



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 82 OF 2020

GAB INTERNATIONAL CONSTRUCTION CO. LTD.....APPELLANT

VERSUS

SAYTO BUILDING CONTRACTORS &

TRANSPORTATION CO. LTD.....RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. C.A.S. Mutai SPM in Bungoma CMCC No. 156/2018 delivered on 6/3/2020)

JUDGEMENT

By a plaint dated 6th April, 2018, the respondent (plaintiff in the subordinate court) sued the appellant for the sum of Kshs 8, 449, 400/= due and owing on an oral contract wherein the respondent leased out his machines and lorry to the appellant.

The appellant filed its defence and counterclaim denying the claim and blamed the respondent for breach of contract and therefore sought damages for the said breach.

In support of its case, the respondent called 2 witnesses.

PW1 Joel Onsare Gesura, a director of the plaintiff stated that they entered into an oral agreement with the respondent for lease of one water Boozer, 2 tippers and a grader for Kshs 12,000/= per day for the water Boozer, Kshs 14,000/= per day for each tipper Lorry and Kshs 4,000/= per hour for the Grader.

That the machines began working from July, 2016 up to 11th March, 2018 and accumulated a debt of Kshs 17, 763, 400/= out of which the defendant had paid Kshs 9, 314,000/= leaving a balance of Kshs 8, 449, 400/= which the appellants had refused to pay.

PW2 Juma Kibet Kisewa stated that he worked with the respondent as a driver and manager of the vehicles leased to the appellant. He kept records for the vehicles while the appellant kept records for the grader.

The appellant on their part called 3 witnesses who testified as follows;

DW I, Abdi Fatah Ali Adan, a director of the appellant stated that they entered into an oral agreement with the respondent through Mr. Joel Gesuka for the hire of 2 tipper lorries for the sum of Kshs 14, 000/= per day for each Lorry, water Boozer for Kshs 8,000/= per day and a Grader for Kshs 4, 000/= per hour.

He stated that the respondent's director Mr Gesuka disputed the hours worked by the machines and carted away the records from the site which had not been returned and the company therefore incurred losses as other suppliers removed their machines from the site and had to mobilize other machines.

DW II Anisa Abdi Ali stated that she worked with the appellant as a secretary and confirmed that she prepared and kept records which were taken away by the said Joel Gesuka.

DW III Mohamed Welle Abdi stated that he worked with the appellant as the site manager. He confirmed that he instructed DW-II to reconcile records with Mr. Gesuka before they received instructions from DW-I not to give out any details. He stated that the said Mr. Gesuka took away the file containing records of how the trucks had worked.

By a judgement of that court, the trial court found in favour of the respondent in the sum of Kshs 8, 449, 400/= together with costs

provoking the instant appeal which is anchored on the following grounds

- 1. That the learned magistrate erred law and fact in his judgement by failing to consider the totality of evidence adduced by the appellant.**
- 2. That the learned magistrate erred in law and fact in his judgement by relying on evidence that was illegally obtained.**
- 3. That the learned magistrate erred in law and fact in his judgement by relying on evidence that was inadmissible.**
- 4. That the learned magistrate erred in law and fact by relying on copies of unsigned/ and or unstamped documents as adduced by the respondent.**
- 5. That the learned magistrate erred in law and fact by entertaining the respondent's suit yet the deponent of the verifying affidavit was not duly authorized by the respondent.**

By directions of this court, the appeal was disposed by way of written submissions.

The appellant on the first ground submits that the trial magistrate failed to consider the fact that the appellant had a VAT liability of Kshs 1.3 M from the transaction, that the learned trial magistrate adopted the evidence of PW 1 ignoring that of DW2 without giving any reasons yet only PW1 and DW2 gave the exact terms of the oral agreement, that the trial magistrate ignored the appellant's counterclaim and finally that the trial magistrate ignored the appellant's statement of defence.

On the second ground, it is submitted that the evidence adduced by the respondent (Pexh III) was obtained after PW1 stormed into the appellant's offices and forcefully carted away the documents, That the actions violate the appellant's rights under Article 31 of the Constitution. Counsel relies on the authority of *Njonjo Mue & Another Vs Chairperson of Independent Electoral and Boundaries Commission & 3 Others (2017)eKLR*.

On the third ground, counsel submits that Pexh 7, 8, 9 and 10 were inadmissible for failing to meet the test under Sections 65(1), 66 and 68 of the Evidence Act yet the learned trial magistrate heavily relied on them.

On the fourth ground, the appellant submits that the deponent of the verifying affidavit neither averred that he was duly authorized by the respondent to swear the affidavit on its behalf nor resolutions filed showing the respondent had authorized DW1 to swear affidavit on its behalf. Reliance has been placed in the cases of *Makupa Transit Shade Co. Ltd & another Vs Kenya Ports Authority & another (2015)eKLR*, *Mavuno Industries Limited & 2 Others Vs Keroche Industries Ltd (2012)eKLR*.

On the respondent's part, it is submitted on the first ground that the appellant failed to produce evidence on who was to pay the VAT. It submits that since the agreement was oral, the court was entitled to choose who to belief and in this case, the respondent's case was consistent and supported by documents.

On the second ground, counsel submits that the documents were carried in an open and transparent manner and left at Bumula Police Station where PW1 was allowed to make copies and return to the Police Station. Counsel relies in the case of *Nicholas Randa Owano Ombija Vs Judges and Magistrates Vetting Board (2015)eKLR*,

On the third ground, it is submitted that the appellant did not object to the production of Pexh 7, 8, 9 and 10 during the hearing despite being served with a notice to produce and in any event, DW2 confirmed the authenticity of the documents. The cases of *Edward Okoth Okeyo Vs South Nyanza Sugar Co. Ltd (2018)eKLR*, *Twahaer Abdulkarim Mohamed vs Independent Electoral & Boundaries Commission (IEBC) & 2 Others (2014)eKLR* and *Wachira vs Ndanjeru (1987)KLR 252* have been cited in support.

On the fourth ground, the respondent submits that the appellant entered into an oral agreement with the respondent through Joel Gesuka and continued to engage the said Joel Gesuka without a written authority. It even paid the said Joel by cash, met him in Nairobi and Bumula all along without written authority.

Counsel submits that the plaint was filed together with the resolutions authorizing Joel Gesuka to instruct a lawyer and commence legal proceedings for recovery of the money claimed.

This is a first appeal and as such it is the duty of the court to subject the whole evidence to fresh scrutiny with a view of arriving at its own conclusion and of course giving allowance that it did not hear or see the witnesses. See *Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where it was held;-

“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”

Upon scrutiny of the record and the submissions. This court is inclined to frame the issues for determination thus; whether the respondent proved his case to the required legal standard.

It is not in dispute that the parties entered into an oral agreement where the appellant leased machinery from the respondent for an agreed sum of money which was paid in installments. There now is a dispute regarding the exact money the appellant owes the respondent. It is not

entirely unlawful or illegal for parties to agree orally. Section 3(1) of the Law of Contract Act does not make all contracts void and unenforceable if they are not reduced into writing.

The court is of the view that oral agreements supported by credible evidence can be and are enforceable. All what the law requires is that certain contracts be in writing as most people either knowingly or otherwise transact their businesses upon oral agreements.

In the instant case, both parties agree on this position. That is why the appellant paid the respondent some money even in the absence of a contract setting out the terms.

The appellant has mounted challenge on the trial court's finding for ignoring the totality of the evidence adduced and believing the evidence of PW1 as opposed to that of DW1. It is trite law that it is the trial court that heard and saw the witnesses testify. The appellate court is not allowed to interfere with the trial court's finding on fact unless it is satisfied that there was no basis upon which the court could make such a finding of fact.

It is also trite law that under Section 107 to 109 of the Evidence Act, he who alleges an existence of a fact bears the duty of proving that fact. In the circumstances of this appeal, the appellant asserts that there are Value Added tax (VAT) obligations it bore as a result of the transaction. There is no evidence in support of this fact yet it was its duty to bring to the attention of the court. The court finds this contention by the appellant untenable for want of proof.

On the ground that the evidence adduced by the respondent was illegally obtained, PW1 stated that when he could not conclude reconciliation of records with DW II, he took away the box file which contained the documents, made copies and left them at Bumula Police Station for onward transmission to the appellant. The said documents were produced as Pexh 7, 8, 9 and 10. There was no objection from appellant's counsel when the same were produced and as such the appellant is estopped from challenging the authenticity/veracity of these documents on appeal the issue not having been raised at the trial court.

Indeed DWII confirmed in her evidence that;

It is me who prepared these documents. The plaintiff further list of documents Exhibit 7, 8 and 9. This is similar with what was in our file which had been taken by Mr. Gesuka Joel.

It is thus the finding of the court that the evidence tendered by the respondent and indeed relied on by the court was not illegally obtained. The authorities cited by the appellant in this regard are not applicable to the circumstances of this case.

On the ground that the deponent of the verifying affidavit did have not authority, the record shows that a meeting of the respondent's directors was held on 28/3/2018 and resolved that Mr. Joel Gesuka does instruct a lawyer for purposes of instituting this suit.

Suits filed by corporations are governed by Order 4 Rule 1 (4) of the Civil Procedure Rules which states;

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

Rule 2 only requires one to verify the correctness of an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

Having analyzed the law as above and properly scrutinized the record, the court is satisfied that the verifying affidavit as filed meets the threshold required by law. There is no merit in the appellants' argument on this ground.

Having considered the appeal and submissions, I find that the judgement of the trial magistrate took into account all the evidence adduced. I find no merit in the appeal which is hereby dismissed with costs to the respondent.

DATED AT BUNGOMA THIS 9TH DAY OF NOVEMBER, 2021

S.N. RIECHI

JUDGE