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Tron Enterprises Limited v Three Star Contractors Limited & another (Civil Appeal 190 of 2023) [2025] KEHC 2479 (KLR) (27 January 2025) (Judgment)

Neutral citation: [2025] KEHC 2479 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 190 OF 2023

NIO ADAGI, J

JANUARY 27, 2025

BETWEEN

TRON ENTERPRISES LIMITED .... APPELLANT

AND

THREE STAR CONTRACTORS LIMITED .... 1ST RESPONDENT

RODGERS MURUNGA WAMUKOYA .... 2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. H. Okwani (PM) in Mavoko CMCC No. 4 of 2019 delivered on 7/7/2021)

JUDGMENT

Facts of the case;

Appellant case:

1. By a Plaint dated 21/11/2018, the Plaintiff (Appellant) sued the Defendants (Respondents) claiming a principal sum of Kshs.12,012,784.00 being the total amount owed for the goods and services supplied together with interest calculated at the then current bank lending rate of 18% plus charge for late payment calculated at the rate of 3% per month.

2. It was the Appellant's case that on or about the 17th day of April 2013, the Plaintiff entered into a sale agreement with the Respondents where it was agreed that the Appellant would supply construction cement to the various sites where the Respondents were conducting business and that payment would be made after Thirty (30) days upon receipt of the cement.

3. That it was further agreed that after the lapse of the agreed Thirty (30) days period, if the invoice amount will still be owing due to none payment, then the said amount will attract an interest at the

prevailing market rate which currently stands at Eighteen Percent (18%) annually and there will also be a Three Percent (3%) monthly charge for late payment from the date its due until payment in full.

4. Between the period starting 17th April 2013 and ending on 14th August 2013 the Appellant supplied cement to the Respondents valued at Kenya Shillings Three Million Nine Hundred and Sixty-Two Thousand (Kshs.3,962,000/=). Between the said period, the Respondents only managed to pay a total of Kenya Shillings Seven Hundred and Ninety-Two Thousand Four Hundred only (Kshs.792,400/=) leaving a balance of Kenya Shillings Three Million One Hundred and Sixty-Nine Thousand Six Hundred (Kshs.3,169,600/=).

5. The Appellant averred that the Respondents had breached the contract by not fulfilling their contractual obligation of paying it the amount owed for the goods and services supplied totaling to Kenya Shillings Three Million One Hundred and Sixty-Nine Thousand Six Hundred (Kshs.3,169,600/=).

6. The Appellant further averred that the interest on the principal amount owed currently stands at Kenya Shillings Two Million Nine Hundred and Forty-Seven Thousand Seven Hundred and Twenty-Eight (Kshs.2,947,728/=) and the accrued monthly charge for late payment currently stands at Kenya Shillings Five Million Eight Hundred and Fifty-Nine Thousand Four Hundred and Fifty-Six (Kshs.5,859,456/=).

7. The Appellant thus claimed for Kenya Shillings Twelve Million Twelve Thousand Seven Hundred and Eighty-Four (Kshs.12,012,784) jointly and severally against the Respondents.,

Respondents Case

8. The Respondent filed a Defence dated 22/01/2019 in which the 2nd Respondent admitted being a co-director of the 1st Respondent but denied either on his behalf or on behalf of the 1st Respondent having incurred subscribed, signed or contracted or at all with the Appellant as pleaded.

9. The Respondents further and by way of Defence averred that if any agreement or understanding or contract was entered between the Respondents but which was vehemently denied then it was only a purchase of cement which was paid for at a value of Kshs.792,400 which was paid in full.

10. The Respondents denied receiving, signing or using the materials alleged on 17/4/2013 and 14/8/2013 or received cement worth Kshs.3,962,000 or at all on any of their sites at Bungoma Law Courts or Mukwaweli Primary school.

11. The Respondents denied written invoice delivery or supply contract signed by the 2nd Respondent and as its co-director, by them, their behalf or at all and pleaded that they would at the earliest possible apply for better particulars before commencement namely; copies of delivery notes, invoices and any other relevant documents.

The Evidence

12. The hearing proceeded on 11/2/2021 when the Respondents and their counsel were absent. The Appellant called Evon Katusime Ndeta as a witness who testified as PWI. She stated that she was the Managing Director of the Appellant who deals with transportation. She relied on her witness statement dated 21/11/2018 as her evidence in chief and produced as PExhibits 1-9 the documents on the list of documents dated 12/11/2018. She prayed for judgment to recover the debt. The Appellant's case was then closed

13. The Respondents did not call any evidence and their case was closed.

14. The Appellant filed submissions on the suit and upon consideration of the same, the trial court on 7/7/2021 delivered judgment dismissing the Appellant's suit.

15. Being dissatisfied with the said judgment, the Appellant lodged the appeal herein vide a Memorandum of appeal dated 16/3/2022 raising 6 grounds of appeal.

16. The appeal was canvassed through written submissions. The Appellant filed submissions dated 30/9/2024. The Respondents did not participate in the appeal or file written submissions.

Analysis And Determination

17. This being a first appeal, this court is reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another Limited v Associated Motor Boat Co. Ltd.& others and in Peters v Sunday Post (1968) EA 123. (1958) E.A page 424.

18. In the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

> A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

19. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

20. In view of the above, I have perused the Record of Appeal and considered the evidence adduced before the trial court together with the Appellant's submissions led herein and wish to consider whether the Appellant who was the Plaintiff in the trial court proved her claim against the Respondent on a balance of probability. The legal burden of proof in a civil case was discussed in the case of Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR where the court stated as follows: -

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as

Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

21. The question then is what amounts to proof on a balance of probabilities? Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated that:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

22. Further in the case of Palace Investment Ltd vs. Geofrey Kariuki Mwenda & Another (2015) eKLR, the judges of Court of Appeal observed as follows: -

> "Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say: -
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> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

23. The burden of proof at all times lies with the Plaintiff/Claimant to prove the case and not the Defendant/Respondent. In the instant case, the trial Magistrate in her judgment found that the Appellant had not proved his case on a balance of probability as the court was not able to ascertain the existence of the contract.

24. In its judgment the trial court framed two issues for determination;(1) whether there existed a contract between the Appellant and the Respondents: (2) whether there was a breach of contract;

25. In determining whether there existed a contract between the Appellant and the Respondents, the trial Court cited Section 5 of the *Sale of Goods Act* which provides that:-

> "Contract of sale how made... subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties: provided that nothing in this section shall affect the law relating to corporations"

26. The trial court upon citing the above provision, went on to state as follows:-

> "that the Plaintiff (Appellant) submits that there was an oral agreement that fits the description above."

27. From the above it is not clear what the trial court found as to whether or not there existed a contract between the Parties or not.

28. On the second issue as to whether there was breach of the said contract, the trial court cited the definition of breach of contract in Black Law Dictionary as a violation of contractual obligations. When one party to the contract fails to perform a duty, promise by repudiating it then the contract is termed as frustrated. The trial Magistrate went on to say: "The terms of the agreement entered into and signed by the parties was unequivocal".

29. From the above, the trial court having found as it did on the first issue above, it is clear that the trial court misapprehended the facts and lost track of the case considering that nowhere in the case did the parties sign any agreement. This such finding was erroneous and misplaced and occasioned injustice to the Appellant.

30. The trial court further noted that the Respondents had filed a Defence but did not follow up to defend the suit and that other than the invoices generated by the Appellant there was no other proof that there existed an oral agreement between the Appellant and the Respondents. That the Appellant had clearly narrated the terms of the agreement and the denial of the Respondents of such agreement the court was at a loss whether a contract existed or not. Again, on this second issue the trial court did not make a determination as whether or not there was breach of contract.

31. In this court's view, the trial court failed to determine the two issues it framed for determination in its judgment.

32. This court notes that in their Defence, the Respondents although they deny there being any agreement or understanding or contract entered between them and the Appellant, they however admit that they purchased cement from the Appellant which was paid for at the value of Kshs.792,400/= and which was fully paid. The Appellant too has admitted that the Respondents paid the stated amount but there was unpaid balance of kshs.3,169,600/=. The Appellant also outlined the terms of the oral sale agreement entered into between the parties in the Plaint, wherein the Appellant was to supply the Respondents with construction cement to various of the Respondents' sites and payment would be made within a period of 30 days upon receipt of the cement.

33. From the foregoing this court finds that there must have been some sort of seller-buyer relationship between the Appellant and the Respondent that resulted into the purchase of the cement that is admitted to have been paid for. In *Rockview Investments Limited v Mungei (Civil Appeal E078 of 2021)* [2023] KEHC 21042 (KLR) (27 July 2023) (Judgment), cited the case of Patrick Njuguna Kimondo vs. Geoffrey Vamba Mbuti [2019] eKLR the court discussed the issue of oral contracts and held thus: -

> " I am of the opinion that oral agreements supported by credible evidence can be and are enforceable. All what the law requires is that certain contracts be in writing – Section (3) (3); Short of that, it would be a travesty of justice as most people either knowingly or otherwise transact their businesses upon oral agreements."

34. In Kericho HCCC Case No.6 OF 2017 Rusu Investments Ltd v Kaisugu Limited [2021]eKLR cited by the Appellant, the Court referred to the holding by the Court of Appeal in Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR, which stated that:

> " a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court said; "It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133at 141".

35. Also, in Total Kenya Limited v D Pasacon General Construction &Electrical Services (Civil Appeal 119 of 2019) [2022] KECA 593 (KLR) (8 July 2022) (Judgment) the Court stated:

> "In the instant appeal, the respondent has claimed the existence of an oral contract and has further described the circumstances that gave rise to the agreement. We are satisfied that the respondent has properly discharged his burden of proof...In the circumstances before this Court, we find that there was evidence of a valid oral contract between the parties. We find that the lack of a local purchase order issued by the appellant did not in any way render the oral contract between the appellant and the respondent void. In the circumstances, we find that the High Court properly addressed itself to the issues at hand and reached the correct conclusion in entering judgment in favour of the respondent herein".

36. It is observed that the Respondents had in their Defence pleaded that they would at the earliest possible apply for better particulars and also filed a witness statement.

37. There is no evidence on record to show that the Respondents indeed applied for better particulars as intimated and further, they failed to call any witness to testify and adduce evidence to controvert the Appellant's evidence. The Appellant called a witness who testified and produced exhibits which were various delivery notes and invoices These documents were never objected to or challenged by the Respondents. The Appellant's evidence was uncontroverted by the Respondents.

In CMC Aviation Limited =vs= Cruise Air Limited [1978] E.A., 103, Madan J. stated;

> "Pleadings contain averments of those concerned until they are proved or disapproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence."
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> In *Linus Nganga Kiongo v Town Council of Kikuyu Nairobi (Milimani) HCC No. 79 of 2011*, the decision of Lady Justice Lessit was cited in the case of Motex Knitwear Ltd v Gopitex Knitwear Ltd Nairobi (Milimani) HCCC No. 834 of 2002 as follows:
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> > "Although the defendant has denied liability in the amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the Ist plaintiff's case stand unchallenged but also the claims made by the defendant in his defence and counterclaim are unsubstantiated. In the circumstances, the counterclaim must fail."
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> > It also stated as follows:
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> > > "Again, in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No 1243 of 2001 the learned judge citing the same decision stated that it is trite law that where a party fails to call evidence in support o fits case. that party's pleadings remain mere statement of fact since in so doing the party fails. to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

It further stated while citing the decision of Ali - Aroni J in Janet Kaphine Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007.

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the plaintiff and that of the witness remain uncontroverted and the statement in the defence remains mere allegations…Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support by way of evidence".

38. In essence, I agree with the Appellant that the Respondents' strategic decision to not call witnesses leaves their accusations unsubstantiated, rendering them mere allegations with no supporting evidence. Therefore, given the weight of unchallenged evidence against the Respondent and the precedent set in the Appellant's cited cases, this court finds that the Appellant proved her case against the Respondent on a balance of probabilities.

39. Going by the provisions of Section 5 of the *Sale of Goods Act* that were cited by the trial court, this court finds and holds that there existed an oral Sale Contract between the Appellant and the Respondents herein which contract the Respondents breached by failing to pay for the goods and services rendered by the Appellant.

40. This court is not able to ascertain the issue of the purported interest on an invoice that was not paid within the 30 days attracting an interest at the prevailing market rate of (18%) annually and a 3% monthly charge for late payment from the date the payment falls due in the circumstances of this matter. The court will thus decline to allow any interest based on the foregoing rates and apply the court rates.

41. By reason of the premises hereinabove, I allow the Appellant's Appeal and enter Judgment as follows:-

    a) The learned trial Magistrate's Judgment delivered on 7th July 2021 is set aside and in place thereof, this Court enters Judgment for Kshs.3,962,000/= made against the Respondents jointly and severally.

    b) Costs of this Appeal, and those for the lower Court suit, shall be in favour of the Appellant.

    c) Interest on the award under order (a) above shall be at court rates from the date of this judgement till full payment.

    d) There shall be 30 days stay of execution.

    e) This file is closed.

42. Orders accordingly

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 27TH JANUARY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 27TH JANUARY 2025

In the presence of :

Ms Mwangi h/b for Banda........ for Appellant

N/A........................... for Respondent

MillyGrace.................... Court Assistant