Melt Grand Ltd v Bio Foods Products Ltd (Commercial Appeal E116 of 2023) [2024] KEHC 4938 (KLR) (Civ) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4938 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

COMMERCIAL APPEAL E116 OF 2023

DKN MAGARE, J

MAY 9, 2024

BETWEEN

MELT GRAND LTD ..... APPELLANT

AND

BIO FOODS PRODUCTS LTD ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and Decree of the Honourable Muturi, Adjudicator in Nairobi SCCCOM Case No. 4812 of 2022 given on 12/5/2023. The Appellant was the claimant in the small claims court.

2. The Appellant filed a 6 paragraph memo alleging various errors of law and in fact. The grounds are as follows:-

    a. That the learned magistrate erred in law and in fact in failing to find merit in Appellant's statement of claim dated 1/08/2022.

    b. That the learned magistrate erred in fact and in law by finding that the claimant had not provided a tabulation of losses to demonstrate damages by providing receipts and invoice for rent payments for the branded pleased premise.

    c. That the learned magistrate erred in fact and in law and misdirected himself by failing to consider the implied contract between the parties and by disregarding the agreements signed by the parties.

    d. That the learned magistrate erred in law and fact and misdirected himself by failing to consider general principles of contracts that an implied contract is capable of enforcement.

e. That the learned magistrate erred in law and fact misdirected himself in failing to find that upon the claimant performing their part which included, leasing a premise, branding the same, purchasing refrigerators, and providing all the company details as requested co the contract was legally binding and enforceable.

f. That the learned magistrate wholly erred in law and fact in arriving at this said decision consequently causing a miscarriage of justice.

3. There is only one question of law raise, that is partly by ground 4 and 5 of the memorandum of Appeal.

4. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under 38 of the *Small Claims Court Act* which provides as doth:

(1) A person aggrieved by the decision or an order Appeals. 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.

5. The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of Mbogo and Another vs. Shah [1968] EA 93, the Court of Appeal stated as doth:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

6. However, an Appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. The court cannot deal with questions of evidence or facts.

7. An appeal on points of law is akin to a second appeal to the court of Appeal. The duty of a second Appeal was set out in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020]* eKLR: -

> "This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the 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. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

8. Then what constitutes a point of law? In *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014)* eKLR, the court stated as doth: -

> "4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court

Of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

9. In *Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013* (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the court of Appeal held as follows: -

> " it was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

10. The claimant sated hat they branded their premises and were asked to buy products at retail price. They claimed a breach of contract. The main ground of breach as I understand it, is that the respondent failed to contract. This is the first time. I have seen such a claim for failure to contract. The court heard the case and dismissed the suit. What was noted that no court could have faulted the small claims court was that on 10/2/2022 the plaintiff was not in existence. It came in existence on 23/2/2022. It could not contract on 10/2/2022.

11. A company cannot be liable of a contrary before its formation. Further it cannot assume impliedly liabilities espoused by the promoters before formation. Its legal existence comes into effect on registration and not before. Halsbury's Laws of England, 4th Edn. Vol. 9 (1) Para. 748 posits as follows: -

> " The general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits; contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuations."

12. The Court of Appeal in *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another [2016]* eKLR(Kihara Kariuki, Pca, Koome & J. Mohammed, JJ.A as they then were sought guidance in the case of Kepong Prospecting Ltd V Sk Jagatheesan & Anor, [1968] AC 810 which stated:

> " They accept that services „prior to its formation? cannot amount to consideration. No services can be rendered to a non-existent company, nor can a company bind itself to pay for services claimed to have been rendered before its incorporation."

13. The issue of lease hold is purely between the Appellant and their landlord Receipts related to Abdurrahman Aden. The court found and rightly so that there was no contract between the parties herein.

14. Secondly that the Appellant did not qualify for distributorship. This was a legitimate question of fact. There is no place for the court to re-write or actually create a contract between parties. The court of

Appeal in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, stated that: -

> " this, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):
>
> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

15. The questions raised are purely questions of fact. There was no contract between the parties. The date of the cause of Action does not make sense since the company was non-existent at the time of contracting. It could not do so. Most crucially, and a fact that was overlooked, there was no consideration. A contract cannot be complete and enforceable without it having consideration in case of *Pius Kimaiyo Langat v the Kenya Commercial Bank of Kenya Ltd [2017]* e KLR the Court of Appeal restated its decision in William Muthee Muthami v Bank of Baroda [2014] e KLR to the effect that:

> " In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the in breach ...
>
> Lord Clarke, in RTS Flexible Systems Ltd v Molkerei ??Aloi Muller GM BH [2010] I WLR 753 at [45], [2010] UK SC 14 put it this way:
>
> "The general principles are not in doubt. Whether there was binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

16. There was no consideration that passed between the Appellant and Respondent. This effectively means that there was no contract. Secondly there appear to have been an invitation to treat. That invitation was not given to the company but to Mr Abdurrahman Aden. The Appellant never made any offer nor received any offer to and from the Respondent. As such the contract lacked all the three elements, offer, consideration and acceptance.

17. It also lacked in respect to legality as a company cannot contract before it is formed. There was nothing to enforce.

18. The general proposition in law is that a company is born mature. It cannot be said to be a minor. Therefore, it is responsible for its acts immediately it is born for then it attains legal personality after incorporation.

19. This principle was aptly articulated by Lord MacNaghten in his celebrated sentiments in the locus classicus decision of the House of Lords in Salomon v Salomon & Co Ltd [1897] AC 22 at 51 – 54 as follows;

> " The company attains maturity on its birth. There is no period of minority – no interval of incapacity. . .
>
> The company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation, the business is precisely the same as it was before, and same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable, in any shape or form except to the extent and in the manner provided by the Act . . .

20. In the case of *Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 others (Petition E071 of 2022)* [2023] KEELRC 320 (KLR) (6 February 2023) (Ruling) Gakeri J stated as follows:

> " Upon registration, a company becomes an incorporated association, an artificial person. A legal entity or body corporate."

21. Similarly, in KT &T Development Pty Ltd -v- Tay (Unreported, Parker J, Supreme Court of Western Australia, 23 January 1995), the Court stated thus:

> " The selection of an incorporated entity as the vehicle for that endeavour brings with it the consequences of the vehicle. The most significant of those consequences...are that the company has a separate legal existence from its shareholders and that the ownership of shares in the company, while potentially valuable, does not give the shareholders any proprietary interest in the property of the company..."

22. Therefore, corporate personality that is the common denominator for companies cannot not be assumed before incorporation since before then, there is no company in existence. Registration which is synonymous to incorporation thus gives identity, distinction and existence to a company.

23. Lastly, the most pertinent aspect is the absence of pleadings. A sum of Kshs. 850,000/= is ought in vacuo. It is claim that has no basis whatsoever. The idea of throwing figure to court and expecting the same to stick or the court to comb though and find something to award was frown upon by the court of Appeal in the case in the case of *David Bagine Vs Martin Bundi [1997]* eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

> "Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

24. The appellant was duty bound, not only to plead but to specifically proved damages. He cannot just through figures to court. Inif rthere was breach of contract, the loss must be particularized and proved. Neither of this elements were proved. In a nutshell, the Appellant's appeal lacks merit and is accordingly dismissed with costs of Kshs. 75,000/=.

Determination

25. In the circumstances, I make the following orders: -

    a. The appeal herein lacks merit and is hereby dismissed with costs of Kshs. 75,000/= payable within 30 days, in default execution to issue.

    b. The file is hereby closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Nyamache for the Respondent

Mr. Akbar Akram for Appellant

Court Assistant- Brian