



**Autoexpress Limited v Amicabre Travel Service Limited (Civil Appeal
426 of 2018) [2024] KEHC 6280 (KLR) (Civ) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 426 OF 2018

JN NJAGI, J

MAY 29, 2024

BETWEEN

AUTOEXPRESS LIMITED APPLICANT

AND

AMICABRE TRAVEL SERVICE LIMITED RESPONDENT

*(Being an appeal from the judgment and decree of Hon G Mmasi, Senior
Principal Magistrate in MCC Civil Suit No. 3025 of 2015 delivered on 14/8/2018)*

JUDGMENT

1. The appellant who was the plaintiff at the lower court filed suit against the respondent/defendant claiming a sum of Ksh.834,240/= for goods supplied to the respondent on credit and not paid for. The respondent filed a defence denying the claim. The appellant filed an application for the defence to be struck out for the reason that it did not raise a triable issue. The trial court agreed with the appellant and struck out the defence. The matter proceeded to formal proof.
2. During the hearing of the formal proof, the appellant's Chief Finance Officer PW1 produced invoices issued to the respondent and Local Purchase Order from the defendant in proof of their case. The court granted leave to counsel for the respondent to cross-examine PW1. The trial magistrate in his judgment proceeded to dismiss the appellant's case for the reason that PW1 in his evidence stated that he did not know the individuals who ordered the goods and hence never met the directors of the respondent.
3. The appellant was aggrieved by the dismissal of the suit and filed this appeal. The grounds of appeal are that:



- a. The learned magistrate erred in law and fact by failing to evaluate correctly the evidence adduced by the appellant and consequently arriving at a conclusion that has no legal or factual basis;
 - b. The learned magistrate erred in fact and law in failing to find that there was a contractual relationship between the appellant and the respondent;
 - c. The learned magistrate erred in law and fact by dismissing the appellant's suit entirely ignoring the fact that interlocutory judgment had been entered against the respondent in favour of the appellant;
 - d. The learned magistrate erred in law and fact by failing to appreciate the legal position on formal proof in cases where interlocutory judgment has already been entered;
 - e. The learned magistrate erred in fact by failing to find that the respondent was under obligation to pay for goods which had been delivered to them by the appellant;
 - f. The learned magistrate erred in fact and law by failing to find that the respondent owes the appellant Kshs 834, 240/= on account of goods supplied by the respondent;
 - g. The learned magistrate erred in fact and law by finding that the appellant had not proved its case on a balance of probability; and
 - h. The learned magistrate erred in law in failing to find that the respondent should bear the costs of the suit at the lower court.
4. The appeal was disposed of by way of written submissions.

Appellant's submissions

5. The appellant submitted that there existed a business and contractual contract between the appellant and the respondent. He relied on the case of *Stacncom Sacco Ltd v Aliiance One Tobacco Limited* (2018) eKLR to establish that a contract can be expressed or implied. That all what a party needs to demonstrate is that there existed elements of the contract which are offer, acceptance, consideration, legality and capacity.
6. The appellant submitted that on 24/10/2014 it issued LPOs No. 1287 to the appellant. The appellant acted on the order on 25/10/2014 and delivered goods as per invoice No. INMTRO188804 dated 25/10/2014. The respondent issued another LPO No. 1273 which was acted upon and goods were delivered via invoice No. inmrd063180 dated 10/10/2014 and No. INMRD064535 dated 3/11/2014.
7. Counsel submitted that the above conduct infers the formation of a contract. Reliance was placed in *William Muthce Muthami v Bank of Baroda* (2014) eKLR, *Rose and Frank Co. v J R Crompton & Bros Ltd* (1923) 2 KB 293, Atkin, LJ and *Ali Abdi Mohamed v Kenya Shell & Company Ltd* (2017) eKLR to demonstrate that all the elements of a contract had been established these transactions.
8. The appellant submitted that there exists uncontroverted primary evidence of executed LPOs and corresponding invoices which proved that the respondent is indebted to the appellant.

Respondent's Submissions

9. The respondent submitted that the case was properly dismissed as there was no filed resolution allowing its filing. The respondent submitted that the appellant never produced any documents that bind the respondent; that the appellant's witness confessed that there was no agreement. That no



receipts and delivery were produced. That the invoices produced did not bear any stamp or mark to indicate that the same had been received by the respondent.

Analysis and determination

10. As the first appellate court in this matter, the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusions. - See the case of *Selle & Ano. v Associated Motor Boat Co. Ltd* (1968) EA 123. This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348.
11. I have considered the grounds of appeal, the record of the trial court and its judgment and the submissions by the respective advocates for the parties. The issues for determination are:
 - (1) Whether there was a contract between the parties.
 - (2) Whether the trial court was justified in dismissing the appellant's case during formal proof.
12. The *Black's Law Dictionary* defines a contract as follows: -

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.
13. A contract may be in writing or implied, that whether a contract is in writing or is implied. Whether a contract is in writing or implied, the elements of offer, acceptance and consideration must be proved.
14. In this case there was no written contract. Therefore, this court is enjoined to ascertain whether the pleadings, the evidence and the general conduct of the parties reveal any contract. If that tour yields in the affirmative, then a contract may be implied.
15. It is clear to me that the Local Purchase Order was a request made by the Respondent to the Appellant to be supplied with goods. That order (LPO) was the offer. The consideration was in the invoices. Suffice to say that there was a performance. That performance connoted acceptance. I therefore find that there was an offer, acceptance and consideration. A valid implied contract hence existed.
16. Of importance to note is that there existed an interlocutory judgment against the respondent after its defence was struck out. The effect of entry of interlocutory judgment was that the issue of liability was settled as between the appellant and the respondent. The role of the court after entry of interlocutory judgment was to assess the amount of money owing to the appellant.
17. The Court of Appeal has categorically stated in numerous authorities that where interlocutory judgment has been entered, the issue of liability is no longer available for discussion. In the case of *Felix Mathenge v Kenya Power & Lighting Co. Ltd.* (2008) eKLR the Court held that:

The respondent having failed to enter appearance within the prescribed time after the appellant had requested for it, it became mandatory upon the court to enter interlocutory judgment and for the appellant to set down the suit for assessment of damages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only



interlocutory with regard to the quantum of damages. See *KAVINDU & ANOTHER v MBAYA & ANOTHER* [1976] KLR 164. We would agree, therefore, with Mr. Muturi that it was an error on the part of the Hon. Commissioner of Assize to dismiss the suit for want of proof of liability instead of merely assessing damages.

18. In *Paul Muiyoro t/a Spotted Zebra v Bulent Gulbahar Remax Realtors* (2016) eKLR where the trial court had gone ahead to set aside the interlocutory judgment during formal proof, the Court of Appeal addressed the issue as follows:
- (17) We would have thought that the effect of the interlocutory judgment was that liability in regard to the appellant's claim was no longer in issue as the respondents had failed to dispute the facts pleaded by the appellant in the plaint...
- (19) The formal proof entailed the taking of evidence in order to demonstrate the loss arising from the respondents' alleged breach of agreement and the justification for the reliefs sought by the appellant. The court, at the stage of formal proof, is only concerned with the extent of the loss and the appropriateness of the relief sought.
- (21) That being our view of the matter, we think the circumstances before the learned Judge did not justify the dislodging of the interlocutory judgment which had been regularly entered against the respondents. It is now settled that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion. In *Felix Mathenge -v- Kenya Power Lighting Company Limited [Civil Appeal No. 215 of 2002] UR*, the Court held:
- "The role of the court after entering interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages".
- (24) We agree with the appellant that the learned Judge misdirected herself on the issue of liability with regard to the appellant's claim for Kshs3,800,000/= for which interlocutory judgment had been entered and which claim the appellant had specifically pleaded and then strictly proved at the formal proof hearing aforesaid.
19. The learned magistrate stated in his judgment that the sales representatives of the appellant were not called to give evidence on the orders they received from the defendant company. The entry of interlocutory judgment in this case meant that there was a valid contract between the parties and that the appellant had supplied goods to the respondent. That the appellant's witness PW1 did not know the directors of the respondent was not an issue at that stage as liability had already been settled. The trial court erred in turning back to the issue of liability when it was no longer an issue. The court was not justified in dismissing the appellant's case during formal proof.
20. In proof of the amount owing, the appellant produced invoices issued to the respondent and LPOs issued by the respondent. I find that the amount owing was proved by way of invoices and LPOs. The learned trial magistrate was wrong in dismissing the appellant's claim.
21. The upshot is that the appeal is merited. Consequently, the judgment of the trial court dismissing the suit is set aside and judgment is instead entered for the appellant in the sum of Ksh.834,240/= with costs of the suit and interest at court rates.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY 2024



J. N. NJAGI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr Salah holding brief for Mr Gathu for appellant

Mr Makori for Respondent

Court Assistant – Amina

30 days Right of Appeal.

