



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 60 OF 2016

SAMUEL MWANGI GATUKURU.....APPELLANT

VERSUS

STEPHEN WANGONDU KININI.....RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgment of Hon. J. Onyiego (CM) delivered on 14/11/2016 in Nyeri CMCC No.522 of 2012.
2. The cause of action arose out of a suit filed by the respondent against the appellant and three (3) other companies associated with the appellant in which he sought for;
 - (i) The sum of Kshs.5,294,853/50 or in the alternative loss of user in the sum of Kshs.20,000/- per day from 18/04/2013 up-to 30/07/2013;
 - (ii) Costs of the suit;
 - (iii) Interest on (a) and (b) at court rates
3. Judgment was given in favour of the respondent on the 14/11/2016 in the sum of Kshs.3,395,000/-; in the alternative any money equivalent to the claim due to the appellant from KERRA to be paid to the respondent directly; both attracted interest from the date of filing suit; the claim for loss of user was disallowed;
4. The appellant being aggrieved by the decision instituted this Appeal and listed nine (9) grounds of appeal as summarized hereunder;
 - (i) The trial magistrate erred in holding that the respondent had proved that there was a valid contract between the appellant and the respondent; and if there was any it was vitiated by mistake;
 - (ii) The trial court erred in finding that there was a specific claim for special damages pleaded by the respondent; and erred in awarding Kshs.3,395,000/- to the respondent without any legal justification;
 - (iii) The trial court erred in finding that the appellant was one and the same person as the alleged companies contrary to the dictates of the principles of separate corporate personality;
5. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the respective rival submissions;

APPELLANT'S CASE

6. The appellant submitted that the parties had an oral agreement but no agreement on sharing of profits; no agreements were produced as evidence for the specific contracts as pleaded in the Amended Plaint dated 24/5/2014 specifically for;
 - (i) NYERI/229/02-21-11/12-021 worth Kshs.4,748,000/-
 - (ii) NYERI/GOK/REG 12/21-11/12-137 worth Kshs.5,227,500/-;
 - (iii) NYERI/22/2-21-11-016 worth Kshs.907,617/71;

7. That the respondent had received the sum of Kshs.2,000,000/- from the appellant but did not particularize work done nor itemize the expenses/costs for the work done; no receipts or invoices were produced to prove these costs and expenses; there was no mutual understanding between the appellant and the respondents to the place and extent of performance of the alleged works by the respondent; neither any agreement of reimbursement and time for such reimbursement;

8. The appellant's contention was special damages was not proved; that special damages must not only be pleaded but must be also strictly proved with as much particularity as the circumstances permit; the case law relied on was **Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited [2016]eKLR**;

9. The respondent tabled no evidence to support the claim of Kshs.5,294,853/50; figures were just thrown at the court and did not reflect whether it was the cost of murram, transport or labour; the transfer forms were not evidence of the special damages; the respondent was obligated to produce documentation on how he expended money on the said projects;

10. The appellant submitted that the trial court acted on wrong principles when awarding the respondent based on evidence of two dishonoured swift transfer forms in the sum of Kshs.2,900,000/- and Kshs.495,000/- but there was no breakdown or proof of these figures to show how they were arrived at;

11. The appellant was sued together with the companies claimed to be associated with him; but no link between the companies sued together with the appellant was not established as alleged in the plaint; no company search was on record to indicate the shareholding or directorship of the companies; case law relied on **George Williams Omondi & Anor vs Co-operative Bank of Kenya & 2 Others [2016] eKLR**; where the court upheld the principle in **Salomon vs Salomon** that a company has a distinct and separate personality from its shareholders and directors; even where the directors happen to be the sole shareholders; the property of the company is distinct from that of its shareholders; and the shareholders have no proprietary rights to the company's property apart from the shares they own; and the company has capacity to take any action to enforce its legal rights;

12. In conclusion the respondent never proved the claim for special damages; nor did he prove his claim to the desired threshold; and humbly urged the court to allow the appeal with costs.

RESPONDENT'S RESPONSE

13. In response the respondent submitted that the appeal was incompetent for failure to include a vital document like the decree in the Record of Appeal; that an appellate court can only be seized of authority once a decree is properly extracted and certified by the trial court; therefore, it ought to be struck out;

14. That the appellant had filed a defence denying the claim but boldly stated and admitted that there was an oral agreement as between the parties but failed to disclose at length the terms of the oral agreement; from the appellants' submissions it is not in dispute that it was the appellant who approached the respondent in the sub-contracting agreements; and it is not in dispute that he was the one who executed the electronic money transfer (RTGS) which were dishonoured by the bank; the transfers were in the sum of Kshs.2,900,000/- and Kshs.495,000/- totaling 3,395,000/-; the appellant stated that he had paid up in cash but did not produce any evidence to support such payment;

15. The respondent's claim was for Kshs.5,294,853/50 which was specifically pleaded in the Amended Plaint and the trial court cannot be faulted in its judgment in arriving at the uncontroverted fact that the respondent owed the sum; otherwise there was no other reason for the appellant to have executed the bank transfers;

ISSUES FOR DETERMINATION

16. Upon reading the written submissions these are the issues this court has framed for determination;

(i) Whether the appeal is incompetent for failure to attach a Decree in his Record of Appeal;

(ii) Whether the appellant's counsel is properly on record;

(iii) Whether the respondent proved his case to the desired threshold.

ANALYSIS

17. In considering the appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; it held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, the Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law.

18. The Court of Appeal also held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT

Whether the appeal is incompetent for failure to attach a Decree in his Record of Appeal:

19. Indeed, upon perusal of the Record of Appeal it is noted that the appellant did not extract and include any decree therein; the law requires that before any appeal is admitted for hearing a certified copy of the judgment, order or decree appealed from must form part of the record and it must be served upon the opposing party;

20. This court makes reference to and is persuaded by the holding by the Hon. Lady Justice Aburili in the case of **Mathew Owino Winja & Anor vs Joyce Atieno Ogudah [2020] eKLR** where it was held as follows;

“56. In the instant case, the appellant only included in the record of appeal, a Ruling giving rise to this appeal. No Decree or order was extracted and included in the record of appeal.

57. However, the wordings in Order 42 Rule 13(f) speak in the alternatives i.e the judgment, order or decree appealed from. It does not say judgment and decree or judgment and order appealed from.

58. That being the case, as the appellant included in the record of appeal the Ruling appealed from, failure to extract the Decree or Order derived from the impugned Ruling is not fatal to this appeal.

59. Furthermore, inclusion of a decree or order is not substantive as the main ruling appealed from is in the record of appeal.

60. The omission of the decree or order appealed from is a mere procedural defect/irregularity and technicality which is curable by application of Article 159(2)(d) of the Constitution which abhors procedural technicality in favour of substantive justice.”

21. In this instance the court record has a Decree that is dated 29/12/2016 but the appellant never included it in his Record of Appeal; maybe by choice he opted to only utilize the judgment appealed from in the record of appeal; nevertheless this court reiterates that it is persuaded by the afore-going authority and concurs that the wording of Order 42 Rule 13(f) provides for alternatives that either the judgment, order or decree; and that the defect (sentence not completed)

22. This court is therefore satisfied that the omission is merely a procedural technicality and is not fatal so as to render the appeal incompetent;

Whether the appellant’s counsel is properly on record:

23. Another defect noted by this court is that the appellant’s counsel is not properly on record as the firm of did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Code; which provides that after a judgment has been passed and there is a change of advocate such change shall not be effected without a consent from the outgoing advocate or upon an application with notice to all parties;

24. The court record reflects that the Notice of Appointment was dated the 23/01/2013 and drawn and filed on the same date by the firm of M/s Andrew Kariuki who remained the counsel on record for all the defendants up until judgment was entered; this was an issue that was brought up in the lower court in the many applications that were filed by the appellant leading to the withdrawal of another firm which had also flouted the provision; apart from the Notice of Change of Advocates dated the 1/12/2017 and filed on the same date by the firm of Amutallah Robert & Co. Advocates there is nothing on record that demonstrates with clarity how this firm complied with Order 9 Rule 9 before coming on record;

25. In an attempt to do substantive justice this court will overlook the technical defect of failing to adhere with the provisions of Order 9 Rule 9 and instead deal with the substantive issue of the appeal which is whether the respondent proved his case to the desired threshold;

Whether the respondent proved his case to the desired threshold.

26. It is a well settled principle of a binding contract that an agreement is only valid if the following can be ascertained (i) the intention of the parties to create a legal relationship (ii) the subject matter and (iii) consideration;

27. The evidence on record of **PW1** was that he had sued the appellant as a director of his three (3) associated companies separately and independently for the total sum of Kshs.5,284,853/-; that the appellant and his associated companies had sub-contracted him to carry out some work given to the appellant by the government; that the respondent was to be paid after completing the works;

28. One of the appellants companies was Joykim Construction & Engineering Ltd (**Joykim**) which had a main contract with KERRA worth 5,000,000/-; the respondent entered into an informal agreement with Joykim to do gravelling works; and the agreement with appellant was that they were to share construction costs and he was to also get 50% of the profits; the respondent agreed under cross-examination that he was not in possession of any formal written agreement; he also stated in evidence that Joykim had been paid by the government but also had nothing to support proof of payment;

29. The evidence of Rose Wanjiku Mbutia (**PW2**) was that she had been sub-contracted by the respondent to supply materials; and that the appellant filled money transfer documents from Family Bank in her favour for the sum of Kshs.495,000/- and when it was dishonoured the respondent paid her and told her he would pursue a refund from the appellant; she too admitted under cross-examination that she did not know the terms of the agreement between the appellant and the respondent;

30. The Appellant in his evidence admitted that the respondent had been subcontracted for works to be carried out on Mukuruweini roads which he completed; the appellant also admitted that he was paid Kshs.4,700,000/- out of which he gave the respondent Kshs.2,000,000/- as a refund of his expenses; that there was no acknowledgment in writing because the respondent did not want anything in writing;

31. As for the dishonoured RTGS it was the appellant's contention that both were for land transactions which were cancelled; that the appellant had agreed to purchase the respondent's quarry in Mweiga worth Kshs.2,900,000/- but later cancelled the deal; and the other RTGS transfer in the sum of Kshs.495,000/- which was in favour of one Rose was also for purchasing land where he could harvest gravel; that this transaction was also cancelled;

32. Upon re-evaluating the above evidence of both parties it is clear from their conduct that there was an intention by the parties to create a legal relationship; and the trial court in its judgment made a finding that there was an implied verbal agreement; which reads as follows;

“Although there is no written contract between the plaintiff and defendant for construction of road works, there was a verbal agreement implied for supply of construction of gravelling and murraming materials and graveling works which the 4th defendant admitted was done. The 4th defendant cannot claim that there was no contract in his testimony yet in his defence did admit that the plaintiff did some work for him in road construction in which he raised payment.”

33. This court concurs with the trial court's finding that the subject matter of the contract was for road construction work; but found that the details of the particular works were not clear from the testimonies of the parties; and there is evidence of an admission by the appellant that the respondent completed the Mukuruweini roads and further admitted that he was paid Kshs.4,700,000/- for works carried out by the respondent;

34. Lastly, on the issue of consideration, the respondent's claim was that appellant never paid him and sued him together with the associated companies for a sum of Kshs.5,294,853/-; the court record depicts the appellant as an untruthful witness; he admitted in his testimony that he owed the respondent some money which he claimed to have paid the respondent a sum of Kshs.2 Million but failed to provide any proof of payment; as for his evidence on the RTGS for Kshs.2,900,000/- he stated that the payment for a failed land transaction between the appellant and the respondent; and that the transaction was then cancelled by the respondent; there was also mention of another land transaction whereby another RTGS was issued for Kshs.495,000/- which the appellant also claimed that it was also cancelled;

35. This evidence on the issuance of the RTGS for land transactions was never included in the appellant's witness statement nor did he provide any details of the title deed numbers and the alleged agreements; and this court finds that this evidence was an afterthought as found by the trial court;

36. With no plausible evidence to rebut the reason why the RTGS's were dishonoured

37. this court is satisfied that this is the only amount that is ascertainable as being due and owing to the respondent is in the sum of Kshs,3,395,000/-;

38. This court is satisfied that the respondent proved his case on a balance of probabilities; in that there was proof that there was an intention by the parties to form legal relations; that the subject matter and consideration was discernable from the evidence; and this court finds no reason to interfere with the trial courts findings that there was a verbal agreement which the respondent duly performed but was not paid;

39. This ground of appeal is found lacking in merit and it is hereby disallowed.

FINDINGS & DETERMINATION

40. From the foregoing reasons this court makes the following findings and determinations;

- (i) The appeal is found to be competent despite there being no decree attached to the Record of Appeal;
- (ii) This court will overlook the issue on whether the appellants counsel is properly on record;
- (iii) The respondent is found to have proved his case to the desired threshold;
- (iv) The appeal is found lacking in merit and it is hereby dismissed; the judgment of the trial court is hereby affirmed;
- (v) The appellant shall bear the costs of the appeal.

Orders Accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 4th day of February, 2021.

HON.A.MSHILA

JUDGE