



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME, & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO.10 OF 2013

CONSOLIDATED WITH

CIVIL APPEAL NO. 20 OF 2013

BETWEEN

LAWRENCE M. GATERE

t/a COLIESTER MACHINE SERVICE APPELLANT

AND

KABARE COFFEE FARMERS

CO-OPERATIVE SOCIETY.....RESPONDENT

AND

FRANCIS KINYUA NYAGA

SIMON MWANGI

JAMES GITARI

RICHARD MWAI

JEREMIAH NJOKA

FRANCIS MUTHIKETHIRD PARTIES

JAMLEK MURIITHI

JOSEPH NDATHI

PATRICK MWANIKI

PAUL MUCHIRA

(An appeal from the Judgment and Order of the High Court of Kenya at Embu (Ongundi, J.) delivered

on 20th December, 2012

in

H.C.C.C NO. 46 OF 2006)

JUDGMENT OF THE COURT

1. By a plaint dated 31st March, 2006, the appellant filed this suit against the respondent Kabare Coffee Farmers Co-operative Society claiming the sum of Ksh. 2,454,714/= and interest thereon at court rates.

2. The respondent Kabare Farmers Cooperative Society joined the Third Parties herein to the suit. The Third Parties were former officials of the Society.

3. The appellant's claim against the respondent Cooperative Society as pleaded in paragraphs 3, 4 and 5 of the plaint is as follows:

“Para (3) - On or about 22.12.04, the defendant asked the plaintiff and the plaintiff agreed to provide services and spare parts to the defendant for a period of one year.

Para (4) - Pursuant to the said agreement the plaintiff provided various services and spare parts to the defendant amounting to Ksh. 6,685,504/=

Para (5) - The defendant paid a sum of Ksh. 4,230,790/= leaving a balance of Ksh. 2,454,714/= which sum remains unpaid and the plaintiff prays for judgment against the defendant over the said sum of Ksh. 2,454,714/= plus interest and costs”.

4. The respondent, Cooperative Society, filed its defence dated 14th August, 2006. In the defence, liability is denied and fraud on the part of the plaintiff and the former officials of the Cooperative Society is pleaded. The former officials of the society were joined in the suit as Third Parties.

5. The alleged particulars of fraud on the part of the plaintiff is itemized in the defence as colluding and conniving with the previous management of the defendant Society to have documents executed without any services being rendered; and purporting to provide services to factories where the plaintiff was not authorized by the defendant. As against the Third Parties, the alleged particulars of fraud are itemized as colluding with the plaintiff to have documents executed without any services being rendered; executing documents and/or requesting the execution of documents for works allegedly carried out in factories in respect of which the plaintiff had not been contracted; purported renewal of contracts with the plaintiff where no such contracts existed or where the conduct of the plaintiff was clearly fraudulent and acting contrary to the provisions of the ***Co-operative Societies Act*** in the conduct of their business.

6. Upon hearing the parties to the suit, the trial Judge dismissed the Co-operative Societies claim against the Third Parties and partially allowed the appellant's claim against the Cooperative Society. Judgment was entered against the Society in favour of the appellant for the sum of Ksh. 1,144,419/= plus interest and costs. The balance of the appellant's claim against the Cooperative Society in the sum of Ksh. 1,310,295/= was dismissed.

7. Two appeals were filed in relation to the judgment delivered by the High Court. The first appeal is ***Civil Appeal No. 10 of 2013*** wherein the appellant is dissatisfied with the judgment and appeals that judgment be entered for Ksh. 1,310,295/= being the balance of the sum claimed in the plaint. The second appeal is ***Civil Appeal No. 20 of 2013***, wherein the Cooperative Society is aggrieved and dissatisfied with the entire judgment of the High Court and seeks the setting aside of the judgment awarding the appellant the sum of Ksh. 1,144,419/= plus interest and costs. The Society is also appealing against the dismissal of its claim against the Third Parties. The two appeals were consolidated at the hearing of this appeal and the holding file is ***Civil Appeal No. 10 of 2013***.

8. At the hearing of the appeal, learned counsel Magee Wa Magee appeared for the appellant while the respondent Cooperative Society was represented by learned counsel George Njoroge Muriu. The 5th respondent was represented by learned counsel Munene Muruiki while the rest of the respondents were represented by learned counsel Wanjiru Wambugu.

9. The appellant by his memorandum of appeal lodged in **Civil Appeal No. 10 of 2013** cites three grounds of appeal to wit:

(a) That the learned Judge erred in law and fact in making judgment against the weight of evidence in respect of the claim for Ksh. 1,310,295/=.

(b) That the learned Judge erred in law and fact in failing to find that the appellant had proved on a balance of probability that his full claim was for Ksh. 2,454,714/=.

(c) The learned Judge erred in law and fact in failing to find that the respondent had not specified the invoices that had been settled by the payment of Ksh. 4 million to the appellant.

10. The respondent Cooperative Society in its memorandum of appeal filed in **Civil Appeal No. 20 of 2013**, raised various grounds of appeal compressed as follows:

(a) The learned Judge erred in law and fact in finding the Cooperative Society liable to the appellant.

(b) The learned Judge erred in law and fact in entering judgment for the appellant in the sum of Ksh. 1,144,419/= plus interests and costs.

(c) The learned Judge erred in law and fact in finding that the Third Parties had not violated procurement laws and committing fraud.

(d) The learned Judge erred in law and fact in failing to consider that the Third Parties were agents of the Cooperative Society and they were required to act diligently with prudence for the benefit of the Society.

(e) The learned Judge erred in law and fact in upholding an invalid contract.

(f) The learned Judge erred in law and fact in considering inadmissible evidence and failed to give due regard to the Cooperative Society's evidence.

(g) The learned Judge erred in law and in fact in failing to protect the Cooperative Society from fraud, extortion and malicious claims.

11. Counsel for the appellant in his written submissions reiterated the grounds of appeal. It was submitted that the claim for Ksh. 1,310,295/= which pre-dated the contract of 22nd December, 2004, was explained in evidence where the appellant testified that he was the one who was dealing with the same contract in 2004. It was admitted that the excluded payment was for invoices prior to 22nd December, 2004, but the appellant was the one who was still the contractor for the Cooperative Society in 2004. Counsel submitted that the Cooperative Society's first witness did not rebut the evidence by the appellant. It was submitted that the sum of Ksh. 4,230,790/= paid to the appellant was not assigned any invoice and thus the full balance was due and payable.

12. In relation to the respondent's appeal in **Civil Appeal No. 20 of 2013**, the appellant submitted that the appeal had no merit and should be dismissed. Counsel for the appellant urged this Court to uphold the finding that fraud was not proved and the inquiry report which the Cooperative Society sought to rely upon was unsigned by the maker and it did not contain annexures referred to therein

13. Counsel for the 5th respondent and the Third Parties made submissions in support of the appellant urging this Court to find that the appeal in **Civil Appeal No. 10 of 2013** was merited while **Civil Appeal No. 20 of 2013** should be dismissed for lack of merit.

14. Counsel for the respondent Cooperative Society urged this Court to dismiss **Civil Appeal No. 10 of 2013** and allow **Civil Appeal No. 20 of 2013**. It was submitted that the appellant had not proved that the Society owed him any monies. Counsel emphasized that the respondent Cooperative Society was subject to the procurement rules under the **Exchequer and Audit Act** which rules were not followed. That since the procurement rules were not followed, the contract between the appellant the Society was null and void and unenforceable. It was submitted that the trial Judge erred in law in failing to find that the Third Parties who were members of the Management Committee were culpable; that since the tendering process was not followed, the Management Committee comprising the Third Parties should be liable to the appellant and if not, they should indemnify the respondent Cooperative Society.

15. We have examined the record of appeal and considered the grounds of appeal and submission by counsel. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See **Selle -vs- Associated Motor Boat Co., [1968] EA 123**); See also (**Abdul Hameed Saif vs. Ali Mohamed Sholan, (1955), 22 E. A. C. A. 270**).

16. The trial Judge in rejecting the appellants claim for Ksh. 2,454,714/= as claimed in the plaint and entering judgment for the sum of Ksh. 1,144,419/= stated as follows:

“The plaintiff’s claim is strictly confined to the period starting 22/12/2004. He gave evidence and produced bundles of documents showing deliveries, invoices and receipt of goods. He maintained that he supplied and was paid part of the claimed amount of Ksh. 4,230,790/=. ...My finding is that save for the deliveries and good receipts made before 22/12/2004, the others are due and payable. The plaintiff is thus entitled to Ksh. 1,144,419/=”.

17. The trial Judge came to the conclusion that all invoices for goods and services rendered before 22nd December, 2004, totaling Ksh. 1,310,295/= were not payable because they pre-dated the contract between the parties. It is the appellant’s contention that the trial Judge erred in not entering judgment for balance of the sum of Ksh. Ksh. 1,310,295/= being the value of the goods and services rendered before 22nd December, 2004.

18. Our reading of the claim in paragraphs 3, 4 and 5 of the plaint indicates that the appellant’s claim is founded on the contract entered into on 22nd December, 2004. The claim is akin to a claim for special damages. In the case of **Siree Limited –v – Lake Turkana El Molo Lodges (2002) 2E.A. 521** this Court stated that where monies due and owing can be calculated to a cent, they must be claimed as special damages. In the case of **Maritim & Another – v- Anjere (1990-1994) EA 312 at 316**, this Court emphasized:

“In this regard, we can only refer to this court’s decision in Sande – v- Kenya Cooperative Creameries Limited Civil Appeal no. 154 where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed”.

19. In the instant case, the appellant’s claim is grounded on a contract entered into on 22nd December, 2004. There is no pleading in the plaint to show that there was any contractual relationship between the parties prior to this date. There is no claim in the plaint for unjust enrichment or for services rendered prior to 22nd December, 2004. It is trite law that a party is bound by his pleadings and a court of law cannot enter judgment on matters that have not been pleaded. Explanations given in the course of hearing are not a substitute for proper pleading. If the appellant was minded to include claims prior to 22nd December, 2004, he should have amended the plaint.

20. In *Galaxy Paints Co. Ltd., -v- Falcon Guards Ltd., (2000) 2 EA 385*, it was stated:

“It is trite law, that issues for determination in a suit generally flow from the pleadings and the trial court may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the Court’s determination. (See also Odd Jobs – v- Mubia (1970) EA 476”.

21. Guided by the principle enunciated in *Galaxy Paints Co. Ltd., -v- Falcon Guards Ltd., (supra)*, we are of the considered view that the Honourable Judge did not err in declining to enter judgment for any claim prior to 22nd December, 2004. We find that the appellant’s appeal as stated in *Civil Appeal No. 10 of 2013* has no merit and is dismissed.

22. We now consider the grounds of appeal cited in *Civil Appeal No. 20 of 2013*. The Cooperative Society in its memorandum of appeal submits that the trial Judge erred in failing to find that the contract between the appellant and the respondent society was null and void. The basis of this submission is that the Society was subject to the procurement procedures as outlined in the *Exchequer and Audit Act*. The trial Judge in considering whether procedure was followed in making of the contract between the parties expressed herself as follows:

“The former Secretary/Manager confirmed that due process was followed in awarding the tender and payments were approved by the Management Committee”.

23. On our part, we have examined the Defence dated 14th August, 2006, filed by the Cooperative Society. Nowhere in the defence is it pleaded that the provisions of the Exchequer and Audit Act were not followed. In the submissions made before the trial Judge, the issue of the *Exchequer and Audit Act* was not canvassed and the judgment by the trial court does not address the validity of the contract dated 22nd December, 2004, *vis a vis* the provisions of the *Exchequer and Audit Act*. This Court is an appellate court and we do not have original jurisdiction to pronounce ourselves on an issue that was not before the trial court. It is our considered view that based on the pleadings and material placed before the trial court, the Honourable Judge did not err in basing her decision on the contract dated 22nd December, 2004. The respondent has not demonstrated to what extent the trial Judge erred in not finding that the contract entered into on 22nd December, 2004, was not valid. It is our considered view that goods and services were supplied pursuant to the said contract and it would be unconscionable and unjust for the respondent Cooperative Society to receive goods and services and enjoy the benefits thereof and then turn around to challenge the validity of the same contract. We are satisfied that from the evidence before the trial court, the Honourable Judge did not err in finding that there was a valid contract entered into on 22nd December, 2004, between the appellant and the respondent Cooperative Society.

24. The respondent Cooperative Society submitted that the trial Judge erred in failing to find that fraud had been proved. The trial Judge expressly stated in the judgment that fraud was not established. Citing *Section 197 (1) of the Evidence Act*, the Honourable Judge correctly stated that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

25. We have examined the record of appeal and we concur with the trial court that the respondent Cooperative Society did not lead evidence to prove fraud. We note that the Secretary/Manager of the Cooperative Society testified that all procedures were followed. This evidence was not challenged by the Cooperative Society. We concur with the trial court’s observation that factory managers should have been called by the respondent to testify whether they participated in filling of the requisition forms. Failure to call the factory managers left a gap in the Cooperative Society’s allegation that fraud had been committed.

26. The final issue for our consideration relates to the respondent’s ground of appeal that the learned Judge erred in not finding the Third Parties culpable and liable to indemnify the Society. The trial Judge expressed herself as follows:

“The defendant would want the 3rd parties to indemnify it because they were in office when the money was allegedly misappropriated. First of all, the defendant has filed suit against the 3rd parties at the Co-operatives Tribunal over the same issues. They want them surcharged. That is the best placed forum to deal with that issue. Dragging the 3rd parties here to indemnify them is to punish the 3rd parties twice over the same facts”.

27. We have considered the record of appeal and the issue of indemnity. The respondent Cooperative Society in its defence stated that the Third Parties were its agents. On the basis of principal agent relationship, we do agree with the trial Judge that the best forum to deal with indemnity issues between the Third Parties and the respondent Society is the Cooperatives Tribunal. On the evidence and material placed before the trial court, it is our considered view that the Honourable Judge did not err in finding that the respondent had not established any reason why it should be indemnified by the 3rd parties.

28. The upshot of our evaluation of the evidence on record and the applicable law is that ***Civil Appeal No. 10 of 2013***, has no merit and we order that it be and is hereby dismissed. It is our further finding that ***Civil Appeal No. 20 of 2013***, lacks merit and we order that it be and is hereby dismissed. Each party is to bear its/his own costs in this appeal.

Dated and delivered at Nyeri this 31st day of March, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR