REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 10 OF 2019

ADKINS EQUIPMENT SUPPLIES LTD.....APPELLANT

VERSUS

TODDY CIVIL ENGINEERING LIMITED.....RESPONDENT

JUDGMENT

1. The suit before the trial court below was by the current Appellant and sought the recovery of the sum of Kshs 2,850,000/- on account of building materials, being sand supplied to the Respondent at its request and instance. It was pleaded that the initial arrangement was that the Defendant would pay for delivery on daily basis but the same was changed to weekly basis and paid into the Plaintiff's account at **Equity Bank Ltd** but there was failure to pay as agreed hence the sum in dispute became outstanding.

2. To the said plaint the Defendant filed a statement of defence which besides making a general denial of the existence of a formal agreement, admitted the fact that the Appellant did supply it with sand delivered by motor vehicle **Registration No**. **KCA 685** but for such delivery payment was made in full as per the customs of the trade

3. While the Appellant filed a witness statement and a bundle of documents including delivery note, invoices and a bank statement showing the payments made, the Respondent filed no such documents nor witness statements.

4. On the 23rd October 2018, the parties appeared before the court and recorded a consent to the effect that the documents filed be produced by consent without the need to call the makers. While the record include the expression "respective filed documents" to suggest that both sides had filed documents intended for use at trial as exhibits, the truth is that the Respondent never filed any. The consequence is that only the Appellant's documents and the witness statement were thus availed to Court as evidence. With that consent, parties closed respective cases then filed written submissions.

5. That state of proceedings consigned the statement of defence filed by the Respondent to the realm of bare and unsubstantiated allegations bereft of evidentiary value[1]

With that state of proceedings after the parties filed submissions upon which the court retired, and prepared a Judgment which was delivered to the parties on the 6th February 2019.

6. In the Judgment the trial court found among the things that by parties conduct of not calling oral evidence, the court had been denied an opportunity to receive evidence and observe the witnesses and therefore it was difficult to know the terms of the oral agreement between the parties. The court then isolated three issues for determination which it resolved in favour of the Respondent and thus dismissed the suit with costs. The determination by the court was whether there was a contract and if it was breached was based on the alleged difficulty occasioned by failure to adduce evidence and failure to adduce evidence to prove breach.

7. That decision has provoked the current appeal in which the Appellant has set out three substantive grounds of appeal and a fourth ground I consider to be consequent ground to abide the outcome of the decision.

The grounds of appeal fault the decision on these following fashion:-

> ***"(1) the learned trail Magistrate erred in law and fact by failing to hold that the Plaintiff's evidence remained uncontroverted and as such the issue of liability should have been ipso facto of the Plaintiff;***
>
> ***(2) The learned trial Magistrate erred in law and fact by failing to find that the statement of defence filed by the Defendant was a mere denial;***

(3) the Learned trial Magistrate erred in law and fact in finding that the burden of proof lied with the Plaintiff despite the fact that the Plaintiff adduced documentary evidence by way of list of documents whilst the Defendant failed to file any list of documents attached to the statement of defence;

The Learned trail Magistrate erred in law and in fact in awarding costs of the suit to the Defendant without any justification."

8. I purpose to deal with the three grounds of appeal globally being guided by the principle of law that a first appellate court proceeds by way of a retrial and thus mandated to review, reappraise and re-examine the entire evidence and proceedings at trial with a view to coming to own conclusion.[2]

9. While it is the law that an appellate court should not freely and slightly set out to interfere with the factual findings of a trial court,[3] it is also the principle of law that where it is shown that the trial court failed in its appreciation of the evidence or law then there is no discretion but to interfere with the decision.

10. In this matte parties led the court to accept the documents filed as evidence and opted not to lead oral evidence or to test the evidence in the documents by cross examination. To this court that consent was a contract between the two and it was not within the liberty of the trial court to challenge it lest the court be seen to assume and arrogate to itself the onus of rewriting a contract between the parties. It is also a principle of law that in civil litigation, parties have the right to resolve their disputes by consent, which the court has a duty to adopt, by way of encouraging alternative dispute resolution mechanism, unless there is evidence or indication that the agreement by contrary to the law or public policy.[4]

(1) Selle –vs- Associated Motor Boat Co. Ltd [1968] EA123 and Mvurla Magwabi –vs- Africa Merchant Assurance Co. ltd [2017] eKLR

11. The contract of the parties aforesaid, is to this court, a valid one which I consider to sit in congruence with the provisions of **Article 159 as read with Order18 Rule 2 (1) Civil Procedure Rules.** It being a contract between the parties it was not open for the trial court to find as it did that the parties opted to deny the court the benefit of receiving evidence.

This too to this court was a clear and outright misapprehension of the law on production of evidence which calls upon this court to intervene and correct. When **Order 18 Rule (2)** provides that the party with the right to begin shall produce his evidence in support of the issues which he is bond to prove, that cannot and does not mandate that only oral evidence be given. In my view the purpose of amendment to Civil Procedure Rules in 2010 to provide that parties file witness statements and documents to be used at trial was purposed to avoid trial by ambush and also enable parties assist court in its overriding objective to administer justice expeditiously and with moderated costs and thus justly. It is therefore well within the overriding objects of the court system to save time by producing agreed documents by consent and without oral evidence.

12. Accordingly when a court proceeds to question a consent by parties which seeks to employ the use of judicial time efficiently, it can only be said that such a court fails the system towards attaining the overriding objects of the court. I do find that in finding that there was no evidence produced, the trail court wholly erred and overly misapprehended the law and the decision on thus reached cannot stand but is hereby set aside.

13. On the standard of proof, the law is that proof within a balance of probability or preponderance is a proof to the level where a fair and impartial arbiter would say, that it is probable that the matter did take place as stated in the evidence led. The evidence must not be so clear as to leave no doubt. Even a narrow win is a win all the same.

14. In the matter before the trial court, the evidence that remained uncontroverted was that there were dealing between the parties regarding supply and delivery of sand. The evidence included delivery notes and invoices together with a bank statement to say that had been paid. The dispute was whether there had been payment for the supplies.

15. When the Respondent pleaded that it had paid for the deliveries in full, that was a special knowledge upon it and it was its duty to lead evidence in that regard in accordance with Section 112 of the Evidence Act. The Court of Appeal in ***Ragbit Singh Chatte-vs- National Bank of Kenya Ltd [1996] eKLR*** did lay onus and burden of a person pleading full settlement in the following words;

***".**"When a party in any pleading denies an allegation of fact in a previous pleading, of the opposite party, he must not do so evasively but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount but he must deny that he received that sum, or any part thereof, or else set out how much he received…First of all, a mere denial is not sufficient defense in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is therefore not sufficient to deny liability without some reason given".* (emphasis added)**"**

16. There being no iota of evidence by the Respondent on the alleged payment, and such pleading having remained bare and not supported by evidence, it was erroneous for the trail court to dismiss the Appellants case on the merit. I do find that there was a clear and unmistakable error by the trial court for which reason, I do set aside the judgment by the trial court and in its place substitute a judgment for the Appellant in the sum of Kshs 2,850,000/- plus costs and interest of such judgment sum at court rates from the date of Plaint till payment in full.

17. I also award to the Appellant the costs of this appeal.

Dated this 13th day of September 2019

P. J. O. OTIENO

JUDGE

Delivered in the presence of;

Mr. Kebere for Appellant

Mr. Walubengo for the Respondent

Mr. Walubengo: I do apply for stay for 30 days from today.

Mr. Kabere: I don't think any execution can ensue as of today there being no decree and the costs having not been assessed. The court order would be in vain and superfluous

Mr. Walubengo: I reiterate any prayer for stay.

Court: I see no eminent danger of execution proceedings ensuing against the Respondent before the costs are ascertained and a decree drawn with the participation of the Respondent.

Accordingly I do not consider it necessary to grant any stay at this juncture.

Let a formal application be lodged at an appropriate time when it can be shown that there is danger of a right being dissipated.

Parties will get copies of the judgment upon payment of requisite court fees.

P. J. Otieno

JUDGE

13th September 2019

---

[1] CMC AVIATION ltd –vs- Cruisair Ltd (No.1) [1978] KLR 103

[2] Selle –vs- Associated Motor Boat Co. Ltd [1968]123 and Mvurla Magwabi –vs- Africa Merchant Assurance Co. Ltd [2017] eKLR

[3] United Insurance Company Ltd –vs- East Africa Underwritters (K) Ltd [1985] KLR

[4] Livingstone K. Ntutu –vs- County Council of Narok & another [2015]eKLR