Kondele Chemist Limited v Enock Ndombi t/a Sparkels Pharmaceuticals (Civil Appeal E162 of 2023) [2024] KEHC 7598 (KLR) (25 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E162 OF 2023

RE ABURILI, J

JUNE 25, 2024

BETWEEN

KONDELE CHEMIST LIMITED .... APPELLANT

AND

ENOCK NDOMBI T/A SPARKELS PHARMACEUTICALS .... RESPONDENT

(An appeal arising out of the Judgment of the Honourable M.I. Shimenga in the Chief Magistrate's Court at Kisumu delivered on the 14th September 2023 in Kisumu CMCC No. 243 of 2016)

JUDGMENT

Introduction

1. The appellant vide a plaint dated 5th May 2016 sought judgement against the respondent for an amount of Kshs. 1,947,144 being monies due to the appellant from the respondent as the price for pharmaceutical goods supplied to the respondent between the months of May 2012 and March 2016. The appellant also sought interest on the amount sought at commercial rats as well as costs of the suit.

2. The appellant averred that the respondent had issued bad cheques which when presented for payment were rejected and that the respondent had at all material times acted in bad faith and in an uncommercial manner bordering on fraud and bad faith.

3. In response the respondent filed a statement of defence dated 8th June 2016 in which he admitted to having a business relationship with the appellant but denied being indebted to the appellant to the sum alleged. The respondent averred that the appellant had all along concealed material facts from him regarding production of deliveries of goods supplied to him and that it had been invoicing him against non-existent deliveries.

4. The respondent averred that the claim against him could only be authenticated once reconciliation was done on all deliveries against invoices issued by the plaintiff and that he had never acknowledged the correctness of the invoices issued to him by the appellant and could not be presumed to admit the limits of his indebtness to the appellant. The respondent denied bad faith alleged by the respondent and pleaded fraud on the part of the appellant praying that the suit be dismissed with costs.

5. The trial court after considering the parties' positions, dismissed the appellant's claim on account that the appellant had not adequately explained the amount claimed on a balance of probabilities.

6. Aggrieved by the said decision, the appellant filed its memorandum of appeal dated 2nd October 2023 raising the following grounds of appeal:

   1. That the learned trial magistrate grossly misdirected herself in not treating the bad cheques issued by the respondent to the appellants as an admission of liability thus coming to a wrong conclusion on the same.

   2. That the learned trial magistrate erred in finding that the respondent had admitted to owing the appellant via correspondence but failing to award the appellant the amounts so admitted or claimed.

   3. That the learned trial magistrate grossly misdirected herself in failing to find that the burden of proof of the existence of the debt shifted from the appellant to the respondent when the appellant adduced evidence of and the respondent admitted to owing the appellant Kshs. 2,100,000 as well as issuing of bad cheques to the appellant.

   4. That the learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.

   5. That the learned trial magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the admission of receipt of goods by the respondent.

   6. That the learned trial magistrate erred by finding that the only defence raised by the respondents was not sufficiently proved yet still dismissing the suit with costs.

   7. That the learned trial magistrate herself on the applicable law and principles, in the evaluation of evidence adduced and thereby arrived at a wrong decision in her judgement.

   8. That the learned trial magistrate's judgement clearly demonstrates extreme biasness and lack of fairness towards the appellant.

7. The parties agreed to file submissions to canvass the appeal.

The Appellants' Submissions

8. The appellant through its counsel submitted that by finding that there was an admission of owing the appellant Kshs. 2,100,000, issuance of bad cheques to the appellant as well as providing no proof that he had paid the amount admitted to yet still dismissing the appellant's case amount to the trial court descending into the litigation arena instead of being a neutral umpire as provided in the case of Fredrick Kigwa Odulah v Titus Wanyonyi Wasianju [2019] eKLR.

9. It was the appellant's submission that the trial magistrate's decision was irrational as was held in the case of Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300.

10. The appellant submitted that the issuance of bouncing cheque was an admission of liability and that the payee acquired an immediate right of recourse against the drawer for the recovery of the money the moment the cheque is dishonoured hence no further evidence needs to be provided to prove the appellant's entitlement to the admitted amount Kshs. 1,110,000 as was held in the case of Palm Oil Transporters Limited v Kenfreight E.A. Limited [2021] eKLR. The appellant also relied in the case of Alfred Anekeya Mangu'la t/a Alfabetty Enterprises v Paul Indimuli & Another [2022] eKLR.

The Respondent's Submissions

11. The respondent submitted that the appellant's claim was not over the monies of unpaid cheques but over alleged failed reconciliations of the totality of outstanding payments and as the appellant failed to put reconciliations over the total payments, the court cannot enforce a value in the air.

12. It was further submitted that the actual value of the sum claimed had a variation with the total amount submitted in the evidence in that the total amount claimed was Kshs. 1,947,144 whereas the total amount in the evidence given was Kshs. 1,437,144 and the court correctly dismissed the claim as a party is bound by its pleadings.

13. The respondent submitted that it was incorrect to state that the court was dealing with a case of admission of liability and that the burden of proof shifted upon such admission because in cases of liquidated demand, a plaintiff must prove the details of the claim by use of receipts or otherwise to the satisfaction of the court and the burden of proof never shifted to the respondent.

14. It was submitted that the respondent never conceded to owing the appellant Kshs. 2,100,000 and that is why he craved for a reconciliation of the accounts, a position which was denied by the appellant.

15. It was further submitted that the appellant's suit ought to have failed in view of the fact that they did not deny that the appellant's verifying affidavit was not signed by an authorised officer with the seal of the company as required under Order 1 Rule 4 of the *Civil Procedure Act*.

16. It was submitted that the authorities cited by the appellant were irrelevant and did not apply to the case at hand as the Palm Oil supra case was founded on a bill of exchange while that of Mariano denacci was a money lending case.

Analysis and Determination

17. As the first appellate Court, this court's role is to revisit the evidence on record, re-evaluate it and reach its own conclusion in the matter. (See the case of Selle & Anor. 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).

18. I have considered the grounds of appeal, the written submissions by each of the parties hereto. I observe that the respondent raised an issue in the suit that the suit before the trial court was filed without the appellant's authority. I will therefore deal with that aspect of the objection first.

19. Order 4 rule 1(4) of the civil procedure Rules provide as follows: -

> " 1(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

20. It has not been disputed that at the time of filing suit in the lower court, resolution to institute suit was not filed. The question that follow is whether that failure is fatal to appellant's suit? In *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000* the court held as follows: -

> " It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect......As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

21. A resolution on behalf of the company suing is intended to address situations where some persons drag the company to court and bind the company on issues litigated yet members of the company have not sanctioned their action. The requirement is therefore intended to protect the companies from unauthorized court processes. From the above, it is evident that the omission can be ratified after the suit has been filed. The authorization is to assure court that the company is properly in court and it is not an action of unauthorized members/individuals.

22. In the case of Leo Investments Ltd v Trident Insurance Company Ltd [2014] eKLR Odunga J. (as he was then) found that the mere failure to file the resolution of the Corporation together with the Plaint did not invalidate the suit and the learned Judge associated himself with the decision of Kimaru J. (as he was then) in the case of Republic v Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR where the court held as follows:-

> " ...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit."

23. In the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR the Court of Appeal stated as follows: -

> " ...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

24. In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was

up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority which the respondent in this case failed to do so. The suit was thus properly before court.

25. Onto the merits of the case, the appellant's case before the trial court was that the respondent was indebted to it in the sum of Kshs. 1,947,144 for pharmaceutical goods supplied to the respondent between the months of May 2012 and March 2016.

26. PW1 who stated that she was the director at the appellant company though she could not provide proof of the same testified that she had no evidence in court to show that they had delivered the goods to the respondent. She testified that they would deliver the goods and the appellant would give them the cheque which cheques all bounced. She testified that they never did a reconciliation of the invoices with the defendant. PW1 confirmed that the cheques which she had produced did not amount to Kshs. 1.9 million but Kshs. 1.5 million.

27. On his part, the respondent submitted that they started receiving invoices from the appellant on 16.4.2014. It was his testimony that they asked the appellant to do a reconciliation and avail actual original invoices as well as the delivery notes but the appellant refused and that the appellant was listing fictitious invoices. The respondent testified that they disputed the amount claimed by the appellant.

28. The respondent further testified that they gave the appellant post-dated cheques as they would sell the supplied medicine first then give the appellant the money. He further testified that the appellant would deposit the cheques without consulting them and the cheques would bounce.

29. It is trite that he who alleges must prove. The Court of Appeal in the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR stated that the evidential burden that 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 sections 109 and 112 of the *Evidence Act*, thus:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

30. In the instant case, the appellant sought judgment against the respondent for an amount of Kshs. 1,947,144 being monies due to the appellant from the respondent as costs for pharmaceutical goods supplied to the respondent. PW1 confirmed that the cheques which she had produced did not amount to Kshs. 1.9 million but Kshs. 1.5 million.

31. In my view, the appellant's claim was in the nature of a special damage. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177 where it was stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss

which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

32. It is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See Nizar Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji v Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd v Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

33. In Jackson K Kiptoo v The Hon Attorney General [2009] KLR 657 the Court of Appeal held that:

> "The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."

34. Similarly, in *Hahn v Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved… for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

35. Further, special damages must flow from particular facts set out in the pleadings. As earlier stated, they must be specifically pleaded.

36. The appellant sought judgment against the respondent for an amount of Kshs. 1,947,144, confirmed that the cheques which she had produced in court did not amount to Kshs. 1.9 million but Kshs. 1.5 million. The respondent on their part disputed the amount claimed by the appellant. It was their case that there was need for reconciliation of the invoices as they used to issue post-dated cheques that would be paid once they sell the drugs supplied, further that they had settled the invoices in the appellant's supplementary list of documents. The respondent also contended that it asked for delivery notes to support the invoices but they were not supplied and neither were they produced in evidence.

37. There is absolutely no reason why the appellant refused a reconciliation of the invoices to determine which ones related to the relevant supplies, for settlement by the respondent. There is also no reason why the appellant refused to produce delivery notes to support the invoices. The appellant did not also adduce evidence to show what amounts were due after payment and this would have been clear in a reconciliation using not only invoices but also delivery notes since there was no evidence that deliveries were made without acknowledgment of the supplied goods.

38. The evidence of returned cheques was not sufficient to establish the claim noting that the original returned cheques were never produced in court as exhibits and no reasons were given for their non-production. Furthermore, the amount contained in the returned cheques are not the same as what the appellant claimed from the respondent and the only way that the appellant could have established its case on a balance of probabilities would have been by production of not only the invoices claiming for the money but also evidence that the goods in question were delivered and that the cheques issued related to particular deliveries as invoiced. In the absence of that evidence, Iam unable to find in favour of the appellant.

39. For the above reasons, I am not persuaded that the appellant proved its case against the respondent on a balance of probabilities. In the circumstances, I find no reason to interfere with the decision of the trial court which I hereby uphold, dismissing the appellant's suit against the respondent with each party to bear their own costs of the appeal.

40. Subject to the recovery of the above assessed costs, this file is closed.

Dated, Signed and Delivered at Kisumu this 25th day of June, 2024

R.E. ABURILI

JUDGE