REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL CASE NO. 38 OF 2011

AMIDA NASAMBU RASHID …... APPELLANT

VERSUS

BOARD OF GOVERNORS MAHANGA (K) SECONDARY SCHOOL .... RESPONDENT

[Being an appeal from the judgment of the Webuye Principal Magistrate's Court [C. Cherono (PM) in Webuye PMCC no. 72 of 2010]

JUDGMENT

1. This is an appeal from the judgment of Principal Magistrate Mr. E.C. Cherono in Webuye PMCC No. 72 of 2010, Amida Nasambu Rashid vs. Board of Governors Mahanga "K" Secondary School. The appellant being dissatisfied and aggrieved, appealed against the entire judgment on the grounds that;

I. The learned trial magistrate erred in law and in fact in dismissing the suit.

II. The learned trial magistrate erred in law and in fact in finding that the appellant had not proved his case, whereas on a balance of probabilities the appellant had proved her case and was entitled to judgment as prayed in the plaint.

III. The learned trial magistrate erred in law and in fact in finding that there was no binding agreement between the appellant and the respondent capable of being enforced.

IV. The learned trial magistrate erred in law and in fact by failing to take into account relevant factors he ought to have taken into account and taking into account irrelevant factors and thus arriving at an erroneous decision to dismiss the suit.

V. The learned trial magistrate erred in law and in fact in failing to consider the evidence on record, documents tendered as exhibits and evidence in totality thus arriving at an erroneous evidence.

VI. The learned trial magistrate erred in law and in fact in failing to enter judgment for the appellant

in the sum of Kshs. 109,950/- being the sum due and owing from the respondents to the appellant on account of school uniforms and sweaters supplied to the school by agreement or mutual understanding.

VII. The learned trial magistrate erred in law and in fact in stating that the contract between the appellant and then principal of the respondent's school was a loose casual arrangement that could not bind the respondent's school in law.

VIII. The learned trial magistrate erred in law and in fact in failing to consider the appellants submissions case law and the law.

The appellant sought for the judgement to be set aside and for this court to enter judgment for Kshs. 109,960/- and costs.

2. In support of her claim the appellant inter alia relied on the exhibits produced and particularly exhibits P2 & 3 which were agreements signed by the appellant and DW2 the then principal of the school in question. It was argued further that DW2 did confirm that the parties "were doing business" and further contended on behalf of the appellant that DW2 confirmed some payments to the appellant.

   Counsel for the appellant faulted the trial court for terming the transaction between the appellant and the respondent as 'a loose casual agreement" between the appellant and DW2 and therefore not binding on the respondent. Counsel argued that the acknowledgment by DW2 of the existing relationship was enough to bind the respondent and that indeed DW2 confirmed some payment was made but failed to prove payment of the entire sum.

3. On the other hand in opposing the appeal the respondent in its submissions contended that the appellant had failed to establish the sums owed; the uniforms were actually ordered and supplied to the school; further there was no evidence that the respondent as an institution made any payments of the sums allegedly, which is clear indication that the appellant did not deal with the respondent. It was also contended that exhibit P2 does not specify the numbers of uniform ordered or supplied and whether the respondent received any uniforms at all.

   Further that in her testimony DW1 testified that the school owed no money to the appellant; DW2 who was the head teacher at the time of the alleged transaction stated that the arrangement leading to this suit was between him and the appellant and did not involve the respondent; they dealt as friends based on trust and payment received were not signed for and that he had cleared with the appellant before he left the school.

4. This is the first appellant court and as such I shall consider the evidence and exhibits on record in order to arrive at an independent opinion.

   In her plaint the appellant sued the respondent, for monies due and owing from the supply of uniforms to the institution. On the other hand the respondent denied the claim in its entirety. The plaintiff in support of her claim produce 2 exhibits; an agreement dated 1.2.08 for supply of uniforms worth Kshs. 48,000/= signed between the appellant and the the then principal of the school DW2 with an indication of payment of Kshs. 4,000/= and a similar agreement form indicating payment for Kshs. 2,000/= signed by the appellant, a clerk and the then principal (DW2).

5. In her evidence the appellant a tailor testified that the respondent was her customer. She made 40 uniforms at a cost of Kshs. 1,000 per pair based on exhibit 2 at a cost of Kshs. 48,000/=. She supplied another 38 at the price of Kshs. 1,200/= and was paid Kshs. 2,000/= She was to supply Sweaters but did not at a cost of Kshs. 1,300/= per pair. She was paid Kshs. 10,350/=. There was a balance of Kshs. 40,350/=. She said exhibit 4 is testimony of the same.
6. The respondent on its part denied the claim in its totality and called 2 witnesses. DW1 was the

principal of the school as at the time of hearing. She testified that the school did not owe the appellant, that the report she received on taking over the school from the outgoing principal DW2 did not list the appellant as a creditor. On the other hand DW2 the principal who dealt with the appellant acknowledged that uniforms were supplied to the school through an arrangement between him and the appellant who was a former school mate of his and that the arrangement did not involve the board of governors. He referred to it as "a local arrangement". He further testified that the documents signed came from him and that the school board and the School where not party to the arrangement. He contended that he did not owe any money.

7. Having considered the evidence and the exhibits on record I find that the issue for determination are;

i. Whether or not the appellant had an agreement with the respondent for the supply of uniform. If so
ii. What is the amount owing
iii. Who meets the costs of the suit

8. The appellant produced a number of exhibits. Important for the 1st issue are exhibits P2, 3 & 4.

Exhibits 2 – a standard agreement gives particulars as uniforms for Kshs. 48,000/= signed by the principal (DW2) and the appellant.

Exhibit 3 – similar to exhibit 1 signed by a clerk. Both exhibits 2 & 3 are approved by the principal.

Exhibit 4 is a plain sheet dated 24.2.09 signed by an accounts clerk for 12 ties, 10 mattresses, 6 skirts and 11 trousers.

I find that the above exhibits do not tally with the appellant's evidence. Exhibit 2 & 3 do not state details of what is to be supplied.

Exhibit 4 is short of the claim of what was supplied. It is clear though that the appellant did supply some uniform the same were received by an accounts clerk, secondly the principal DW2 signed an agreement for supply of uniform.

9. So much for the exhibits and what they depict, the question is whether there was an agreement between the appellant and the respondent.

In my considered view the answer to this question was answered by DW2 who was the principal of the school and a party to exhibit P2 & 3. In his own words this is what he stated,

"The uniforms were independent. Pupils buy uniforms separate from school fees. Other students were being referred to Amida Nasambu's shop to buy uniforms there. It was not a board of governor's decision to direct pupils/parents to buy uniforms at Amida Nasambu's shop. It was local arrangement…….. Amida Nasambu is neither a creditor nor a debtor."

In reference to exhibit P2 he stated

"This document comes from me'……………………… the school board and the entire school were not privy"

The above statement is clear in that there was no agreement between the appellant and the respondent. The agreement was clearly between the appellant and DW2. Indeed DW2 required a board decision in order to bind the school and to be fair to him he stated clearly the neither the board nor the school were privy as this was a "local arrangement" between him and the appellant. I will not consider it as a loose agreement, as it was indeed and arrangement between the appellant and DW2 outside the purview of the respondent and unknown to the respondent. Indeed even if we were to consider DW2 to have been an agent where he acted without authority he cannot bind his master. All in all I need not go

beyond the testimony of DW2, so that if the appellant is owed she ought to pursue DW2 and not the respondent. This I find obvious, the appellant knows or ought to know that she only had a deal with an old friend DW2.

This court for reasons above agrees with the finding of the trial court and does not fault the same. The appeal therefore fails in its entirety with costs to the respondent.

Dated at Bungoma this 6TH day of OCTOBER 2015.

ALI-ARONI

JUDGE.