



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CIVIL APPEAL NO. 28 OF 2014**

**BETWEEN**

**GEORGE PHILIP INVESTMENT LTD T/A ROCK HOTEL.....APPELLANT**

**AND**

**AMTECH SALES LIMITED.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. N. Okumu, RM dated 13<sup>th</sup> March 2014 at the Chief Magistrates Court at Kisumu in Civil Case No. 471 of 2011)***

**JUDGMENT**

1. The appellant appeals against a judgment entered against it for Kshs. 120,000/= with costs and interest for goods sold and delivered to it by the defendant.
2. The respondent's case before the trial court was that the appellant requested it to supply it with a telephone system. It provided a quotation on 11<sup>th</sup> July 2009 and they agreed on a price of Kshs. 300,000/=. Thereafter the respondent supplied additional material at an agreed price of Kshs. 35,000/= making the total amount of Kshs. 335,000/=. The respondent paid Kshs. 170,000/= and Kshs. 45,000/= on 28<sup>th</sup> July 2009 and 26<sup>th</sup> August 2009, respectively leaving Kshs. 120,000/= outstanding which formed the basis of the claim.
3. Although the appellant made a general denial in the defence, it also pleaded in the alternative that in the event there was a contract, the respondent supplied and installed part of the equipment leaving several rooms without services contracted for. It contended that the respondent breached the contract hence it was not entitled to Kshs. 120,000/=.
4. The trial magistrate was satisfied that the respondent had proved its claim and entered judgment against the appellant. The appellant now appeals against the judgment on various grounds set out in the memorandum of appeal dated 24<sup>th</sup> November 2011. The thrust of the appeal argued by Ms Khasiala, counsel for the appellant, is that the trial magistrate did not appreciate the evidence and came to the wrong conclusion that the appellant was liable for a contract which the respondent had breached.
5. The respondent supported the judgment and contended that there was no breach of contract. Its counsel, Mr Yogo, submitted that the contract was admitted and that the appellant did not complain about any breach in performance of the contract. In his view, the respondent proved its case on the balance of probabilities.
6. As this is a first appeal, I must bear in mind that the primary role of the first appellate court is to re-

evaluate the evidence before the trial court and then determine whether the conclusions reached by the learned trial magistrate stand or not while making allowance for the fact that I neither heard or saw the witnesses testify (see *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212).

7. Since the contract to supply the phone equipment and part payment was admitted, the legal and evidential burden shifted to the appellant to establish breach of the contract. Under **sections 107 and 108** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the person who alleges is under a duty to prove its assertions or allegations. The particulars of breach of contract contained in the defence were as follows:

- (a) Failing to make supply of equipment as per specification;
- (b) Failing to install the equipment in the units and quality contracted for;
- (c) Failing to comply to specifications;
- (d) Failing to make despite demand;
- (e) Abandoning the project while incomplete.

8. The appellant's case before the trial court was as follows. George Okumu (DW 1), the appellant's Chairman and Managing Director, testified that he agreed with Gordon Omondi (PW 1) to supply a PABX telephone system for 26 extensions for the Hotel premises comprising rooms in the new block, 2 gates, manager's office, accountant's office and bar at a total cost of Kshs. 300,000/= as follows;

1 Panasonic KX-TDA 100 main unit	Kshs. 120,000/=
3 Extension cards KX TD174 (40 extensions)	Kshs. 90,000/=
1 Operator phone KX-T7636	Kshs. 15,000/=
25 Standard Phones KX-TS500	Kshs. 37,500/=
Main Connection Box 100 pairs	Kshs. 6,500/=
Wiring material for 26 extensions	Kshs. 39,000/=
2 pieces 20 pair connection boxes	Kshs. 4,000/=
Labour for installation and programming	Kshs. 25,000/=

9. The respondent made a further quotation dated 14<sup>th</sup> July 2009 for materials necessary for expansion to the old wing of the hotel amounting to Kshs. 35,500/=. The materials were as follows;

100 metres underground cable	Kshs. 25,000/=
2 pieces 50 pair connection	Kshs. 8,000/=
25 pieces 20mm conduits	Kshs. 2,500/=

10. DW 1 testified that the respondent was to install internal room telephones for 42 rooms and that it did not supply and install the equipment as per the order hence the task was incomplete and that it abandoned the site. He complained that only 16 rooms had phones installed. In cross-examination, DW 1 stated that the work was not completed and that he would be willing to pay the balance of the amount if the work was done.

11. In his evidence, Gordon Omondi Adhoch (PW 1) confirmed that he delivered all equipment and material quoted as per delivery Notes. Nos. 5162 and 5163. Since all the material was supplied he started work. PW 1 testified that since he was not paid the full amount, his advocates, *Ken Omollo & Co., Advocates*, wrote a demand dated 26<sup>th</sup> October 2009 and another demand letter dated 12<sup>th</sup> November 2009. After the second demand letter, the appellant paid Kshs. 45,000/=. PW 1 testified that he completed the work but was not paid the full amount and that he never received any complaint that his work was unsatisfactory.

12. Having considered this evidence, I am in agreement with the learned trial magistrate that the respondent performed his part of the bargain by installing and delivering the agreed telephone equipment and installing services in 26 rooms at a cost of Kshs. 325,000/= leaving a balance of Kshs. 120,000/=. This is confirmed by the delivery notes duly signed on behalf of the appellant. The respondent's case is fortified by the fact that the appellant did not respond or contest the demands made to it by the respondent's advocates. In fact, it made part payment for the sum of Kshs. 45,500/= when the demand was made.

13. It was the appellant's burden to establish breach of contract as pleaded in its defence. DW 1 did not point to or specify what specifications of the contract were breached or how the work done was below quality. In short, the appellant failed to prove that the respondent had breached the contract.

14. In the memorandum of appeal and before the trial court, the appellant contended that in so far as the verifying affidavit was sworn by George Omondi Adhoch, the suit was incompetent it was not sworn by an officer of the company as required by **Order 4 rule 1 (4)** of the **Civil Procedure Rules** which reads:

*Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so.*

15. I am not persuaded that the suit is incompetent as the rule does not define an officer of the company and does not require a resolution of the company to be filed. In this respect, I find support for this position in **Mavuno Industries and Others v Keroche Industries Limited Milimani HCCC No. 122 of 2011**, where the court observed that:

*As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaintiff or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru J., in **Republic v Registrar General and 13 Others Misc. Application No. 67 of 2005 (2005) eKLR** and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage.*

16. It is also clear from the evidence that the appellant contracted with the respondent and was aware that PW 1 was disclosed agent for all purposes.

17. This appeal is devoid of merit. It is dismissed with costs to the respondent which I now assess at Kshs. 40,000/-.

**DATED and DELIVERED at KISUMU this 20<sup>th</sup> day of February 2017.**

**D.S. MAJANJA**

**JUDGE**

Ms Khasiala instructed by Kimanga and Company Advocates for the appellant.

Mr Yogo instructed by Otieno, Yogo and Company Advocates for the respondent.