



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 42 OF 2015

BETWEEN

SIMON WYCLIFFE OUMA.....APPELLANT

AND

BULSHO TRADING COMPANY LTD.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No.339 of 2012 by Hon. Hannah N. Ndung'u- Chief Magistrate).

JUDGMENT

1. **SIMON WYCLIFFE OUMA**, the appellant herein, was the defendant in the Busia Chief Magistrate's Court Civil Case Number 339 of 2012. He was sued for a claim of Kshs.486, 092/= which came to his possession by virtue of his employment but could not account for.
2. After the hearing of the case the learned trial magistrate allowed the claim.
3. The appellant was aggrieved by the judgment which was delivered on 3rd December 2015 and filed this appeal. He was represented by Mr.E.M Bogonko, learned counsel. In the Memorandum of Appeal the appellant set out six grounds of appeals as follows:-
 - a) The learned trial magistrate erred in law and in facts in making a finding that the respondent had established its claim against the appellant for Kshs.486, 092/= in the absence of any sufficient evidence in support thereof.
 - b) The learned trial magistrate erred in law and in facts in making a finding that the appellant was an employee of the respondent Company in the absence of any evidence thereof.
 - c) The learned trial magistrate erred in law and in facts in failing to hold that Bulsho Trading Co. and Bulsho trading company limited were two different legal entities with capacity to sue and be sued.
 - d) The learned trial magistrate erred in law and in fact in failing to hold that the written undertaking dated 25/2/2012 produced as plaintiff's exhibits 3 was inadmissible for having not been filed in court together with other pleadings and for having been obtained under unfavourable circumstances.
 - e) That the judgement of the learned trial magistrate was against the weight of the evidence adduced together with the submission filed by the appellant.
 - f) The learned trial magistrate erred in law and in facts in dismissing the appellant's counterclaim without properly evaluating the appellant's evidence as adduced before it.
4. The respondent was represented by Mr.Omondi learned counsel. He prayed that the decision of the trial magistrate be upheld.
5. When the matter came for directions on 18th July 2017, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.
6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

7. The appellant has raised an issue with the decretal amount. He has argued that parties are bound by their pleadings. This is the law. This legal position was well articulated by Jessel M.R, in **THORP V. HOLDSWORTH, (1876) 3 Ch. D, 637 at 639**, as follows:

The whole object of pleadings is to bring the parties to an issue and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.

After the payment of Kshs.19, 779.50 by the appellant to the respondent, then the balance ought to have been Kshs.468, 090/=. In my view, this is not a variance from the pleading but a calculation error which cannot be used to deny the respondent his entitlement, if sufficiently proved.

8. The circumstances of this case did not require the proof that the appellant was an employee of the respondent. This fact was used to form a basis as to how the appellant came to possess the money complained of by the respondent. The respondent explained during the hearing that they had presented the names **Bulsho Communications Ltd** and **Bulsho Trading Company Ltd** to the Registrar of companies who picked the second name for registration. **Bulsho Communications Ltd** is therefore not registered.

9. In his evidence the appellant conceded that he was not given a renewal letter. In **Halsbury's Law of England 4th Edition Volume 16(1A)** at page 27 para 15 we find the following statement:

In general a contract need not be in any particular form. A contract of employment may thus be inferred from the conduct which shows that a contract intended although never expressed, as where there has been service of the kind performed by employees.

In the instant case the learned trial magistrate was justified, from the evidence on record, to infer the existence of an employment contract. The conduct of both parties herein could not be interpreted in any other way. It was clear from the evidence that **Bulsho Communications Ltd** was not registered and is therefore not a legal entity.

10. The appellant, during cross examination, admitted that he wrote the undertaking that he owed Kshs.487, 889.50 and out of this sum, he has repaid Kshs. 19, 779.50. He went further to say that he wanted to pay the money to **Bulsho Trading Company Ltd**. This in my view is a claim that has been acknowledged by the appellant. He testified during cross examination that he was normal when he wrote the undertaking. His assertion that he did so under duress is not supported by any evidence on record. He did not plead duress.

11. In her judgment the learned trial magistrate gave reasons as to why she dismissed both the defence and the counterclaim. After evaluating the entire evidence on record, I find that I cannot arrive at a different conclusion from that of the learned trial magistrate. The only correction that ought to be made, is on the decretal amount. I am therefore substituting the sum of Kshs.486, 092/= with a sum of Kshs.468, 090/= as the decretal sum. But for this correction, the appeal is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 8th day of May, 2018

KIARIE WAWERU KIARIE

JUDGE