



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 39 OF 2019

FREDRICK OWINO T/A COOL & SMARTECH AGENCIES.....APPELLANT

VERSUS

THE BOARD OF MANAGEMENT KAMURIAI SEC. SCHOOL.....RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. King'ori, C.M in Bungoma C.M.C.C No. 320/2015 delivered on 3rd May, 2019)

JUDGEMENT

In his amended plaint dated 12th August, 2015, the plaintiff (now appellant) claimed against the respondent; payment of Kshs 450, 000/= being money owed to the plaintiff by the defendant for goods supplied and or services rendered, Kshs 1,000 bank charges on cheques presented and returned unpaid, interest and costs of the suit.

The facts giving rise to the suit were that on the 3rd December, 2014 and 13th December, 2014, the appellant at the respondent's request supplied goods and or offered services worth Kshs 450,000/= at the respondent's request following an invitation to tender by the respondent in which the appellant was awarded.

He stated that the respondent issued 2 post-dated cheques in settlement of the debt which when he presented to the bank for payment were returned unpaid for the reason that the account was frozen.

Fredrick Joel Owino testified as PW-1. He stated that the respondent advertised a tender where he applied and awarded a tender to supply 6 desk top computers which he delivered on 3/12/2014 and received by the Principal himself. That on the same day, he was requested to repair existing computers and he charged Kshs 150,000/=.

That he was informed by the said principal that the respondent did not have funds to settle his costs and issued him 2 postdated cheques drawn against the respondent's bank account which when he banked were unpaid, precipitating the suit.

PW2, John Masinde Wanjala stated that he worked at Family Bank Bungoma Branch as a manager. That the appellant deposited a cheque on 10/2/2015 which was not cleared.

PW3, Brian Okoth worked as Branch Manager Ugunja and he stated that the appellant's cheque was not paid because the account had been frozen.

The respondent filed their statement of defence denying the appellants claim.

DW1 John Purege denied an award of any tender to the appellant and deemed the documents in support of his claim as forgeries. He gave an elaborate procedure before and after an award of tender. He denied the respondent ever receiving the goods allegedly supplied by the appellant.

DW-2 Clement Oruka was the security man at the respondent's gate. He denied ever seeing the appellant enter the school gate.

The court in its judgement dismissed the appellants claim provoking the instant appeal which is premised on the following grounds of appeal.

1. That the learned trial magistrate erred in law and in fact by considering extraneous matters which had no bearing to the suit and as such arriving at a wrong decision in law.

2. *That the learned trial magistrate erred in law and in fact in failing to consider the evidence of the appellant.*
3. *That the learned trial magistrate erred in law and in fact in failing to appreciate that indeed goods were supplied to the school and services rendered and payment made by cheque only that the cheques were dishonoured for lack of sufficient funds.*
4. *That the learned trial magistrate erred in law and in fact by giving contradicting opinion in his decision.*
5. *That the learned trial magistrate erred in law and in fact by alluding that the principal of the school had no authority to receive goods while there was no evidence to that effect.*
6. *That the learned trial magistrate erred in law and in fact in relying on hearsay evidence.*
7. *That the learned trial magistrate erred in law and in fact in relying on the gatekeepers register when the said gate keeper admitted that the said register was not consistent, complete and verifiable.*
8. *That the learned trial magistrate erred in law and in fact in alluding that there was collusion between the plaintiff and the school principal when there was no evidence to that effect.*

The appeal was disposed of by way of written submissions. The appellant through Mr. Ndinya Omolo and Mr. Odongo learned counsel for the respondent filed their respective submissions.

The appellant submits that the evidence on record shows that the appellant's conduct in the transaction was for the benefit of the school and not for the outgoing principal or himself. The appellant clearly proved he supplied computers to the respondent by production of delivery notes and the invoices.

He submits that the principal is an authority in the institution and the dealing with him by the appellant does not in any way flaunt the procedure of payment.

That the appellant visited the school several times and he was not required to sign at the gate and the fact having not been raised in the pleadings, the learned trial magistrate considered extraneous factors. Further that on the 3/12/2014 when the computers were supplied, there was no one at the gate.

Counsel submits that the appellant demonstrated he supplied goods to the school and paid for except that the cheques were dishonoured. That the cheque could not be paid because the bank could not reach the principal while the latter cheque could not be paid because the account had been frozen.

That by the time the goods were supplied on 3/12/2014 and 13/12/2014, DW-1 had not taken over from the then principal and he cannot therefore be a competent witness on the happenings of the dates when the goods were supplied as well as on the list of creditors since he was not the maker.

Counsel finally submits that since no complaint has been raised by the respondent against the appellant and Mr. Masika regarding the demand for payment, the assertion that the 2 individuals conspired to defraud the school does not hold water and that by existence of LPO and a tender, it is sufficient to say there existed a contract.

The respondent on its part raised the following issues counsel deemed central to the appeal.

1. **Duty of the trial court.**
2. **Whether there was privity of contract between the appellant and the respondent.**
3. **Whether the court was persuaded by evidence or extraneous circumstances.**

On the second issue, counsel submits that the respondent is bound by the Public Procurement and Asset disposal Act, 2015 and therefore since it is a public entity, any supply of goods or provision of services to it without following the laid down procedure is a nullity *ab initio*. Reliance has been placed on the case of *Pakatewa Investment Company Limited Vs Municipal Council of Malindi (2016) eKLR* .

Citing the cases of *Scott vs Brown (1982) 2QB 724* and *Macfoy Vs United Africa Company Limited (1961) 3 ALLER 1169*, Counsel submits that no court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of an illegal transaction if the illegality is brought to the notice of the court.

Counsel submits that the transaction was a nullity because; the appellant had neither applied nor invited to appear before the procurement committee of the respondent, the appellant was not among the pre-qualified suppliers of the respondent and that the appellant did not supply the goods or services as the gatekeepers book, stores records and the visitors book did not have any entry showing entry of the appellants or his agents.

Counsel further submits that the alleged transaction falls outside the purview of the law of Contract Act for the reason that there was no written contract and therefore the trial magistrate was right in his conclusion. In support of this proposition, he cites the case of *Tana-Athi Water Services Board Vs Pasha Enterprises Ltd (2020)eKLR*. He submits therefore that the oral representation by the principal does not bind

the respondent and thus illegal. See *Kenya Airways Ltd Vs Satwant Singh Flora (2013)eKLR* and *Heptulla Vs Noormohammed (1984)eKLR*.

It is further submitted that while it is true the cheques were issued at the respondent's instance, the cheques were signed by persons without capacity since at the time they were presented for payment, the signatories to the bank had been changed and the authority of the signatories had not been sought.

On the 3rd issue, it is submitted that the court merely analyzed the evidence relating to whether the appellant had proved that he had followed the right procurement process and on the issue as to whether the goods were actually supplied, the trial court merely analyzed the evidence on record and the finding thereon is well grounded.

After a careful scrutiny of the record and the submissions herein, the court is of the view that the following issues will dispose of the matter;

- 1. Whether there was supply of goods and services rendered by the appellant.**
- 2. Whether there was a contract between the parties worth enforcement.**
- 3. Whether the appellant is entitled to the payment of the sum of money sought.**

While addressing the above issues, the court is alive to the duty bestowed upon it being a first appellate court. The duty was stated in the case of *Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, thus;

“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”

Whether there was supply of goods and services rendered by the appellant.

In trying to establish that he actually supplied goods and rendered services to the respondent, the appellant produced a local purchase order (LPO) prepared by the respondent's bursar and approved by the Principal Masika Isaac, delivery notes and the invoices duly prepared and received by the respondent. From these documents produced the respondent states that the same were a forgery, the appellant was not awarded any tender for the supply of the goods he allegedly supplied.

The other contention is that the principal who received the goods did not have the authority to receive since the proper person was the store keeper. Reliance was also placed on the failure by the appellant or his agent to sign on the visitors' books at the gate and at the principal's office demonstrates that the goods were not delivered.

The court has had chance to look at the LPO's dated 1/12/2014 and 3/12/2014 prepared by the school bursar. This is the genesis to the impugned transaction. I also note that the allegation by the respondent that these documents were a forgery does not hold water. Neither the maker nor the said Masika Isaac who allegedly prepared and approved the documents were ever called to confirm whether they prepared the document or not.

In arriving at the conclusion, the court is guided by the provisions of **Section 107(1)** of the *Evidence Act*, which provides;

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.

In the same vein, **Sections 109** and **112** of the *Evidence Act* provide;

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

Whether there was a contract between the parties worth enforcement.

It is no doubt that the respondent's acquisition of goods and services is a process governed by the provision of the Public Procurement and Asset disposal Act, 2015. It is clear that the respondent was not awarded a tender and therefore he was not in the panel of pre-qualified suppliers.

The respondent contends that even the letter allegedly awarding the tender to the appellant was forgery is baseless. The respondent's duty under Sections 107, 109 and 112 of the Evidence Act as above has not been discharged.

It is elementary that a contract is formed when the offer is accepted and acted upon and valuable consideration given. Indeed, **Section 3(1)** of the *Sale of Goods Act, Chapter 16* recognizes that:

"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."

In **P.S. Atiyah's An Introduction to the Law of Contract, (3rd Edition)**, it is propounded;

"An offer is, in effect, a promise by the offeror to do or abstain from doing something, provided that the offeree will accept the offer and pay or promise to pay the 'price' of the offer. The price, of course, need not be a monetary one. In fact, in bilateral contracts, ... the mere promise of payment of the price suffices to conclude the contract..."

Thus, having acted on the LPO and supplied valuable consideration in the form of goods that were duly delivered to the respondent, there can be no doubt that a valid and binding contract was thus created.

Even if this be the case, there was an express representation by the respondent through the issue of the LPO that they indeed wanted the goods which were actually acted upon and supplied. It matters not that whoever received the goods was not authorized to.

The doctrine of equitable estoppel would work against the respondent as was discussed in **Nurdin Bandali vs. Lombank [1963] EA 304**, that:

"The precise limits of an equitable estoppel are however by no means clear. It is clear however that before it can arise one party may have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it be acted upon and the other party in the belief of the truth of the representation acted upon it."

In the circumstances, it is this court's finding that there was a valid contract worth enforcement.

Whether the appellant is entitled to the payment of the sum of money sought.

Upon supply of the goods, the appellant was issued with 2 postdated cheques which ultimately bounced. The respondent contends these cheques were a forgery. No evidence however was adduced in this regard.

Section 47(1) (a) of the Bills of Exchange Act provides:

"A bill is dishonoured by non-payment:- (a) when it is duly presented for payment and payment is refused or cannot be obtained.

Sub-section (2) thereof provides:-

"Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder."

The case of **Hassanali Issa & Co v Jeraj Produce Store [1967] 1 EA 555**, while discussing the issue of a bounced cheque, the Court of Appeal for East Africa held;

"The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled."

This position was affirmed in **Paresh Bhimsi Bhatia –vs- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported)**;

"A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken.

In the circumstances of this case, the respondent issued the cheques in satisfaction of the debt. It did not prove that the cheques were a forgery or that there are circumstances that disentitle the respondent to payment upon presentation. In the circumstances, I find that the appellant is entitled to judgement based on the dishonoured cheques.

The appeal is hereby allowed with costs to the appellant. For completeness and clarity, the appellant is awarded the sum of Kshs 451,000/= together with interest from the 3rd May, 2019 until payment in full. Each party to bear its own costs.

DATED AT BUNGOMA THIS 9TH DAY OF NOVEMBER, 2021

S.N. RIECHI

JUDGE