**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT MALINDI**

**CIVIL APPEAL 190 OF 2008**

**CHARLES AGINA …..……..…….…….....…...…… APPELLANT**

**AND**

**SHIPMARC LTD**

**J. H. NIELSEN ……...…….……..... RESPONDENTS**

*(An appeal from the Judgment of the High Court of Kenya at Mombasa (Mwera, J) dated 16th September, 2005*

**in**

**H. C. C. C. No. 40 of 2003)**
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**JUDGMENT OF THE COURT**

***Charles Agina***, the appellant herein, was employed by Shipmarc Ltd, the first respondent, as a marine engineer, on 14th May, 1995. There was no written contract. However, all the negotiations for the terms of employment were undertaken by J. H. Nielsen, the director of Shipmarc Ltd, and the second respondent herein.

In or about October, 2002 Shipmarc Ltd began experiencing business and liquidity problems, and sought to terminate the services of the appellant. There were clearly differences of opinion on what did or did not form part of the terms of employment, and the eventual terminal benefits payable to the appellant. Following extensive negotiations, the parties reached settlement, and signed a memorandum of agreement dated 1st November, 2002, pursuant to which the appellant agreed to receive the sum of US $20,032 "in full and final settlement of (his) terminal dues". There is no dispute that the parties accepted this agreement to be mutually binding, and proceeded to perform-in-part their respective obligations. There is no dispute, for example, that all the payments stipulated in the said agreement were made, except for two items at the end of the agreement, being the salary for November 2002 US $1,609, and the salary for December 2002 US $1,609. According to the respondents, the only reason why these two payments were not effected is that the appellant never in fact worked during those two months, and was accordingly not entitled to any such payment. According to the appellant, he had made no such

undertaking to perform services during those two months, and was entitled to that payment as part of a terminal package negotiated between the parties. We shall return to this issue later. Suffice to note at this point that except for those two items, the parties had indeed fulfilled their respective obligations, pursuant to the agreement of 1st November, 2002.

On 27th February, 2003, the appellant filed suit in the High Court of Kenya at Mombasa, claiming Kshs.6,722,356/= and US $ 9,500 being terminal dues that he was entitled to, and which had not been paid. Paragraph 7 of the Plaint reads as follows:

***"7. The Plaintiff avers that at the time of this dismissal he was entitled to the benefits and payments as follows:-***

***(a) Leave due 46 days @ Kshs.126,300.00/= for 30 days -Kshs.216,514.00/=***

***(b) Leave due difference contract/actual 46 days @ Kshs.67,425.00/= for 30 days-Kshs.103,385.00/=***

***(c) Leave travelling allowance-Kshs.100,000/=***

***(d) Severance pay for 7.5 years @ 2 months for each year 15 months wages @ Kshs.126,300.00 Kshs.1,937,352.00/=***

***(e) Severance pay difference contract/actual @ 2 months 15 months @ Kshs.126,300.00/= Kshs.1,011,375.00/=***

***(f) Gratuity pay for 7.5 years @ 2 months for each year 15 months wages @ Kshs.126,300.00/=***

***Kshs,1,937,352.00/=***

***(g) Gratuity pay difference – contract/actual 15 months wages @ Kshs.67,425.00/= Kshs.1,011,375.00/=***

***(h) Severance pay 7.5 years @ 2 months for each year 15 months @ US $500.00/= (overseas allotment) -US$ 7500.00***

***(i) Gratuity pay for 7.5 years @ months for each year 15 months @ US$500.00 (overseas allotment) US $7500.00***

***(j) Salary arrears (contract versus actual) May 2001 to October 2002 18 months @ US $870 per month***

***Kshs.1,252,800.00/=***

***(j) Less outstanding in the current account as at 31st October, 2002-Kshs.396,196.15/=***

***(l) Less Kenya Shilling amount received as at 31st January, 2003-Kshs.352,600.00/=***

***(m) Less US dollar amount received as at 31st January, 2003-US $ 5,500.00***

***Balance of terminal dues.***

1. ***Kshs.6,722,356.00/=***

2. ***US dollars 9,500.00".***

The respondents filed a joint defence in which they denied any liability, and averred that the matter had been settled by the memorandum of agreement executed on 1st November, 2002; that the said agreement had been fully performed by them; that the salaries for the months of November and December 2002 totaling US $ 3,218 had not been paid because the appellant did not work during those months, and was not entitled to any such payment; and finally that the 2nd respondent claimed that he had been wrongly sued as the appellant's contract of employment was with Shipmarc Ltd, and not with him personally, and that in any event, as no notice of filing suit was served on him he was entitled to costs of the suit.

The learned Judge of the High Court (Mwera, J) after considering carefully the evidence that was adduced before him, came to the conclusion that the appellant was not justified in claiming the sums stipulated in the plaint, except only the salaries for the months of November and December 2002, being US $ 3218 in total. Here is how the learned Judge rendered himself, in part:

***"From the above this court concludes that the salaries for November and December 2002 were incorporated in the memorandum/schedule of 1.11.2002 to represent notice to terminate. If in their friendly manner the 2nd defendant got the plaintiff to accept to do some work during that period, it was not a condition to pay the 2 months salary. It was not written in the accord. It should be paid (US $3218) – if it has not been paid. Indeed Mr. Magolo told the court that any dues to his client following the summary judgment were fully paid as per the evidence of 2001 on vouchers duly signed by the plaintiff and other evidence of acknowledgement. It is no matter that part of the payment was against the 2nd's defendants' account with his wife. He said that that was as per arrangement with the 1st defendant.***

***ISSUE 12: Demand notice: From Exh.P1 (containing 30 pages) this court was unable to locate any such notice sent to the defendants. Thus no demand to pay was made. The 2nd defendant maintained so and the plaintiff did not prove service of such notice.***

***ISSUE 14, 15: If plaintiff was entitled either to Kshs.6,722,356/= or US $9,500: This court does not think so because no evidence was led to support either.***

***ISSUES 16, 17, 18 to 20: Who should pay costs to the 2nd defendant, if the plaintiff is entitled to costs and the fate of this suit: The 2nd defendant as a director of the 1st defendant a limited company, ought not to have been sued along with it. The 1st defendant has the capacity to sue and be sued on its own for whatever claim and not along with its directors. So the plaintiff will pay the costs to the 2nd defendant here.***

***The court has found that all the sums agreed on 1.11.2002 were paid except US $ 3218 representing salaries for November and December 2002. This sum ought to be paid and the plaintiff gets judgment for that. To some extent this court was left with the impression that from the way the litigants dealt with each other here, and notwithstanding the cash flow problem that the 1st defendant experienced, it had at all times intended to pay the whole sum of US 20 032 without being pushed to court. It paid it all except the salaries bit that has now been ordered due to the plaintiff. But the plaintiff was not entitled to the colossal sums he put in his plaint. They had no basis. He did not serve a demand notice either.***

***In sum this suit is dismissed with judgment given limited to US $ 3218 computed at the current shilling rates from the Central Bank of Kenya. The plaintiff will also get 5% costs plus interest on the lower scales. But he will pay full costs to the 2nd defendant whom the plaintiff ought not have sued here in the first place."***

That is the decision that gave rise to this appeal. In his memorandum of appeal, filed on 18th August, 2008, the appellant has outlined nine grounds of appeal as follows:

***"1. THAT the Learned Trial Judge erred in law and fact in making a finding that the Appellant had not made any demand before filing the suit.***

***2. THAT the Learned Trial Judge erred in law and fact in failing to find as a fact that a contract of employment existed as defined in the Employment Act.***

***3. THAT the Learned Trial Judge erred in law and fact in finding that the Appellant's suit against the second Respondent was misconceived and in effectively overturning a finding made by a Court of similar jurisdiction.***

***4. THAT the Learned Trial Judge erred in law and fact in failing to find that the Appellant was entitled to gratuity calculated at a minimum of 18 days of each year served.***

***5. THAT the Learned Trial Judge erred in law and fact in finding that the Memorandum of the 1st November, 2002 was drawn by the Appellant and in failing to note and find that the said Memorandum of execution by the second Respondent personally and in his personal capacity.***

***6. THAT the Learned Trial Judge erred in law and fact in finding that the draft contract was not relevant yet the same had been partly acted upon.***

***7. THAT the Learned Trial Judge erred in law and fact in completely ignoring the Appellant's submissions and all the matters raised therein.***

***8. THAT the Learned Trial Judge erred in law and fact in demanding that the Appellant be only entitled to 5% of the costs and further in condemning the Appellant to pay costs to the 2nd Respondent on higher scale.***

***9. THAT the Learned Trial Judge erred in law and fact in otherwise dismissing the Plaintiff's suit."***

Mr. Jared O. Magolo, learned counsel for the appellant, in his submissions before us, argued essentially three grounds: that the learned Judge of the High Court ignored evidence of the contract between the parties that entitled the appellant to claim the sums stipulated in the plaint; that the contract did not require him to provide services during the months of November and December 2002; and that the learned Judge erred in awarding him only 5% of the costs, and in holding that the 2nd respondent had been wrongly sued. He submitted that in a separate but related ruling, Khaminwa, J had already ruled that the 2nd respondent had been "properly" joined as a party to the suit.

On the other hand, Mr. Kinyua Kamundi, learned counsel for the respondents, argued that the parties were bound by the agreement dated 1st November, 2002; that the respondent had fully complied with the said agreement; that Khaminwa, J had never made any final or conclusive findings that the 2nd respondent had been properly enjoined in the suit; and that the learned Judge was correct in assessing the costs at 5% on the basis that indeed the appellant's success in the High Court represented no more than 3.4% of the total claim.

We have considered the pleadings, the evidence that was adduced before the High Court, the exhibits, and, in particular the agreement of 1st November, 2002, the judgment of the High Court, the submissions made before us, and in the High Court, and the law. As this is a first appeal, our duty is to reconsider and re-evaluate the evidence, and to draw our own conclusions, bearing in mind though that we have neither seen nor heard the witnesses, and making due allowance for the same ***(See Selle v. Associated Motor Boat Co. (1968) EA 123)***.

The material facts in this case are not in dispute. As we said at the beginning of this judgment, there was no written contract governing the employment of the appellant. Clearly, both sides had different views. The learned Judge heard witnesses for both, and had the benefit of the documents executed by the

parties. The most important document that guided the learned Judge in arriving at the conclusion that he did, was the memorandum of agreement entered into between the parties on 1st November, 2002, outlining the settlement that they had reached on their respective obligations. This document is on the appellant's own letter head, prepared initially by him, and subsequently, items **added** (not deleted) by the 2nd respondent in the latter's hand writing, making a **total** sum payable of US $ 20,032, which the appellant accepted as **"full and final settlement"**. The document very clearly outlines every aspect of the appellant's claim, and there has been no evidence of any coercion, fraud, or mistake associated with it. The learned Judge was correct in coming to the conclusion that the said document represented accurately the contract between the parties, and that there was nothing more, and nothing less, payable to the appellant. We concur fully with that proposition, and uphold that decision.

With regard to costs, that was the discretion that the learned Judge exercised, correctly in our view. Normally, costs follow the event. Here, the appellant's success represents no more than 5% of his original claim. The Judge cannot be faulted for giving him 5% of the costs. We are also of the view that the 2nd respondent was wrongly joined in this suit for the reasons outlined by the Judge, and having examined the record we also find that no demand had been served upon the 2nd respondent in his personal capacity. Accordingly, we uphold the decision of the High Court in its entirety, and dismiss this appeal with costs to the respondents.

Orders accordingly.

**Dated and delivered at Mombasa this 19th day of July, 2012.**

**ALNASHIR VISRAM**
**……**
**JUDGE OF APPEAL**
**M. K. KOOME**
**……..**
**JUDGE OF APPEAL**
**H. M. OKWENGU**
**…….**
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**