



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 5 OF 2014

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION.....APPELLANT

VERSUS

SHUGULU ENTERPRISES LIMITED.....RESPONDENT

(Being an appeal from the Judgment of Hon S.M. Wahome, Senior Principal Magistrate dated 30th December 2013

In

REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT VOI

CIVIL CASE NO 103 OF 2012

SUGHULU ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATIONDEFENDANT

JUDGMENT

INTRODUCTION

1. In his judgment delivered on 30th December 2013, Hon S.M. Wahome, Senior Principal Magistrate at Voi Law Courts awarded the Respondent herein a sum of Kshs 3,087,000/= together with interest and costs until payment in full.
2. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed its Memorandum of Appeal dated 30th January 2014 on the same date. The grounds of appeal were as follows:-
 1. **THAT the Honourable Magistrate erred by disregarding the evidence adduced by the defence witnesses that pointed to impropriety on the Plaintiff's director's part.**
 2. **THAT the Honourable Magistrate erred in law in awarding Kshs 3,087,000/= yet the same was not specifically pleaded nor specially (sic) proved.**
 3. **THAT the Honourable Magistrate erred in law in disregarding the fact that PW 1 did**

- not adduce any proof of the existence of the Plaintiff as an entity or his own directorship.
4. **THAT the Honourable Trial Magistrate erred in law in giving regard to documents that were not tendered in evidence by the Plaintiff's witnesses.**
 5. **THAT the Honourable Magistrate erred in law in giving regard to the testimony of a single witness without further corroboration.**
 6. **THAT the Honourable Magistrate erred in law in arriving at a decision that was not in consonance with the Law (sic).**
 7. **THAT as at the date of proclamation to wit, 27th January 2014, the Respondent had not served the Appellant with a duly certified decree.**
3. The Appellant's Record and Supplementary Record of Appeal were filed on 14th April 2014 and 3rd June 2015 respectively. Its Written Submissions were dated 3rd February 2015 and filed on 4th February 2015 while Respondent's Written and Further Written Submissions dated 2nd and 5th February 2015 were filed on 3rd and 5th February 2015 respectively.
 4. Mary Kasango J who was seized of this matter had initially reserved her Judgment for 4th March 2015. However, on perusing the court file, she noted that exhibits that had been tendered in the subordinate court had not been placed before her. She thereafter directed that the Appellant files a Supplementary Record of Appeal, which it did as shown hereinabove, and thereafter a fresh date be taken at the Registry for the hearing of the Appeal herein.
 5. The matter subsequently came up in court before Mureithi J but he referred it back to Kasango J for mention on 10th February 2015. The same was, however, not listed. Thereafter, the parties herein filed a consent in which they agreed to have the Appellant's Notice of Motion application dated 22nd May 2015 and 27th May 2015 seeking orders for dismissal of the Appeal herein for want of prosecution, withdrawn to pave way for the hearing of the Appeal herein.
 6. When the matter came up before this court on 9th December 2015, the parties informed the court that they would entirely rely on their respective Written Submissions without highlighting the same. The Judgment herein is thus based on the said Written Submissions.

LEGAL ANALYSIS

7. Having looked at the Appellant's grounds of appeal and in particular to its Written Submissions, it was evident that the said grounds could be dealt with under the following separate heads.

A. INCORPORATION OF THE RESPONDENT

8. Ground of Appeal No 3 was handled on its own. The Appellant averred that although the Respondent had indicated in its Plaint dated 30th August 2012 and filed on 31st August 2012 that it was a body corporate, Mr Mwamburi (hereinafter referred to as "PW 1") did not produce proof of the Respondent's incorporation or its directorships.
9. A perusal of the Plaint shows that the Plaintiff (Respondent herein) was described as follows:

"That the plaintiff is a limited liability Company duly incorporated as such under the relevant laws of Kenya whose address of service for the purposes of this suit shall be care of M/S MWINZI & ASSOCIATES ADVOCATES, JUMBO HOUSE, 1ST FLOOR, SUITE NO. 1009, P.O. BOX 80300 VOI."

10. In Paragraph 2 of its Statement of Defence dated 3rd October 2012 and filed on 4th October 2012, the Defendant (the Appellant herein) stated as follows:-

"The Defendant admits the contents of paragraphs 1 and 2 of the Plaint in so far as they are merely descriptive of the parties herein, save to add that the Defendant's address for service for purposes of this suit is..."

11. Clearly, the Appellant acknowledged the existence of the Respondent as a limited liability

- company. It failed to adduce any evidence to the contrary or to demonstrate that it was illegal for it to have awarded a tender to an entity other than a limited liability company, if at all.
12. As the Respondent correctly submitted, it was not necessary for it to have adduced in evidence the Certificate of Incorporation as it was not an issue in contention. The issue was raised for the first time during PW 1's cross-examination. Had the Appellant wished to challenge the same, nothing would have been easier than for it to have included it as an issue in the Statement of Agreed Issues, for determination by the Trial Court.
13. The purpose of Pre-Trial, which in this case was conducted before the hearing commenced, is meant to ensure that all the evidence parties wish to rely upon and the issues they want determined are set out in a transparent manner. The new judicial and legal dispensation has no place for trial by ambush. In this regard, Ground of Appeal No 3 was not meritorious and the same is hereby dismissed.

B. CERTIFICATE OF INSPECTION

14. In his Memo dated 29th December 2009, Eng P.A. Ogut, the Appellant's Ag Managing Director informed all its concerned officers of the establishment and duties of the Inspection and Acceptance Committees so as to comply with the provisions of the Public Procurement and Disposal Act.
15. The Appellant contended that the Respondent did not furnish the court with proof that it was issued with the Certificate of Inspection after delivery of the goods as was required under the Public Procurement and Disposal Regulations, 2006.
16. It tendered in evidence a sample of a Certificate of Inspection and argued that the non-submission of the said Certificate by the Respondent coupled by the fact that one Miriam Chari Mbogho was dismissed from its employ were sufficient evidence to show that there was fraud and collusion between herself and the Respondent herein.
17. It placed reliance on Section (sic) 17 of the said Regulations where it is stipulated as follows:-

“4. The inspection and acceptance committee shall-

- a. **Ensure that the correct quantity of goods has been received;**
- b. **Ensure that the goods, works or services meet the technical standards defined in the contract;**
- c. **Ensure that the goods, works or services have been delivered or completed in time, or that any delay has been noted;**
- d. **Ensure that all required manuals or documentation have been received;**
- e. **Issue interim or completion certificates or goods received notes, as appropriate and in accordance with the contract.”**

18. It was, however, the Respondent's averment that there had been no complaint touching on the non-compliance of the Public Procurement and Disposal Act, 2006 and that the Appellant could not be a complainant as it was a contracting party. DW 1 stated in cross-examination that there was a standing committee of inspection in Nairobi but ad hoc ones at project levels outside Nairobi.
19. According to Paragraph 4 of the said Complaint, the Respondent delivered the goods the Appellant had tendered for on various dates between November 2009- January 2010. Bearing in mind DW 1's evidence, it was expected that there should have been an Ad Hoc Committee in place as the project was outside Nairobi.
20. However, as was rightly pointed out by the Respondent, the Appellant did not tender evidence to demonstrate that there was indeed an Inspection and Acceptance Committee, ad hoc or otherwise. In the absence of such evidence, the Appellant had an uphill task in creating a nexus between the Respondent and the said Miriam Chari Mbogho to prove fraud and collusion. Any weak links in the Appellant's Procurement system had nothing to do with the Respondent as the same was an internal affair.
21. The Learned Trial Magistrate therefore made a correct finding that the Appellant had the benefit of counsel and ought to have given particulars of fraud and collusion in its Statement, which it did

not and that the Appellant had not shown how the Respondent could be blamed for the fraud and collusion as it had contended.

22. In this regard, the court was not persuaded that Ground No 4 of the Grounds of Appeal had any merit and are therefore hereby rejected and dismissed.

C. WITNESSES

23. Grounds of Appeal Nos 1, 2 and 5 were related and were dealt with under this head.

24. The Appellant took great exception to the Learned Trial Magistrate relying on a single witness, namely PW 1 to find that the Respondent had proven its case to the required standard. It was its contention that the actual drivers of the delivery trucks ought to have been called to testify about the disputed deliveries.

25. It referred this court to the evidence of John Nzioka (hereinafter referred to as "DW 1") who testified that **" the goods delivered were not of the quantity tendered for and hence the Respondent was only entitled to what was delivered."**

26. On the other hand, the Respondent was categorical that PW 1 had personal knowledge of the documents that were submitted in court and that the evidence he adduced was sufficient for the Trial Court to have entered judgment in its favour.

27. The Appellant's argument that the said drivers ought to have been called to testify in the case was neither here nor there as it was a claim that was hinged on documentary evidence. It was not the quantity but rather the quality of the evidence that was tendered before the court. In this case, the Delivery Notes the Respondent tendered in evidence were sufficient for the Learned Trial Magistrate to have considered at the time of making his decision without the said drivers having been called to testify in the Trial Court.

28. It was also irrespective that the said Delivery Notes were not stamped as the stamp was not its possession or custody. It was the duty of the Appellant to ensure that the same was done. In the same way that this court observed hereinabove, the Respondent could not be blamed for the omissions of its officers at the time of receiving goods that were supplied to it. The Appellant must therefore bear the consequences of the shortfalls of its procurement process. The court, however, hopes that it has now complied with the aforesaid Memo of 29th December 2009 to streamline its procurement operations.

29. Going further, it was evident from the Appellant's letter dated 3rd August 2012 to the Respondent's Advocates that it was offering the sum of Kshs 1,500,000/= in full and final settlement, on a without prejudice basis, to bring the matter to an end. It was apparent from the said letter that the Appellant had failed to pay the Respondent because investigations had revealed that it did not receive all and/or was cheated out of some of its supplies.

30. There can have been no better admission that there was indeed a contractual relationship between the Appellant and the Respondent. Simon Mbugua's (hereinafter referred to as "DW 2") evidence that it was found that there were some materials that could not be accounted for was therefore immaterial for all purposes and intent.

31. Similarly, issues of impropriety or otherwise of Miriam Chari Mbogho were not of concern to the Respondent once it supplied the Appellant with the goods. As the Appellant did not adduce any evidence to demonstrate impropriety of PW 1, its assertions remained merely speculative. Such conjecture of his impropriety had no legal basis and was of little or no probative value to this court.

32. For a court to make a positive finding on an issue of fraud and collusion, the particulars must be set out in the pleadings and strictly proven. In fact, the standard of proof in such cases is that of beyond reason doubt and not merely on a balance of probability.

33. The Learned Trial Magistrate rightly observed that the evidence on record was overwhelming that the Respondent supplied materials to the Appellant and whatever the Appellant did with the said material was not for his court to speculate.

34. In that respect, Ground Nos 1, 2 and 5 of the Grounds of Appeal were not merited and the same are hereby dismissed.

CONCLUSION

35. The court did not analyse Grounds Nos 6 and 7 of the Grounds of Appeal as none of the parties submitted on the same. Drafted as they were, it was unclear to this court what the Appellant intended to submit on. In fact, from the Appellant's Written Submissions, it is apparent that it specifically mentioned Grounds Nos 1 and 3, with no specific mention of the other grounds, which this court nonetheless found it prudent to address for completeness of record.
36. Accordingly, after a careful evaluation of the oral and documentary evidence and written submissions that was given by both the Appellant and the Respondent in the lower court and the Written Submissions by the parties in this court, this court came to the firm conclusion that the Respondent was able to prove its case to the standard required in civil cases and that the Learned Trial Magistrate acted correctly when he entered judgment in favour of the Respondent against the Appellant in accordance with the documentary evidence that was adduced before him.

DISPOSITION

37. For the reasons foregoing, the upshot of this court's judgment is that the Appellant's Appeal lodged on 14th April 2014 was not merited and the same is hereby dismissed with costs to the Respondent.
38. It is hereby directed and ordered that the sum of money that was deposited in court pending the hearing and determination of this Appeal pursuant to the court order of Hon S.M. Wahome SPM made Con 10th March 2014 in **SPMCC No 103 of 2012 Shughulu Enterprises Ltd vs National Water Conservation & Pipeline Corporation** be and is hereby released to the Respondent herein forthwith.
39. It is so ordered.

DATED and DELIVERED at NAIROBI this 9th day February of 2016

J. KAMAU

JUDGE