Tumaz and Tumaz v Ryce East Africa Ltd (Civil Appeal E055 of 2022)
[2025] KEHC 3216 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 3216 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E055 OF 2022

SC CHIRCHIR, J

JANUARY 30, 2025

BETWEEN

TUMAZ AND TUMAZ ..... APPELLANT

AND

RYCE EAST AFRICA LTD ..... RESPONDENT

(Being an appeal from the judgment of Hon. G. Ollimo, SRM delivered on 28/7/2022 in Butere SPM'S court civil case No. 100 of 2018)

JUDGMENT

1. The appellant sued the respondent herein in the lower court seeking for an order of specific performance of the contract dated 20th June 2018 entered into by the parties herein. It further sought for damages for breach of contract. In response, the respondent denied the claim and filed a counterclaim for ksh. 2, 583,116 being unpaid car rental charges, the interest accrued and other incidentals.

2. In a Judgment delivered on 28th July 2022 the trial court dismissed the Appellant's claim and allowed the counterclaim.

Memorandum of Appeal

3. The Appellant was aggrieved by the outcome and proffered this Appeal. He has set out the following grounds:

    a). The learned magistrate erred both in law and in fact by holding that the LPO dated 20th June 2018 is not a binding agreement between the parties, despite having found the respondent was aware of the said LPO and even extended the time for payment from 14 days to 45 days pursuant to the LPO.

b). The learned magistrate erred in both law and facts in holding that the LPO did not amount to a binding contractual relationship while at the same time finding the LPO extended the time for payment from 14 days to 45 days

c). The learned Magistrate erred in law and in fact in holding that the LPO was not binding on the respondent when clause 1.1 of the LPO clearly stipulates that the respondent's electronic acceptance, acknowledgment of the LPO or commencement of performance constituted the respondent's acceptance of the terms and conditions of the LPO.

d). The learned Magistrate misapprehended the contents of Clause 1.1 of the LPO which categorically states that the LPO constituted the entire and exclusive agreement between the parties and therefore superseded any previous agreement between the parties.

e). The learned Magistrate misapprehended the provisions of Clause 1.1 of the LPO which stipulates that the acceptance of the purchase order was conditioned on the respondent's agreement that any term different from or in addition to the terms of the LPO shall not form part of the LPO, even if the respondent conditions its acceptance of the purchase order, the plaintiff's agreement to such different or additional terms, thereby arriving at an erroneous decision.

f). The learned magistrate erred in both law and facts by declining to hold that the LPO dated 20th June 2018 superseded all the previous agreement between parties.

g). The learned Magistrate misapprehended the provisions of clause 10 clause 17 of the LPO which provided the procedure to be followed in this instance of a dispute.

h). The learned magistrate erred in both law and in fact by holding that the LPO dated 20th June 2018 only extended period from 14 days to 45 days but did not amend the previous agreement between the parties.

i). The learned magistrate erred in law by implying that for a contract to be binding it must be executed by all the parties.

j). The learned magistrate erred in both law and in fact in dismissing the Appellant's suit.

k). The learned Magistrate erred in both law and in fact by holding that the Appellant had not tendered any evidence to refute the Respondent's counter claim and thereby allowing the same.

4. The Appeal proceeded by way of written submissions

Appellant's Submissions

5. It is the Appellant's submissions that the Local purchase order dated 20/6/2018 (I will hereafter refer to it as the LPO),was the agreement in force ; that it was supreme and it made obsolete any previous agreements between the parties. That consequently the invoice dated 3/6/2018 was due for settlement on 29/8/2018, yet the respondent repossessed the vehicles on 10/8/2018 before the lapse of the 45 days; that the respondent was therefore in breach of the agreement.

6. It is further submitted that, in any event, this matter ought to have been resolved through Arbitration as per the provisions of the agreement.

7. The Appellant goes on to admit that it refused to settle the other invoices because the respondent was already in breach.

8. The Appellant insist that the LPO had all the elements of a contract, namely; offer, acceptance and consideration which albeit , had not been paid. It is further submitted that the respondent , through their conduct agreed to the variation of the earlier agreement by continuing to offer car- hire services and issuing invoices.

9. While agreeing that any variation in a contract requires the meeting of the minds of the parties, the Appellant argues that the termination letter dated 27/7/2018 clearly indicated that there was a meeting of the minds, namely that indeed they agreed to the variation.

10. Consequently, the Appellant contends, notwithstanding the fact that the respondent did not sign the LPO, they were bound by it, by their conduct.

Respondent's Submissions

11. On the issue of whether the LPO was a binding contract between the parties, the respondent refers the court to clause 10 of the rental agreements which provides that variation can only be in writing and that in any case , there was no proof that the LPO in question was ever delivered to the respondent .

12. It is further submitted that the LPO does not meet the threshold of a contract as it lacks the three basic elements of a contract, namely offer, acceptance and consideration, and thus the Appellant cannot base its claim for an order of specific performance on it.

13. The respondent argues that it was a stranger to the LPO dated 20/6/2018 and therefore it cannot be enforced against it as it goes against the principle of the privity of contract;

14. The respondent further submits that, in any event, pursuant to clause 18.2 of the LPO , should there be a conflict between the LPO and SOW (as defined in clause 2.8 of the LPO) the conflict will be resolved in favour of SOW; that SOW in this case was the rental Agreements as they are the documents that specified the scope , objectives and time frame of the deliverables. Consequently, where there is conflict between these two documents the court should go by the rental Agreements.

15. The Respondent contends that the LPO was a document by the Appellant for the Appellant and therefore it could not vary the terms of the agreement.

16. It is further submitted that the Appellant has come to court with unclean hands and therefore disentitling him to the equitable remedy of specific performance.

17. The respondent finally submits that the LPO was not a valid contract and hence cannot form a basis for an order of specific performance.

18. On the counter-claim , the respondent submits that it was not refuted at all; that the first invoices were delivered on 5th and 6th may 2018 , but the same was not paid even within the 45 days the Appellant is claiming; that the demand for physical copies of the invoices had no basis as there was no agreement on the physical delivery of physical copies ,and was only made after the respondent had written the demand letter of 2/8/2018.

19. It is further stated that in any event , according to the Appellant's email of 31.7.2018, the reason the Appellant gave for non- payment was lack of funds, and not because they had not received the invoices.

20. According to the respondent what was critical was the fact that the invoices were delivered , as that is what commercial sense entails.

21. It is the respondent's final submission that, on the date of the delivery, it is evident from the Appellant's letter of 17/5/2018 that the Appellant was already in receipt of the vehicles.

The Evidence

The plaintiff's case

22. PW1 was Evanson Mwale, a director at the Appellant company. He relied on his witness statement and the four documents listed in their list of documents. The documents were produced and marked as exhibits 1 to 4. He stated that his company had leased 3 vehicles from the respondent for a period of 180 days ; that the respondent issued invoices on 26th June 2018 which were due for payment on 29th August 2018. He stated that hard copies or email copied were to be submitted.; that he received the invoices through email. He further stated that the respondent sent an Auctioneer to their premises before the invoices were due for payment. ; that the Auctioneer was sent on 19/8/2018. He testified that because the vehicles were repossessed before the due date , the Appellant refused to pay the rental fee.

23. On cross- examination , he confirmed that they had hired 3 vehicles from the defendant being two single cabs and a Toyota Land cruiser ; He also did confirm that as per the LPO issued by the respondent, the delivery date was 3/6/2018; that he had not seen an email from his company stating that the vehicles had been received. He denied knowledge of the rental agreements. He further stated that he was not aware of any agreement to the effect that his company was to effect payments within 14 days from the date of the invoice. He admitted that he had not made any payment by the time of the attempted repossession. On being referred to the LPO , he admitted that the respondent did not sign it and there was no evidence that it was received by the said defendant.

24. He further stated that according to the LPO the vehicles were delivered on 3/ 6/ 2018 and that would mean the vehicles were delivered before the LPO was issued. . He further told the court that there were two previous contracts but the one of LPO superseded the others.; that the LPO amended the previous two contracts . He stated that the Appellant was to pay 4,500 per day per single cabs and ksh. 6500 for the Land cruiser. He admitted that he never made any single payment for any of the vehicles. He further stated that the LPO was not signed by the defendant . He admitted that according to the first agreement the plaintiff was to make payments within 14 days but the LPO superseded the agreements.

25. In re- examination he stated that the under clause 1.1 of the LPO , the LPO was to constituted the entire and exclusive agreement . He further stated that the payment was subject to the delivery of hard copy invoices

The defendant's case

26. DW1 was Bernard Nyamere ,head of leasing at the defendant company. He adopted his witness statement dated 15/11/2018 and list of documents which were marked as defence exhibits Nos .1-8.

27. He denied having any knowledge of the LPO but was aware of the one dated 2/5/2018 , and that the later was the basis upon which the vehicles were delivered to the plaintiff. In his written statement, he stated that in the rental agreement the plaintiff was to settle the payment within 14 days from the date of the invoice; that the plaintiff sought for extension of the period to 45 days ;that this request was made through an LPO prepared by the plaintiff, and that his company agreed to the request. . He further stated that the initial invoice was dated 04/5/2018 for ksh. 539,400 and was due for payment on 19th June 2018. He stated that the plaintiff used the vehicles from 4th may 2018 up to the date of repossession and that to date no payments have been made. This was despite issuance of subsequent invoices dated 22/6/2018, 30/7/2018 and 20/8/2018. The vehicles were repossessed on 20/8/2018 by which time the plaintiff owed the defendant ksh. 2,583,116 . This was the amount the defendant was claiming via the counter- claim.

28. On cross- examination, he stated that the credit terms of hiring the vehicle was for 14 days ; that the plaintiff did request for 45 days ; that the payment was to be made within 45 days from 03/5/2018; that two vehicles were delivered to the plaintiff on 04/5/2018 while one was delivered on 05/5/2018. That payments ought to have been made on 19/6/2018 and the vehicles were repossessed in August.

Analysis and Determination

29. The appeal to this court from the magistrate's court is by way of a retrial. Consequently this court is mandated to review the evidence, do its own evaluation and arrive at its own its own determination. (see: selle & Ano vs Associated Motor Boat Co Ltd (1968)E.A 123

30. I have considered the pleadings, the trial record, the memorandum of Appeal and the parties submissions and I have identified the following issues for determination:

    a). Whether the LPO dated 20/6/2018 was binding on the respondent and whether it superseded the terms of the rental Agreement.

    b). Whether the Appellant is entitled to an order of specific performance.

    c). Whether the respondent is entitled to ksh. 2,583,116

Whether the LPO dated 20/6/2018 was binding on the respondent and whether its provisions supersedes the rental Agreements.

31. The parties herein entered into a car rental Agreements in which the respondent was to provide three rental cars at an agreed daily rental fee. A rental Agreement was signed in respect of each vehicle. At some point the Appellant defaulted in payment of rental fee. In the course of negotiation, the Appellant issued a Local purchase order (LPO) to the respondent. The LPO contained some terms which essentially varied the terms of the Rental Agreement. One of the terms varied was the period of payment of the fee , which was varied to 45 days from the initial period of 14 days provided for in the rental Agreement. The Appellant still defaulted on payment, and the Respondent repossessed the Motor Vehicles.

32. The Appellant then moved to court contest centred on which document governed the relationship of the parties? - was it the rental Agreement or the LPO?

33 There is common ground that car Rental Agreement were signed between the parties. The rented vehicles were KCG 314 Y,KCA880N and KCG 263 Y. The Hand- over reports show that two vehicles were handed to the Appellant on 4/5/2018 and one on 5/5/2018. The invoice was sent via an email dated 14th may 2018. As per the terms of the Rental Agreements, the invoice was due for payment within 14 days from the date of issue.The Appellant acknowledged the invoice on 17th may 2018, where he stated " Thank you for the invoice. Kindly adjust the price of one pick up which was out of service for 3 days"

34. However on 20/6/2018 the Appellant issued an LPO signed on 20/6/2018 by the Appellant's director. There is no consensus as to whether the LPO dated was delivered to the respondent . However the respondent's witness testified that the Appellant made a request through an LPO to vary the period of settlement of the LPO. This means the respondent must have been aware about the LPO and that was why they conceded to the request. However what is not in dispute is that the LPO was not signed by the respondent.

35. It is the Appellant's case that the LPO superseded the rental Agreements. what does the law say about variation of contracts?

36. In Kenya Breweries Limited v Kiambu General Transport Agency Limited NRB CA Civil Appeal No. 9 of 2000 [2000] eKLR. Justice Gicheru stated as follows;

> A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration. If the agreement for the variation is mere nudum pactum it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement..."

37. In the famous decision in Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ it was held:

> " One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English Law ....."

38. In Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999, it was held:

> "...Courts shall not be the for a where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

39. Further in the present case the rental Agreements in clause 10 provided for variation of the agreement. The clause states as follows: " No waiver or variation of the terms hereof shall be binding on the company unless authorized in writing and signed by a director of the company " The Agreement in this case was authored by the respondent and therefor the " company " being referred to can only be construed to have been referring to the respondent.

40. By presenting a fresh LPO dated 20th June 2018 to the respondent with fresh terms as to time of payment the appellant was in effect making a fresh offer which was different from what was in the original agreement. In order for it to be effective, it had to be accepted by the respondent by appending their signature or there had to be a meeting of minds which is an essential component for the formation of an enforceable contract.

41. However the Appellant argues that although the respondent may not have signed the LPO their conduct of allowing them to take possession of and continue usage of the motor vehicles , and accepting the extension of the period of the payment shows that there was meeting of minds and hence it can be implied that through the conduct the contract was valid and legally binding on both parties.

42. The Appellant has referred to two items which they submit was an indication of the respondent's concession to new contractual terms , that is the fact that the respondent allowed them to keep the vehicles, and allowing the Appellant to make payment after 45 days as per the subject LPO.

43. On the use of vehicles, the Appellant's argument is devoid of merit as the contractual period was 180 days , which were yet to expire. The respondent therefore was complying with its part of the bargain notwithstanding the default on the part of the Appellant.

44. The concession by the respondent was therefore on one issue ;- the extension of the payment period. Can this concession be construed as meeting of the minds in respect to the variation or that the LPO had replaced the rental Agreement?

45. In seeking to answer this question I wish to cite extensively the decision of Justice Emukule in Gimalu Estates Ltd & 4 Others -vs- International Finance Corporation & another [2006] eKLR] where he observed as follows: "Parties to a contract effect a variation of the contract by modifying or altering its terms by mutual agreement.....a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract. (see. (Cowey –Vs- Liberation Operations Ltd, [1966} 2 Lloyds' Rep. 45).

> ...So the form of variation is important to determine whether there has been a mere variation of terms or a rescission. The effect of a subsequent agreement – whether it constitutes a variation or a rescission depends upon the extent to which it alters the terms of the original contract. In the case of MORRIS -VS- BARON & CO. [1918] A.C. 1, 19. Lord Haldane said that, for a rescission, there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting."

46. Also in the case of County Government of Migori v Hope Self Help Group [2020] eKLR the court had this to say about such minor variations in a contract: This court has intently considered the contents of the letter dated 23/01/2014 (Exbibit 4) which purportedly varied the terms of the contract..... It is undoubtedly clear that the object of the letter is the bringing down the contractual sum. It does not envision any other alteration as to the nature of performance of the obligations as set out in the contract. It is therefore this court's finding that the change constituted a variation on just one limb of the entire contract".

47. Back to the present case it is abundantly clear that the main purpose of the LPO was to vary the payment period only and which variation the Respondent by their conduct acquiesced to it. That one concession can not be taken to mean that the respondent had agreed to the substitution of the Rental Agreement by the LPO or a rescission of the rental Agreements.

48. Further in Hudson's Building and Engineering Contracts, (10th Edition, pg . 22) the Author writes: "A simple contract can be validly varied by the subsequent agreement of the parties, so long as there is consideration to support the variation agreement. If at the time when the variation agreement is made, obligations remain partly unperformed under the original contract by both parties, there will usually be consideration for the new agreement. If, however, one party to the contract has wholly performed his obligations, and therefore agrees without advantage to himself or detriment to the other party to forgo some part of the performance of the outstanding obligations of the other party, there will be no consideration to support his agreement to do so. The variation agreement will therefore be unenforceable if not under seal and the original contract requiring full performance will remain.....". (Emphasis added)

49. The respondent herein had fully performed its part of the contractual obligations, by delivering the vehicles. The vehicles were delivered on 4/5/2018 and 5/5/2018 as per the check- list and hand- over report dated the same dates respectively. The Appellant's allegation that the vehicles were delivered in

June was not supported by any evidence. In the words of Hudson(supra) the LPO was not enforceable and therefore did not replace the rental Agreement.

Is the Appellant entitled to an order of specific performance ?

50. The answer to the above question is in the negative. Firstly the LPO, for reasons I have stated herein before was not a valid contract capable of being enforced. The Appellant therefore could not and cannot use it as a basis for seeking the remedy of specific performance.

51. Secondly, it is evident that even with the concession , the Appellant did not make the payments within 45 days. The first invoice was sent via email on 14 /5/2018 and were acknowledged by the Appellant through their email of 17 /5/2018. That first invoice , going by 45 days was due on 27th June 2028. By their own witness admission no payment had been made by the time the vehicles were repossessed in August 2018. The Appellant argument that payment was upon delivery of physical copies was really an attempt to circumvent the due dates. Thus the Appellant was in breach and the respondent had a right to terminate the contract

52. Thirdly, the remedy of specific performance is an equitable remedy.Those who come to equity must do so with clean hands. The Appellants hands are soiled . It is not deserving of an equitable relief.

The counterclaim

53. The Appellant has faulted the trial court for holding that the counterclaim was not contested. By way of evidence the Appellant's witness readily admitted that his company had not made any payment and the only reason he gave was that the vehicles were repossessed before the due date. Effectively there was no other contest touching on the counter-claim.

54. In this regard however , I have already found that it is the Appellant who was in breach. That was the reason for repossession. I have no reason to fault the trial court in this regard.

55. In conclusion this Appeal has no merit. It is hereby dismissed and the findings of the trial court upheld.

56. The Respondent shall have the costs of this Appeal .

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE.