



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 14 OF 2018

BEDROCK HOLDINGS LIMITEDAPPELLANT

VERSUS

RALLYTEC MOTORS LIMITED.....RESPONDENT

[Being an appeal from the Judgment and decree of the Honourable A. ODAWO Resident Magistrate delivered on 14th February 2018]

RULING

By a Judgment dated 14th February 2018, the learned trial magistrate dismissed both the Plaintiff's suit and the Defendant's Counter-Claim. The court ordered each party to bear their own costs.

1. The Plaintiff had claimed Kshs 151,614/= in respect of outstanding payments for services it had rendered to the Defendant.
2. The Plaintiff had also claimed interest at 17% per annum from August 2010, when its services were terminated.
3. In its Defence, the Defendant denied ever having received any services from the Plaintiff.
4. The Defendant then lodged a Counter-Claim for Kshs 492,000/=, being the value of the loss and damage it sustained due to the negligence of the Plaintiff's servants/agents or employees.
5. The Defendant's further claim was for Interest at 17% per annum from November 2010.
6. The Grounds of Appeal were as follows;

“1. The Learned trial Magistrate erred in law in her evaluation of the evidence presented, thereby wrongly dismissing the Plaintiff's case when it had been specifically pleaded and proved.

2. The Learned trial Magistrate erred in law by failing to appreciate and apply the well known principles of law as regards the burden of proof thus arriving at a decision contrary to law.

3. The Learned trial Magistrate erred in law by failing to properly evaluate the evidence properly adduced before her thereby arriving at a wrong decision.

4. The Ruling is contrary to provision of Order 21 of the Civil Procedure Rules and provisions Of the Evidence Act.”

7. In determining the appeal, this Court will re-evaluate all the evidence on record, and draw its own conclusions therefrom.
8. I will also re-evaluate the judgment of the trial court, to ascertain if it was properly founded upon the evidence provided and the applicable law.
9. During the trial, the Plaintiff called two witnesses, whilst the Defendant did not call any witnesses.
10. **PW1, MAURICE OWIRA OMOLLO**, worked for the Plaintiff, as an Accountant. His responsibilities included Billing clients and the reconciliation of Client accounts.
11. He testified that the Defendant was a client of the Plaintiff since the year 2006. He said that the Plaintiff offered, to the Defendant;

“Security services and alarming service at his shop and residence.”

12. **PW1** told the trial court that it is the Defendant who terminated the “guarding services” in August 2010.

13. However, the Alarm Services were retained at the Defendant’s residence until an unspecified date.

14. **PW1** said that the Defendant run up a Bill for Kshs 151,614/90 for

“previous security services rendered.”

15. He explained that when the Plaintiff demanded payment of that sum, the Defendant responded by alleging that there had been a theft at “his workshop”, for which he blamed the Plaintiff.

16. The witness said that the Defendant’s allegation of theft was curious as no theft had been reported to either the Police or to the Plaintiff until after the Plaintiff had demanded payment of the bill, in September 2010.

17. In the circumstances, the witness believed that the Defendant was truly indebted to the Plaintiff in the sum of Kshs 151,614/90, together with Interest at

“Commercial rate of 17% from August 2010 until date of payment in full.”

18. The witness also asked the court to award to the Plaintiff, the costs of the suit.

19. In support of the claim, the Plaintiff produced a letter dated 5th October 2007, which had been signed by its Director, William O. Ololo.

20. That was a letter forwarding to the Defendant, “a revised contract agreement”, which had been signed by the Plaintiff. The Plaintiff asked the Defendant to peruse the agreement, and to execute it if it was agreeable.

21. **PW2, WILLIAM ONYANGO OLOLO**, was the **CEO** of the Plaintiff. He made it clear that the Defendant never returned the Agreement which had been sent to them by the Plaintiff.

22. Therefore, it is clear that there was no signed contract between the parties.

23. Nonetheless, the Plaintiff said that they provided to the Defendant, security guards and an Alarm System.

24. **PW2** testified that the fact that the Plaintiff provided services and that the Defendant had settled some invoices raised by the Plaintiff, was reflected in the correspondence exchanged between the parties.

25. It is the law that whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he has asserted, must prove that those facts exist. The Appellant recognizes that legal position, as spelt out at **Section 107 (1)** of the **Evidence Act**.

26. It is important to note that the burden of proof cannot be deemed to have been discharged simply because the party against whom a claim has been made, did not controvert the evidence tendered by the Plaintiff.

27. A Plaintiff may adduce uncontroverted evidence, but if such evidence is not sufficient to prove the facts required to find the Defendant liable, the court would still be entitled to dismiss the claim.

28. In this case the Defendant did not adduce any evidence. It therefore follows that the Counter-Claim was not proved.

29. Secondly, the failure by the Defendant to call any witnesses meant that the evidence tendered by the Plaintiff was not controverted.

30. The **Civil Procedure Rules** now require the Plaintiff to file his Witness Statements and his Documentary Evidence, together with the Plaintiff.

31. Similarly, when the Defendant was filing his Defence, he is required to file his Witness Statements and his Documentary Evidence.

32. However, the fact that such documents had been filed alongside the respective pleadings does not imply that the Witness Statements and the Documents had become evidence.

33. The Witness Statements only become evidence after the authors thereof had been sworn before the trial court, and had then adopted their respective Statements as their evidence.

34. It is only when the witness has adopted his Statement on oath, and he is available to be cross-examined by the other party that fairness can be attained by the court, in the discharge of its mandate, which requires it to give a fair hearing to all parties, before making a

determination.

35. In the circumstances, when a person who signed a Witness Statement fails to attend court, during the hearing of the case, his said statement cannot be deemed as evidence.

36. For that reason, the Appellant was not entitled to make reference to the Witness Statement signed by Noorez Shamji, who was never called to testify in court.

37. If the court were to permit reference to Witness Statements signed by persons who did not present themselves as witnesses during the trial, the danger would be that the evidence of such persons could never be tested for veracity, as the said persons would not be available for cross-examination.

38. In this case, the Plaintiff specifically produced a document dated 1st October 2007, describing it as the contract between the two parties.

39. As the Defendant did not sign that document, it cannot be said to have accepted the terms set out in it.

40. Even the Plaintiff had asked the Defendant to sign the said document if the terms therein were agreeable. Surely, when the Defendant failed to sign the document, the Plaintiff must be deemed to have understood that to signify that the Defendant had not agreed to some or all the terms of that document.

41. I therefore find that the document dated 1st October 2007 did not constitute the contract between the parties.

42. However, I also find that there was contractual relationship between the parties. I so find because the Plaintiff exhibited documents which show that the Defendant's workshop was guarded by the Plaintiff's guards.

43. The letter dated 9th February 2007 was written by the Plaintiff to the Defendant, making reference to the charges per guard.

44. By a letter dated 1st October 2007, the Defendant gave specific instructions which the Plaintiff's guards were to comply with at "*Rallytec Motors Limited.*"

45. That letter does not mention either Alarms or any residence.

46. Even when there were allegations of theft at the Defendant's premises, the correspondence exchanged between the parties refers to the Defendant's premises.

47. Based on that correspondence, I find that the Plaintiff provided guard services at the Defendant's premises.

48. The Defendant had a contractual obligation to pay for the said guard services.

49. This case is distinguishable from the case of **KUKAL PROPERTIES DEVELOPMENT LIMITED Vs TAFAZZAL H. MALOO & 3 OTHERS, CIVIL APPEAL NO. 155 OF 1992**, as the law espoused in that case was in relation to the disposition of an interest in land.

50. Pursuant to **Section 3 (3)** of the **Law of Contracts Act**, suits brought upon contracts for the disposition of an interest in land, had to be in writing, signed by all the parties thereto.

51. That statutory provision expressly required all the terms of the contract to be agreed in one document.

52. In the case before me, the contract was not in relation to any disposition of an interest in land. Therefore, the provisions of **Section 3 (3)** of the **Law of Contract Act** were not applicable.

53. The case of **LEO INVESTMENT LIMITED Vs ESTUARINE ESTATE LIMITED, ELC CIVIL SUIT NO. 2067 OF 2007** was also in relation to a contract for the disposition of land.

54. The court made it clear that;

".... it would be an affront to the unequivocal text of the statute and to the well-established principles of statutory interpretation to hold that a suit seeking to enforce an unsigned contract for the disposition of an interest in land is tenable within the existing statutory framework and prevailing jurisprudence."

55. The Learned Judge held that an Agreement for sale of land was unenforceable on the ground that it had not been signed by the Defendant.

56. I reiterate that because the case before me does not involve the disposition of any interest in land, the case is distinguishable from the authority cited by the Respondent.

57. I now get to answering the specific issues raised in the appeal.

1) The Plaintiff specifically pleaded that there was a contract between the parties for the period between 2006 and 2010.

No evidence was led to prove such a contract

Therefore the trial court did not err by holding that there was no such valid contract.

2) The learned trial magistrate did not shift the burden of proof to the party who had no such burden. It was the obligation of the Plaintiff to prove its case.

The trial court held, correctly in my view, that the Plaintiff did not prove the contract running between 2006 and 2010.

The trial court further held that, if the contract relied upon was enforceable, the Plaintiff failed to prove that it was renewed after the lapse of the two- year period specified in it.

Once again, I find no error in that finding.

3) The trial court held that there was

“some sort of agreement between them.

The rules on contract that guided the agreement between the parties is what is unclear to the Court.”

58. By my analysis of the evidence adduced, I arrived at the same conclusion.

59. I said that the Defendant should pay for the guard services provided.

60. However, from the evidence tendered by the Plaintiff, wherein there is no distinction about the guard services which had not been settled, I was unable to determine the sum payable, based on the contract.

61. It may have been fairer for the trial court to award a reasonable sum to compensate the Plaintiff.

62. But it was always the responsibility of the Plaintiff to prove its case. Therefore, when the trial court held that the Plaintiff had failed to prove its case, I find that the dismissal of the case was not an error.

63. In the result, the dismissal of the Plaintiff's suit is upheld.

64. However, I find that following the dismissal of the Counter-Claim, the costs thereof should have been awarded to the Plaintiff.

65. Accordingly, I now dismiss the appeal, with costs to the Respondent, save to order that the costs of the Counter-Claim be paid by the Respondent to the Appellant.

DATED, SIGNED and DELIVERED at KISUMU this 3rd day of June 2019

FRED A. OCHIENG

JUDGE