Outsourced Professional Services v International Planned Parenthood (Civil Appeal E684 of 2022) [2024] KEHC 5273 (KLR) (Civ) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E684 OF 2022

CW MEOLI, J

APRIL 26, 2024

BETWEEN

OUTSOURCED PROFESSIONAL SERVICES ..... APPELLANT

AND

INTERNATIONAL PLANNED PARENTHOOD ..... RESPONDENT

((Being an appeal from the judgment of Caroline Ndumia (Adjudicator) (SRM) Small Claims Court delivered on 27th July 2022 in Nairobi Milimani SCCC No. E1803 of 2022)

JUDGMENT

1. This appeal emanates from the judgment delivered on 27.07.2022 in Nairobi Milimani SCCC No. E1803 of 2022 (hereafter the lower court claim). The claim in the lower court was brought by Outsourced Professional Services, the claimant before the lower court (the Appellant herein) against International Planned Parenthood, the respondent before the lower court (the Respondent herein) for the sum of USD 6,247.50 arising from an agreement for services rendered pursuant to an agreement.

2. It was averred that on 19.11.2019, the Appellant and Respondent entered into an agreement for consultancy services pursuant to which, the Appellant performed its part of the contract by providing the Respondent with required services that included (a) translation of the CDMIS system to French and Portuguese; (b) development of a web-based user manual; (c) offline system for the CDMIS. That the Respondent only paid USD 902.50 upon signing the contract leaving an outstanding balance of USD 4,907.00 which was owing and outstanding as of the date of filing of the claim, plus an additional USD 2,150.00. It was further averred that despite acknowledgment of services rendered and demand, the Respondent failed to make payment.

3. The Respondent filed a response dated 04.06.2022 acknowledging having entered into an agreement with the Appellant but denied indebtedness as alleged. On the basis that the Appellant did not fully

provide the services to the satisfaction of the Respondent as mutually agreed and hence non-payment of the 2nd and 3rd payments under the agreement.

4. The claim proceeded to hearing during which both parties called evidence. In its judgment, the lower court found that the Appellant failed to prove its case on a balance of probabilities and proceeded to dismiss the claim with costs to the Respondent.

5. Aggrieved with the outcome, the Appellant preferred this appeal challenging the whole judgment based on the following grounds: -

> " 1. That the honorable Magistrate erred in law and in fact to consider the Appellant's evidence in support of its claim and thereby dismissing the same.
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> 2. That the honorable Magistrate erred in law and in fact in making a finding that work subject of the contract between the parties and further subject of the claim in the lower court had not been completed despite there being clear evidence of the same.
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> 3. That the honorable Magistrate erred in law and in fact in finding that work subject of the contract between the parties and further subject of the claim had not been completed by the Appellant despite lack of particulars from the Respondent as to what had not been completed as alleged in its response.
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> 4. That the honorable Magistrate erred in law and in fact in finding that work can only be deemed to have been completed if the Respondent expressly admitted and accepted it as such.
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> 5. That the honorable Magistrate erred in law in dismissing the Appellant's claim against the weight of the evidence adduced and which was an erroneous action in consideration of the Constitutional principle of exercise of judicial authority and power set out in Article 159 of *the Constitution* of Kenya, 2010." (sic)

6. The appeal was canvassed by way of written submissions. Counsel for the Appellant summarily addressed the grounds in the memorandum of appeal by contending that the Appellant completed the work as documented in the correspondence tendered before the lower Court and that the Respondent failed to honor its part of the contract, to settle accounts for work done. Referring specifically to the emails dated 04.11.2021, 22.02.2022 and 28.02.2022, counsel maintained that work was done by the Appellant. And hence the lower Court erred by finding that work could only be deemed to have been completed upon the Respondent's express and acceptance.

7. It was further submitted that the lower Court erred in finding that the subject work had not been completed by the Appellant despite lack of particulars by the Respondent concerning what parts had not been completed. That the Appellant having demonstrated that they had fulfilled their part of the contract, the Respondent's end of the bargain was what was outstanding.

8. Concerning the duty of this Court as the first appellate court, counsel relied on the decisions in Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123, Mkube v Nyamuro (1938) KLR 403-415, Acceler Global Logostics v Gladys Nasambu Waswa and Another [2020] eKLR and Rachael Wambui Nganga & Another v Rahab Wairimu Kamau [2020] eKLR. Therefore, the was called upon to re-evaluate, re-assess and re-analyze the record and determine whether the conclusions reached by

the learned Magistrate can stand. In conclusion, it was submitted that the trial court's findings on the issues placed before it were in error and the Court ought to allow the appeal as prayed.

9. The Respondent naturally defended the trial Court's findings, and in so doing, counsel separately addressed the Appellant's grounds of appeal. Addressing ground 1 of the appeal, counsel argued that Appellant had not specified which parts of its evidence before the lower Court was disregarded. Pointing out that , the judgment of the trial Court referred to CW1's evidence and the documents relied on. Submitting on ground 2, counsel placed reliance on Clause 6 of the executed agreement to assert that the Respondent was the sole judge of whether works agreed upon were completed satisfactorily. And the Appellant ought to abide by the decision of the Respondent that work was not satisfactorily completed. It was further submitted that a review of RW1's oral and documentary evidence adduced by both parties, showed that the project had not been completed and or undergone pilot testing. Hence the lower Court did not err in its finding that the project has not been developed as agreed.

10. With respect to ground 3, counsel cited the provisions of Section 107 to 109 of the *Evidence Act* to reiterate that he who alleges must prove, and therefore it was upon the Appellant to prove satisfactory completion of the project by either evincing that pilot testing was done, or that issues identified by the parties were resolved. It was further argued that the Respondent's evidence lent credence to the pending issues concerning the project therefore the lower Court's finding that the Appellant failed to discharge its onus of proof that it completed the tasks it was contracted to carry under the agreement was sound.

11. Submitting on ground 4, counsel called to aid the decisions in Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR and Osteria Ice Cream Limited v Junction Limited [2011] eKLR to argue that the Appellant had not proved any metric other than the terms of Clause 6 in the agreement, for confirming that work was completed. That the Appellant further did not demonstrate that the terms of the agreement were unconscionable, unfair, or entered into under duress. Thus, by insisting that work was done in disregard of Clause 6, the Appellant was seeking to redraft the terms of the contract between the parties.

12. Regarding ground 5, counsel contended that the Appellant did not demonstrate how the lower Court failed to exercise judicial authority or erred. Further asserting that a claim not supported by evidence cannot succeed. In summation, it was asserted that the Appellant's claim before the trial court exceeded the contracted sum and that it failed to discharge the legal burden of proof. Therefore, the appeal ought to be dismissed with costs.

13. The Court has considered the memorandum of appeal, the record of appeal as well as the submissions by the respective parties. In ordinary first appeals, the first appellate Court is entitled to re-evaluate the evidence of the trial and to make its own conclusions as held in will only interfere with a finding of fact made by a trial Court when such finding was based on no evidence, or if it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982 – 1988) 1 KAR 278. Nevertheless, this being an appeal from the Small Claims Court, the Court must first satisfy itself that the appeal before it falls within the purview of Section 38 of the *Small Claims Court Act*.

14. Section 38 of the *Small Claims Court Act* prescribes the nature of appeals that lie from the said Court to the High Court as follows; -

> "(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

(2) An appeal from any decision or order referred to in subsection (1) shall be final."

15. In considering its mandate in respect of second appeals , that is, on points of law only, the Court of Appeal in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR, distinguished between matters of law and matters of fact by stating that: -

> "I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

16. Black's Law Dictionary, 9th Ed. Pg. 1067 defines; -

> "Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law as: A matter involving a judicial inquiry into the applicable law."

17. The Court of Appeal in its subsequent decision in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR while addressing the question whether a memorandum of appeal on a second appeal raised factual issues and the distinction between a matter of fact and matter of law, observed that; -

> "One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of BRACEGIRDLE Vs. OXLEY (2) [1947] 1 ALL E.R. 126 at p 130;
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> > "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

18. The Court of Appel continued to state that: -

> " That reasoning has been adopted in this jurisdiction. In A.G. Vs. DAVID MURAKARU [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also Patel vs. Uganda [1966] EA 311 and Shah Vs. Aguto [1970] EA 263.
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> There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal a question of law is or of fact is not always a very straight-forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision. That reality has with it the inherent danger that legal ingenuity may attempt to dress-up and camouflage purely factual issues with the borrowed garb of "legalness." This is what the majority of this Court had in mind in M'riungu and OtherS vs. R [1982-88] 1 KAR 360 when it stated, (per Chesoni AJA) at p366;
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> > "We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law."

19. Applying the principle in Bashir Haji Abdullahi (supra) , albeit an appeal arising from an election dispute, to the grounds of appeal in the instant matter, the said grounds would appear to exemplify "an attempt at legal ingenuity to dress-up and camouflage purely factual issues with the borrowed garb of "legalness" in a bid to escape the stricture of Section 38 of the *Small Claims Court Act*. The court is equally perplexed that counsel for the Appellant in four out the five grounds of appeal elected to use the troublesome pair of words, namely, "law and in fact" contrary to the statutory exclusion of matters of fact pursuant to Section 38 of the *Small Claims Court Act* in appeals from the Small Claims Court. Even for arguments sake, if the inclusion of the pair of words "in fact" in the four (4) grounds presented in the memorandum of appeal was erroneous, an examination of the grounds and arguments raised in support reveals the Appellant's true intent. The issues raised challenge the lower court's findings and inferences of facts and not exclusively on the "law".

20. The key thrust of the Appellants' case in the lower court and on this appeal is that it satisfactorily completed the contract work but the Respondent failed to honor its part of the contract by failing settle accounts for the work done. The Appellant's arguments appear primarily to rest on factual and evidentiary questions pertaining to performance of the contract between the parties herein. That required the trial Court to examine factual and evidentiary material place before it. Indeed, the lower

Court after considering the respective parties' pleadings and material relied on in support of the pleadings, stated in its decision that; -

> " Upon consideration of the evidence on record the Court finds that it is not in dispute that the parties entered into a contract for consultancy services as per the agreement dated 25th November 2019 and the terms of reference therein. The issue in dispute is whether the Claimant finalized the assignment and thus is entitled to the 2nd and 3rd payment as per Clause 5 of the said contract.
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> .....
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> Parties have produced lengthy emails upon perusal of the same there was dissatisfaction in respect to the deliverables where on 10th March 2022, Mr. tra has informed a Mr. Roy that there was still trouble getting to the platform and that Mr. Kimeu had been informed and the problem was still occurring.
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> On the same date Mr. Tra also stated that once a handover was done the payment would be done.
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> Taking into account the terms of the contract 40% was to be paid upon development with acceptance and 40% upon pilot testing and acceptance.
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> From the emails produced admitted into evidence its clear the project had not been developed with acceptance and neither has the pilot been tested and accepted.
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> As per the holding in the Cannon Assurance above for the Claimant to succeed in getting a judgment it was the duty of the Claimant to discharge the burden of proof on a balance of probabilities. The Claimant herein has only stated that they completed the work however from the numerous emails provided by both parties it is clear the project had not been completed, handed over and or been accepted by the Respondents and such the Claimant has failed to prove that its case on a balance of probabilities.
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> Therefore, the Claimant's claim is dismissed with costs to the Respondent." (sic)

21. The subject judgment exhibits the fact that the trial court arrived at its conclusions upon analysis of the factual material presented before it. By its appeal, the Appellant is inviting this court to re-evaluate the trial evidence, contrary to the provisions of Section 38 of the *Small Claims Court Act* and consequently to make an alternate finding on the facts presented before the trial Court. As held in Bashir Haji Abdullahi (supra) an appellate court faced with a situation of this kind is at liberty to strike out any grounds of appeal that offend the above provision, while retaining those that are compliant. In this case, the court having reviewed each of the Appellant's grounds of appeal and arguments made thereon is constrained to strike out every ground, for offending Section 38 of the *Small Claims Court Act*, through tacit invitations therein inviting this court to address factual issues. The appeal is therefore incompetent. Consequently, the appeal is hereby struck out in its entirety and, costs awarded to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondent: Ms. Munene h/b for Mr. Muriithi

C/A: Erick