



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 40 OF 2014

CHINA JIANGSU INTERNATIONAL ECONOMIC

TECHNICAL CORPORATION EAST AFRICA CO.....APPELLANT

-VERSUS-

LEWA CONSTRUCTION CO. LTD.....RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate dated 12th February, 2014,

in Nairobi Milimani Commercial Courts Civil Case no. 3286 of 2012

by Hon. S. Atambo, PM).

JUDGMENT

- 1) **Lewa Construction Co. Ltd**, the respondent herein filed an action before the Chief Magistrate's court, Nairobi, against **China Jiangsu International Economic Technical Corporation (E.A) Ltd**, the appellant herein, to be paid a sum of ksh.400,000/= plus interest and costs vide the plaint dated 18th June 2012.
- 2) The respondent took out the motion dated 15th May 2013 in which it applied for summary judgment against the appellant. Hon. S. Atambo, learned Principal Magistrate entered summary judgment as prayed in the aforesaid vide her ruling delivered on 12th February 2014.
- 3) The appellant being aggrieved filed this appeal and put forward the following grounds:
 - i. *The learned magistrate erred in law and in fact in holding that there was a binding contract between the parties.*
 - ii. *The learned magistrate erred in law and in fact in ignoring the appellant's submissions that a certain Mr. Pang did not have power or authority to bind the appellant in any way.*
 - iii. *The learned magistrate erred in law and in fact for ignoring the submissions that there was no evidence that the respondent had executed any works for the appellant and therefore there was no consideration.*
 - iv. *The learned magistrate erred in law and in fact in holding that the subject cheque could only be cancelled or stopped solely on account of fraud, duress or misrepresentation.*
 - v. *The learned magistrate erred in law and in fact and put undue weight on the fact that the subject cheque was not forged, issued under duress or misrepresentation and that it could not be cancelled or stopped in the circumstances.*
 - vi. *The learned magistrate erred in law and in fact in not appreciating that it was fraudulent on the part of the respondent to demand payment for services not rendered.*
 - vii. *The learned magistrate erred in law and in fact in holding that the defense by the appellant did not raise any triable issues.*
 - viii. *The learned magistrate erred in law and in fact in holding that the only valid defense would have been fraud forgery of the subject cheque.*

ix. The learned magistrate erred in law and in fact in allowing the application against judicial precedent in striking out pleadings and allowing summary judgment.

- 4) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions.
- 5) I have re-evaluated the arguments which were presented before the trial court over the motion for summary judgment dated 15th May 2013. I have also considered the rival written submissions together with the authorities cited. The history of this matter started when one David Mwaura Ndungu, the respondent's director visited the construction site of the appellant in quest for work for the respondent. The respondent successfully applied to do excavation work for the appellant at a fee.
- 6) It is stated by the respondent that one **Mr. Pang**, the appellant's site manager accepted the respondent's quotation for excavation services. The respondent said that it immediately assembled men and equipment at the aforesaid site. It is also stated that Mr. Pang was present at all times of execution of the aforesaid excavation and even oversaw execution done to the fullest extent of the appellant company's requirements and instruction.
- 7) The respondent avers that it requested for payment from the appellant for work done and the appellant responded by forwarding cheque number 935384 dated 24.8.2010 for kshs.400,000/=. Upon presentation, the cheque was returned unpaid with remarks **"cancelled in error drawer's confirmation required."**
- 8) A demand for payment was done but the appellant failed to respond to the demand prompting the respondent to file the suit.
- 9) Having set out in brief the history behind this appeal, I now turn my attention to the merits or otherwise of the appeal. Though the appellant put forward a total of nine grounds of appeal, those grounds may be determined together. The main issue is whether or not summary judgement should have been entered in the circumstances of this appeal.
- 10) It is the submission of the appellant that the respondent had failed to provide evidence to show that works were carried out in the appellant's site to merit being paid and to controvert the appellant's defence.
- 11) The respondent also pointed out that the appellant introduced new issues on appeal which were not canvassed before the trial court. The respondent specifically pointed out that the question as to whether one **Mr. Pang** had the capacity or authority to contract on behalf of the appellant was not raised nor argued before the trial court hence it should not be entertained on appeal.
- 12) Having considered the rival submissions, two issues commend themselves for determination. **First**, is whether or not summary judgement should have been entered. **Secondly**, whether or not new issues were raised on appeal and if yes whether they should be entertained. I think the second issue appears to be more of a preliminary issue which should be determined first.
- 13) It is the submission of the respondent that the issue touching on the authority or capacity of Mr. Pang, the alleged appellant's site manager, was not raised before the trial court. However, I have carefully perused the defence filed by the appellant dated 19.12.2012. In **paragraph 3** of the aforesaid **defence**, the appellant has specifically stated that the director who engaged the respondent had no authority nor capacity to make the oral agreement on behalf of the appellant therefore the appellant was not bound.
- 14) The law is very clear that the appellate court may decline to entertain a new point raised on appeal for the first time unless the same was canvassed before the courts below. In the case of **Tanganyika Farmers Association Ltd vs= Unyamwezi Development Corporation Ltd (1960) E.A 620**, the Court of appeal held *inter alia* as follows:
- "although an appellate court has direction to allow an appellant to take a new point on appeal it will not do so if the matter had not been properly pleaded or if all facts bearing on the new point have not been elicited in the court below."**
- 15) It is apparent that the preliminary issue raised by the respondent cannot stand because it was raised and argued for the first time on appeal. This court does not feel obliged to consider it.
- 16) The remaining issue therefore is whether summary judgement should have been entered. It is clear from the ruling of the learned Principal Magistrate that she found and held that there was a binding contract between the parties. She also stated that there was no explanation as to the existence of the dishonoured cheque and why it was not paid. The question which must be answered is whether the appellant's defence raised triable issues.
- 17) It is clear in my mind that one of the issues which needed to be tested in a trial is the question as to whether or not Mr. Pang was a director or a principal officer of the respondent. The other very important issue is whether Mr. Pang had authority or capacity to contract with the appellant on behalf of the respondent. If he did not have the authority or capacity to contract then the appellant would not be bound by the oral agreement. The learned Principal Magistrate therefore erred when she failed to take the aforesaid issues into account. In other words, the appellant's defence raised triable issues which required the suit to go for trial.
- 18) In the end, the appeal is found to be meritorious. The same is allowed. Consequently, the order entering summary judgment is set aside and is substituted with an order dismissing the motion dated 15.5.2012. The suit is reinstated to be heard on its merits by another magistrate of competent jurisdiction other than Hon. S. Atambo. Costs of the appeal is awarded to the appellant.

Dated, Signed and Delivered at Nairobi this 14th day of June, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent