet once verified and accepted to avoid dispute. The lessor was then required to attach the working time sheets to the invoices and submit to authorized person of the lessee. It was also agreed that once the invoices are reviewed and approved by the lessee, then, the lessor shall issue ETR to the lessee.

9. The defendant averred that, through its procurement and finance offices, it discovered that invoices submitted by the plaintiff for payment were erroneous, as most of them were overcharged and the same were notified to the plaintiff who was asked to rectify which were never done, but instead the plaintiff filed this suit despite several meetings held at the site to resolve the matter.

Evidence

10. The plaintiffs witness PW1 Lilian Lanet Leikeny, testified on 21st October 2021 adopted her written statement as part of her evidence and told the court that her company had entered into a lease agreement with the defendant for hire of Tata/ashok/sharkman/isuzu 20 Ton Tipper at a monthly rate of ksh 450,000. That contrary to the lease agreement, the defendant failed to pay the amount in full as it decided arbitrarily on the amount to be paid. She therefore asked the court that the balance of the amount due be paid in full.
11. The defendant on their part called DWI SHeila Cherotich Rutto who adopted her statement dated 13th October 2020 as her evidence in-chief. According to the witness, the rental payments in respect of the tipper in dispute was to be calculated on a monthly basis and on the number of days work excluding the events/ occurrences contemplated by the parties under clause 1.1 of the agreement.
12. The issue for determination in my view is whether the defendant is in breach of the lease agreement entered into on 8th August 2019 and if in the affirmative what remedies should the court grant.
13. I have read and found useful the submissions and the authorities supplied in support of parties' respective position, and reviewed the evidence tendered as required of the first appellate court.
14. Section 107 of the [Evidence Act](#) provides as follows: -

It is trite law that 'whoever alleges must prove'. Section 107 of the [Evidence Act](#), Chapter 80 Laws of Kenya states as follows:

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.

15. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
16. The court of appeal in the case *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR discussed the burden of proof and stated thus:

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.



17. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case..."

18. It therefore behoves the appellant in this court to prove the facts alleged against the defendant by evidence and especially that the defendant was in breach of the lease agreement.

19. There is no dispute that the parties herein had entered into an agreement where upon the appellant supplied machinery and equipment for the defendant use at the Kipeto wind farm project in Kajiado County. The dispute is whether the monthly payments relating to the use of the Tipper was paid for or not, or if paid, whether the same was paid as per the contract which according to the appellants is on a monthly basis. According to the appellant the reason why under the contract, the Tippers work was to be paid monthly was because there was no inbuilt mechanism in the Tipper to records the hours it engaged for the day's work unlike the other two machines whose payment models was on hourly basis.

20. The documents relied on by the appellant in the court below and in this appeal are the copies of the lease agreement, a copy of the demand letter, copies of the invoices, and working sheets. The appellant attached eight (8) invoices, (4) for the years 2019 and another (4) for the year 2020, which I presume were intended to establish the amount due and owed by the defendant in favour of the appellant. Accompanying these invoices are the attendance sheets for rental equipment for machines reg no KCH 935Z and KCA 869Z, the details of which are in a language that is not familiar to the court. I see no such translation in the court below and no efforts was made to explain to the court the details of the work sheet. A scrutiny of the invoices shows that they are for all the machines hired and the subject of the contract. In the lease agreement, there is no mention of the registration numbers of the machines hired out by the appellant and especially the registration number(s) for the Tipper and how many those Tippers were. It is only in one invoice dated 05/10/2019 delivery no 01 that the name 'Tipa' appears against registration number KCH 935Z and KCA 869Z which suggest that the appellant had hired two tippers for use by the defendant in the project.

21. The Total amount invoiced in the eight invoices in my calculations adds up to Ksh. 10, 948,542. The appellant claims for a specific liquidated sum of ksh. 2,385,001. This amount must be capable of ascertainment by way of evidence. The evidence in court by Lilian Lanet Leikeny PW1 and her statement which was adopted as her evidence in chief did not with certainty establish the amount claimed as due. She told the court that the appellant company was not paid in full by the defendant as some balance is due. There is no evidence of the amount paid by the defendant in relation to the hired Tipper(s) since the commencement of the work and how much was due or disputed. This was left to the court to discern from the invoices and the work sheets which as I mentioned are in a foreign language and which appellant similarly complained of despite being party to the lease agreement. Yet under the lease agreement, the Appellant was required to prepare the working sheets and attach the same to the invoices for the lessee to review and if the lessee agrees with it then the same is approved and payment process commences.

22. From the evidence and the submission of the parties, there was a dispute as regards the invoices submitted by the appellant to the Respondent for payment. The respondent submitted that the same was communicated to the appellant who it is said refused to amend and/or rectify leading to the filing of the suit. The lease agreement, under the sub-head 'for the rental payment' provided that the lessor shall firstly get the previous month working time sheet copies from the site, and the lessor's person in charge at the site shall sign freshly on the copies once verified and accepted to avoid future dispute. It



was therefore, the responsibility of the of the appellant herein as a lessor to have its person at the site to sign copies of the time sheet once verified for this was intended to avoid future dispute.

23. There is no evidence that the appellant had its person at the site and if that person was the driver of the Tipper such driver was not called as a witness nor statement taken from him. Contrary to the assertion by the appellant that the driver was denied opportunity to sign against the hours worked, there is no evidence before the magistrate court and this court of such material allegations.
24. The trial magistrate found as a fact that the Tipper leased by the appellant to the respondent at ksh.450,000 per month was not eligible for full payment as the machine did not work for certain days. This is finding of fact which was not challenged by the appellant. From the documents attached it is clear that there were days that work at the site did not go on owing to situations anticipated in the lease agreement. It was incumbent upon the appellant under section 107 of the *evidence Act* to establish by cogent evidence that the Respondent was in breach of the contract and as a result it suffered damages. This burden in my view was not discharged as no evidence was tendered to support the allegations of non- payment by the respondent. The appellant quantified the claim to a specific amount of monies due and payable. Quantification of a claim does not make such a claim liquidated. The amount claimed by the appellant should have been easily determined or capable of being ascertained as a matter of arithmetic. The appellant did not give evidence on the specific invoices that were submitted to the respondent for payment totalling 2,785,001. The invoices attached are not specific to any particular tipper but includes other machinery whose payments are not in dispute and other items such as mobilizations and so on.
25. In the circumstances and for the above reasons, I find that the appeal herein is for dismissal which I hereby do with cost.

DATED AND DELIVERED THIS 5TH DAY OF NOVEMBER 2024

JOHN T. LOLWATAN

JUDGE

