



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 32 OF 2016

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

ALBAYAN LOGISTICS LIMITED..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J.M. Njoroge, SPM dated 23rd May 2016 at the Chief Magistrates Court at Kisii in Civil Case No. 137of 2010)

JUDGMENT

1. In this appeal, the appellant has challenged the judgment of Kshs. 2,470,800/- entered against it. The appellant was the defendant before the subordinate court while the respondent was the plaintiff. I shall refer to the parties in their capacities before the trial court for ease of reference unless the context otherwise admits.
2. The plaintiff's case was that the defendant contracted it to offer clearing and forwarding services for the financial year 2007/2008. The plaintiff claimed that it rendered services in accordance with the terms of contract but the defendant failed to pay it Kshs 2,470,800/- which is claimed in the plaint.
3. The defendant denied the plaintiff's claim. In its amended statement of defence, it denied that it exported Sugar to any company either in South Sudan or to any other country which would have necessitated clearing and forwarding services. It further stated that a company, Pan-Yac Trading Company Limited ("Pan-Yac"), incorporated in South Sudan purchased sugar directly from its factory and that the sugar was destined for export to South Sudan through Lokichoggio and that it is the said Company that instructed the plaintiff to clear the sugar and for that purpose it generated export documents namely Customs Form 63 which showed that Pan-Yac as the consignee and the defendant as the consignor. It further stated that the documents were falsely and fraudulently generated invoices to claim payment for services it never tendered.
4. In addition, the defendant pleaded that the plaintiff's claim was fraudulent and an attempt to obtain money from the defendant through false pretence. It contended that the invoices and the customs declaration forms relied upon were false and fraudulent and that the defendant did not issue any formal or written agreement for services from the plaintiff.
5. When the matter was set down for hearing, the plaintiff called its Head of Operations, Kennedy Olong (PW 1). After the plaintiff closed its case, the matter was set down for the defence hearing but neither the defendant nor its advocate appeared hence the court closed the defence case. Later on, the trial court allowed the defendant to defend the case. After several adjournments, occasioned by both parties, the trial magistrate set down the defence case for hearing the last time. When the defendant failed to attend court, the defence case was closed.
6. On the basis of the testimony of PW 1 and the documents produced, the trial court entered a judgement against the defendant for the amount claimed. It is this judgement that has now precipitated this appeal. In summary the appeal, set out in the memorandum of appeal dated 13th June 2016, is based on the following grounds summarized as follows; that the trial magistrate failed to appreciate that C63 forms were prepared by the defendant, there was no evidence that the appellant instructed or engaged the respondent, that trial court made an error in finding that there was a contractual relationship between the parties and that the trial court failed to appreciate statutory laws governing public procurement by public entities.
7. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see *Selle and Another v Associated Motor Boat Company Ltd* [1968] EA 123).
8. In summary, I find that the issues raised in this appeal are two-fold. First, whether there was a contractual relationship between parties. Second, whether the plaintiff proved its case on a balance of probabilities. In order to address these issues, it is important to recall that the defendant did not call any witness to advance its case. The effect of this was succinctly stated by Odunga J., in *Shaneebal Limited v County*

Government of Machakos MKS HCCC No. 25 of 2016 [2018] eKLR, as follows:

*Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite law that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.*

9. The fact that the defendant did not call any evidence does not, for that reason alone, entitle the plaintiff to judgment. The plaintiff still has to prove its case on the balance of probabilities. In **Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau NRB CA Civil Appeal No. 87 of 2014 [2016] eKLR**, the Court of Appeal cited with approval the decision of the Supreme Court of Uganda in **Departed Asians Property Custodian Board v Issa Bukenya t/a New Mars Ware House, CA No 26 of 1992** where Platt, JSC stated thus:

I should, however, draw attention to the duty of the Court when conducting ex-parte proceedings. If allegations are made in the plaint so that the facts alleged support the prayers asked for, and when the prayers called for are legally justified, then all that is necessary is for the trial Court to hear evidence which proves the facts and hear submissions of law that the remedies are justified ... It must be understood that the evidence led is such, that without contradiction by the Defendant, it is sufficient to prove the claim. It is not necessary that the facts alleged should be queried, but the facts alleged must be full and accurate enough to support the plaint. A Judge may assist the Plaintiff in pointing out that the evidence so far adduced is not sufficiently full and accurate, and that other evidence, documentary or oral, may be needed to support the claim. What cannot be done is that remedies are granted as prayed, which are not supported by the pleadings... In this case the learned Judge should have observed that the pleadings did not support the remedies wanted...

10. Although PW 1's testimony was unchallenged, he was cross-examined. He produced in evidence a letter dated 2nd October 2007 from the defendant informing the plaintiff that it had been prequalified for the provision of clearing and forwarding services for the year 2007/2008. He testified that the defendant was exporting sugar to Southern Sudan and it prepared the export documents including C63 forms. He stated that the plaintiff and defendant agreed on a charge Kshs 15,000/- per truck and that the defendant was furnished invoices. On cross examination, PW 1 took the view that the letter of prequalification served as contract. He also told court that though he was not involved in the prequalification process and that the invoices sent to the defendant were under his instructions. He also testified that C63 forms are transmitted electronically to Kenya Revenue Authority (KRA) and approved by KRA entering a number on the form which confirmed that the documents were authentic.

11. A contract may be express or implied. In this case the documented relationship between the plaintiff and the defendant is the letter dated 22nd October 2007 where the plaintiff was qualified to provide services on the basis of prequalification, the said letter read as follows:

We are pleased to inform you that you have been Prequalified for the Provision of Clearing and Forwarding Services for Sonysugar Company Limited for Imports and Exports during the Financial year 2007/2008.

You are required to conduct Head of procurement for more details of the services and please acknowledge receipt of the Notification in writing.

12. Although I agree that the letter of prequalification was not of itself a contract, it merely provided a basis for a further relationship. As I understand, the plaintiff's case was that the contract for services was on the basis of the instructions it received as evidenced by Customs declaration forms C63 which were prepared for purposes of exporting sugar. In this case, the plaintiff produced proforma invoices showing that the defendant sold sugar to Pan Yac and that the sugar was duly exported as evidenced by the Form C63 which shows that the defendant was the consignor and the plaintiff the clearing agent. All these documents were produced without objection and confirmed that indeed the plaintiff acted for the defendant by offering clearing and forwarding services.

13. As the appellant did not counter the evidence or indeed prove the fraud or falsity of the documents in issue, its defence remained unsubstantiated. As consequence I find and hold that the plaintiff proved its case against the defendant on the balance of probabilities.

14. I dismiss the appeal with costs of Kshs. 50,000/-.

DATED and DELIVERED at KISII this 13th day of MARCH 2019.

D.S. MAJANJA

JUDGE

Mr Odero instructed by Okong'o Wandago and Company Advocates for the appellant.

Mr Nyantika instructed by Boinett and Bett Company Advocates for the respondent.