



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 348 OF 2017

BETWEEN

SELINA VUKINU AMBE.....APPELLANT

AND

MDF-ESA KENYA.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya

at Nairobi (Mboghli, J.) delivered on 26th April, 2017

in

H.C.C.App. No. 256 of 2013)

JUDGMENT OF THE COURT

1. The appellant, Selina Vukinu Ambe, is a human resources expert. In July 2008, the respondent, MDF-ESA, a training and consultancy firm, engaged her on a consultancy project to carry out staff assessment for the respondent's client, Forum for African Women Educationists (FAWE) in Nairobi. Although a written contract dated 14th July 2008 setting out the terms and conditions of the consultancy engagement had been prepared, the respondent declined to sign it. She explained in her testimony that she refused to sign the contract because it contained a dispute resolution clause for arbitration in accordance with the Arbitration Ordinance of Tanzania, a jurisdiction with which she was not familiar. Nonetheless, although no written contract was executed, the parties went ahead with the engagement.

2. According to the appellant, the consultancy was to run from 14th July 2008 to 8th August 2008 for which she was to be paid 200 euros per day for 19 days making a total of 3,800 euros which was payable upon completion and submission of a final report. She averred that she duly submitted the final report on 9th September 2008 and that, although the same was implemented, the respondent refused to pay her the amount due to her. She accordingly filed suit before the Chief Magistrate's Court at Nairobi in Civil Suit No. 8017 of 2008 in which she sought judgment against the respondent for "3,800 euros equivalent of Kshs.380,000.00@100" interest and costs.

3. The substance of the respondent's defence to that suit was that, although there was no consultancy agreement, the appellant submitted a substandard report that was rejected by the client, FAWE; that payment to the appellant was conditional upon approval of her report by FAWE; that since no approval was given no money was payable; that despite the fact that the report was substandard, the respondent had offered the appellant an *ex gratia* payment of 1,500 euros in an attempt to settle the matter which the appellant rejected. The respondent prayed for dismissal of the appellant's suit.

4. After conducting a hearing, in which only the appellant testified, and after considering rival submissions, the learned trial magistrate delivered judgement on 30 April 2013 in which he granted the appellant judgment for Kshs.190,000.00 being half the amount she had claimed. In doing so, the court expressed:

"There is a dispute raised as to whether the work done was to the required standard and the defendant did not notify the plaintiff early enough. She also chose not to sign the contract and cannot rely on it.

Having considered the evidence as a whole and the submissions, the court finds that on the balance of probability, the plaintiff

has established that she did work for the defendant and is entitled to payment. Instead of the 19 days claimed, the court will award her half of the period of 9.5 days at the rate of 200 euros per day which total 1900 euros in law converted into 18 hours. That as indicated in the plaint comes to 190,000/=. The plaintiff will have costs of the suit and interest at court rates.”

5. Dissatisfied, the appellant lodged an appeal before the High Court. She complained that the trial court should have allowed her claim as pleaded in her plaint; that there was no basis for the court to award her for 9.5 days when she had established that she had worked for the 19 days for which she had claimed; that the court erred in finding that there was no binding contract between the parties; and that the conclusion reached by the trial court that her report was substandard was not supported by evidence.

6. After considering the appeal and submissions by counsel, the High Court was not impressed. In a judgement delivered on 26 April 2017, the court (**A. Mbogholi Msagha, J.**) agreed with the trial court that the report prepared by the appellant was not accepted by the respondent's client, FAWE, and the same had to be re-done. The High Court was also satisfied that as the appellant had declined to sign the written contract, the finding by the trial court that *“there was no written contract between the appellant and the respondent”* was well-founded. In dismissing the appeal, the learned Judge concluded;

“...the appellant did some work which however was not acceptable to the respondent's principal. The evidence was there in writing. There is no evidence that the appellant's report was accepted and implemented as she alleged in her evidence. In my assessment of the entire record, I am persuaded that the lower court would not have reached a different determination.”

7. In the present appeal, the appellant has faulted the judgement of the High Court on the ground that the Judge did not re-evaluate, re-assess and re-analyze the evidence on record and therefore erred in rejecting her appeal.

8. During the hearing of the appeal before us, **Mr. Edward Nyakeriga**, learned counsel, held brief for **Mr. Tombe** for the appellant. Although the respondent had been served with notice of hearing, there was no appearance for it.

9. Mr. Nyakeriga relied on his written submissions which he highlighted urging that the Judge did not re-evaluate the evidence; that contrary to the principle that a court of law cannot re-write a contract between the parties as enunciated by this Court in the case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd [2001] eKLR**, the judge did exactly that and purported to re-write the contract between the parties.

10. It was submitted further that the Judge should have considered that the parties had at some stage in the course of proceedings before the trial court entered into a consent judgment in favour of the appellant for Kshs.380,000.00 which was however set aside as it had not taken into account interest; and that there was no evidence that the work done by the appellant was substandard. Counsel urged us to set aside the judgement of the two courts and grant the appellant judgement as prayed in the plaint.

11. As already indicated, the respondent did not appear during the hearing of this appeal and neither did it file written submissions. Nevertheless, it was incumbent upon the appellant to establish its grounds of appeal so as to warrant interference by this court.

12. We have considered the entire record, the decision of the trial court and that of the High Court, the submissions by counsel and the law. In a second appeal such as this, the mandate of the Court is limited by Section 72 of the Civil Procedure Act. Under Section 72(1)(a) of that Act, an appeal lies to this Court from a decree passed in appeal by the High Court on the grounds, *inter alia*, that the decision is contrary to law.

13. We cannot interfere with concurrent findings of the two courts below on matters of fact unless such findings are not based on any cogent evidence. In the case of **M'Riungu vs. Republic, (1983) KLR 455**, this Court, when considering its jurisdiction on second appeal where a right of appeal is confined to question of law stated:-

“Where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law. (Martin vs. Glyned Distributors Ltd (t/a MBS Fasteners – The Times of March 30, 1983).”

14. Although that pronouncement was in the context of criminal jurisdiction of the Court on a second appeal, the same principles apply to second appeals in civil matters. Guided by those principles, the main grievance by the appellant in this appeal as already stated is that the High Court did not re-assess, re-evaluate and re-analyze the evidence. The issue for our determination therefore is whether the High Court discharged its duty on a first appeal to *“re-hear the case”* and *“reconsider the materials”* so as *“to make up its own mind”* and reach its own independent conclusion in line with its mandate as pronounced in **Selle vs. Associated Motor Boat Co Ltd [1968] EA 123**.

15. Based on the appellant's evidence before the trial court, there is no doubt that she was engaged on a consultancy to undertake staff assessment for FAWE on the basis that the project was to be undertaken for 19 days and she was to be remunerated at the rate of 200 euros per day. She testified that following the engagement, she had a meeting at FAWE headquarters where she was given staff files which she reviewed and developed a questionnaire and thereafter undertook the work and submitted a report. Under cross examination, the appellant accepted that *“I was to be paid if the report was accepted”*. She however maintained that her report was accepted and implemented.

16. After reviewing the evidence, the trial court concluded, and the High Court concurred, that legitimate questions were raised regarding the standard or quality of work that the appellant submitted. The question is whether there was a basis for this conclusion. Amongst the documents produced by the appellant before the trial court in support of her case were email exchanges between the parties concerning her assignment and report. In an email of 13th August 2008 addressed to the appellant, the respondent brought to the attention of the appellant,

“some comments and questions from the Chairperson of FAWE...about the report”. That was in reference to a draft report that the appellant had submitted. One of the comments made in that email, which was hardly complimentary of the appellant’s report, was as follows:

“ I requested that you stick to the scope of the assignment, you provide specific reports on each staff qualifications and suitability for the demands of the new structure and strategic plan (a matrix), remove statements that are not accurate and that appear to create scissions between Pos and support staff, remove all references to yourself and others in name and or nationality, and produce a report in which the problems and recommendations sections are not just a list but categorized and are within the scope of feasibility for FAWE.”

17. Based on the email exchanges that followed, the appellant appears to have made further inputs into her report before finally submitting a final report under cover of her email of 9th September 2008 to which she attached her report and thanked the respondent for the opportunity to work on the FAWE assignment. That was however noted to be the end of the matter. Thereafter, the respondent continued to express dissatisfaction with the appellant's work. For instance, in an email of 7th October 2008 addressed to the appellant, the respondent complained to the appellant that she had “*failed to deliver a timely and satisfactory report despite numerous very concise indications both verbally and in writing from the client FAWE after you had provided a first draft.*”

18. In the same email of 7th October 2008, the respondent informed the appellant,

“our client FAWE has not accepted the report in the versions that you have provided over the course of a month (between 8th of August and 10th of September), and MDF-ESA has had to resort to other consultants to finalize it, though not being able to re-do interviews and tests. This has put both FAWE and MDF-ESA in a difficult position: FAWE has not received a much-needed input for the reorganization of its regional office, MDF-ESA has had to dedicate and unplanned for time and effort to deliver an acceptable product to the client. FAWE has nevertheless offered to pay half of the contract amount upon acceptance of the belated and incomplete report.”

19. Based on the foregoing, there was material on the basis of which the trial court, and the first appellate court reached the concurrent findings that there was a dispute regarding the standard of work undertaken by the appellant. It was on that basis that both courts concluded that reasonable compensation due to the appellant would be half the amount that the appellant would have earned had she delivered an acceptable report. In light of the evidence therefore, the concurrent findings of the courts below are well founded. We do not have a basis for interfering with the same.

20. As regards the complaint that the Judge erred in finding that there was no written agreement between the parties, the appellant's own testimony provides the answer. She stated that she declined to sign the contract. To quote her, “*I did not sign the contract as they had asked me to abide by the contractual act of Tanzania which I did not know about.*” On the face of that statement, the conclusion by the Judge that, “*there was no written contract between the appellant and the respondent. She had declined to sign what was placed before her*” is absolutely accurate and supported.

21. Finally, there is the complaint that the Judge ought to have considered that a consent judgement in favour of the appellant for the full amount of euros 3,800 had it been entered in the trial court. In that regard, the record shows that following negotiations between the advocates for the parties, a consent judgement was recorded before the trial court on 16th February 2012 in terms that “*judgment is entered for the plaintiff against the defendant*” for the principal amount of Kshs.380,000.00 and costs of Kshs.59,000.00 “*in full settlement.*”

22. Soon thereafter, on 22nd February 2012, the appellant presented an application before the trial court seeking orders that the consent judgement made on 16th February 2012 be set aside and for the matter to proceed to hearing.

23. In a ruling delivered on 17th July 2012, the trial court allowed that application and set aside the consent judgment on the ground that “*the consent did not take into account the interest*” and on the further ground that “*the plaintiff has rejected it, it cannot be forced on her.*”

24. The consent judgement having been set aside on the appellant's own motion, it was no longer a matter that could form the basis of the eventual judgement that resulted after the trial which the appellant herself demanded.

25. The result of the foregoing is that the appellant's appeal has no merit and is accordingly dismissed. As the respondent did not appear during the hearing of the appeal, we make no order as to costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of October, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR