



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 178 OF 2011

BETWEEN

AUGUSTINE M. SIWA APPELLANT

AND

KERIO VALLEY DEVELOPMENT AUTHORITY RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Eldoret (Karanja, J.) dated 8th March, 2009

in

H.C.C.A. NO. 5 OF 2009

JUDGMENT OF THE COURT

1. This is a second appeal from the judgment of **Karanja, J.** in **HCCA NO. 5** of **2009**, where the learned High Court Judge overturned a decision by **M'masi**, Senior Resident Magistrate, and allowed an appeal that had been filed by the respondent. In the initial suit that gave rise to the first appeal, the appellant had filed a suit against the respondent seeking a sum of **KShs.720,000/=** being the balance of consultancy fees that was allegedly payable to him for a feasibility study on Livestock Development in West Pokot and Turkana that he had conducted in September, 2003 at the respondent's request.
2. The trial magistrate had entered judgment in favour of the appellant but on appeal the first appellate court held that there was no written contract between the parties and it was therefore not established how the sum of **KShs.720,000/=** was arrived at. The learned judge further held that the appellant had not adduced sufficient evidence to prove that he was justly and fairly entitled to the claimed sum.
3. Being dissatisfied with that decision, the appellant preferred an appeal to this Court. He contended, *inter alia*, that the learned judge erred in law in holding that there was no consultancy agreement between him and the respondent, and that the claimed sum of **Kshs.720,000/=** was therefore not payable.
4. This being a second appeal, our consideration of the same is limited by the provisions of **section 72 (1)** of the **Civil Procedure Act** which states as follows:

“72 (1) Except where otherwise expressly provided in this Act or by any other law for

the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court on any of the following grounds, namely -

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by the Act or by any other law for the time being, which may possibly have produced error or defect in the decision of the case upon the merits.”

5. The grounds of appeal were argued globally by both **Mr. Maritim**, learned counsel for the appellant and **Miss Isiaho**, learned counsel for the respondent. Before we make our findings, it is appropriate that we summarise the main arguments advanced by the parties.

6. The appellant's evidence before the trial court was that he was a freelance community development consultant with a degree in Business Administration and a Consultant on areas of Community Development. Sometime in August, 2003 or thereabouts he was introduced to one **Fredrick Kimeto**, the respondent's Senior Planning Officer, who prepared an internal memo for the approval of the respondent's Managing Director with a view to engaging the appellant to carry out a feasibility study on livestock improvement in the northern Rift Valley. The internal memo was not produced in evidence but was only marked for identification.

7. The appellant commenced the feasibility study and asked for a consultancy fee of KShs.720,000/- which was considered too high by the respondent. The respondent offered to pay facilitation fees of **KShs.42,000/=** and imprest forms to that effect were prepared. The said sum was paid to the appellant.

8. The appellant proceeded to draw his work plan and thereafter went to the field and commenced his work. Upon completion the appellant presented the report to the respondent and requested for payment Kshs.720,000/=.

9. On the other hand, the respondent contended that there was no written contract for consultancy services between itself and the appellant. The feasibility study was jointly conducted by the appellant and the respondent's two employees, **Fredrick Kimeto** and **David Biwott**. A sum of K.Shs.42,000/= was paid to the appellant for the services rendered and that was clear from the imprest warrant that was produced by the appellant as an exhibit. There was no other express or implied contract between the parties.

10. The learned judge observed that although the appellant had carried out the work given to him by the respondent, he was unable to prove that there was any agreement for payment of KShs.720,000/= as claimed.

11. Turning to the grounds of appeal, the main issue for determination is whether there was a consultancy agreement between the appellant and the respondent, and if so, the terms thereof.

12. There is no dispute that the appellant together with two employees of the respondent carried out a feasibility study on livestock development in West Pokot and Turkana sometime in 2003. However, there is no evidence that the parties discussed and agreed on the fees payable to the appellant. The appellant suggested to some employees of the respondent a sum of Kshs. 720,000/= but that was not agreed upon.

13. Upon payment of the KShs.42,000/= the appellant and his colleagues proceeded to the field and completed the feasibility study sometime in October, 2003. It was not until 27th November, 2003 when the appellant wrote to the respondent's Managing Director requesting for payment of Kshs.720,000/=

being his consultancy fees. The respondent's Managing Director denied the appellant's claim.

14. From the foregoing, we do not think that the learned judge can be faulted for holding that there was no written contract for consultancy services between the parties. The appellant did not prove that a sum of Kshs.720,000/= was payable to him.

15. We find no basis of interfering with the High Court judgment and consequently dismiss this appeal with costs to the respondent.

Dated and delivered at Eldoret this 29th day of October, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR