



REPUBLIC OF KENYA



**Zingo Investments Ltd v Jondu Enterprises Ltd (Civil Appeal 454 of 2019)
[2023] KEHC 19078 (KLR) (Civ) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 19078 (KLR)

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

CIVIL

CIVIL APPEAL 454 OF 2019

DO CHEPKWONY, J

FEBRUARY 17, 2023

BETWEEN

ZINGO INVESTMENTS LTD APPELLANT

AND

JONDU ENTERPRISES LTD RESPONDENT

(Being an Appeal arising out of the Judgment and Decree of Honourable Mr. D. A. Ocharo (PM) dated 30th July, 2019 in Nairobi CMCC No. 7761 of 2016)

JUDGMENT

Background

1. By way of a Complaint dated October 25, 2016 and filed in court on November 14, 2016, the Respondent sought the following reliefs against the Respondent before the Trial Court in CMCC No 7761 of 2016;
 - a. A sum of Kenya Shillings One Million Nine Hundred and Forty Thousand Only (Kshs 1,490,000/=).
 - b. Interest thereon.
 - c. Costs of this suit.
2. At Paragraphs 3 and 4 of the Complaint, the Respondent pleaded that on or about June 16, 2015 and March 23, 2016 supplied the Appellant with petroleum products and to be specific industrial diesel valued at Kshs 6,190,000/=. The Appellant paid a sum of Kshs 4,250,000/= leaving a balance of Kshs 1,940,000/=.



3. In response to the Plaintiff, the Respondent filed its Defence and Counter-claim dated December 6, 2016, in which it denied the contents in the Plaintiff and pleaded for special damages amounting to Kshs 4,439,104/=, together with costs and interest in the Counter-claim.

Evidence

4. The matter proceeded for full hearing whereby the Respondent called one witness who testified as PW1 on March 21, 2019. In his testimony PW1- Johnson Ndungu Njau stated that he was a Director of the Respondent. He told court that he started supplying Diesel to the Appellant on January 28, 2015, and by March 25, 2016, he had made seven supplies. He averred that the total amount for deliveries was Kshs 6,190,000/=, whereby Kshs 4,250,000 was paid and a balance of Kshs 1,940,000/= remains outstanding.
5. According to the Respondent, he tried following up for payment of the outstanding balance but without success. He then engaged an advocate, who issued a demand letter on July 29, 2016. He denied that the Appellant had complained that the diesel was adulterated and the letter attached was never sent. He also stated that it was the duty of the Appellant to ensure that the seals were not broken before offloading so that if the seals broken they had an obligation to decline receipt of the diesel. That it was a requirement that payment be made within 30 days of the invoice.
6. On cross-examination, PW1 confirmed that he would be present whenever most deliveries were made and his messenger would be present when he would be away. He also stated that he used to get the industrial diesel from different agents who never gave him any documentation to ascertain the quality and quantity thereof. PW1 asserted that the Respondent would put the seals himself and at no time did the Appellant complain about the quality of the product discuss the issue of quality when he delivered the diesel.
7. The Appellant called two witnesses who testified on April 9, 2019. DW1-Paul Rubia Njenga stated that he works for the Kenya Bureau of Standards (KBS) as a Manager Petroleum. He told court that on May 9, 2018 he received a sample of industrial diesel oil from Quality Assurance at the Kenya Bureau of Standards (KBS), with a request that the same be tested for ash content, calorific value, density, flash point and kinematic viscosity. He carried out the analysis and the product failed to meet the density and the calorific value tests. He prepared a report dated July 10, 2018 which he produced as exhibit in this case.
8. During cross-examination, DW1 stated that he did not know where the samples had come from and the Respondent was not involved in the process of the analysis.
9. DW2 - Robert Njoka Muthama adopted his witness statement filed in court on December 8, 2016 as his evidence in chief. On being cross-examined, he stated that he is not the one who receives the products. He told court that they had agreed that any complaint regarding diesel be made within 24 hours. He also stated that his workers do not have the technical knowhow on the quality of diesel and the technician who repaired the boilers was not in court to testify. Further, DW2 stated that Kenya Bureau of Standards collected samples in 2018 while the Respondent last supplied diesel in 2016.
10. After the close of the defence case, the parties were directed to file and exchange written submissions in summary of their respective cases.
11. Upon considering the evidence adduced by both parties and submissions filed by their respective counsel, the Trial court delivered its Judgment on July 30, 2019 in favour of the Respondent as against the Appellant. The Trial Court then proceeded to enter Judgment for the Respondents in the sum of Kshs 1,490,000/=, costs and interest on the decretal sum from the date of filing suit.



The Appeal

12. Being dissatisfied with the decision of the Judgment and Decree of Honourable Mr DA Ocharo (PM) dated July 30, 2019 in Nairobi CMCC No 7761 of 2016, the Appellant filed this appeal vide a Memorandum of Appeal dated August 5, 2019 setting out the following Grounds of Appeal: -
- a. THAT the learned Trial Magistrate erred in law and fact in that he entered Judgment in favour of the Respondent against the Appellant for the amount claimed in the Plaint when he knew or ought to have known that the Respondent did not deliver industrial diesel but instead delivered contaminated product and hence arrived at a wrong conclusion.
 - b. THAT the learned Trial Magistrate erred in law and fact in holding that the product and samples analyzed by Kenya Bureau of Standards were not of the product delivered by the Respondent to the Appellant's premises despite the overwhelming evidence from the Appellant's witnesses that he said sample was from the Respondent's product that it had supplied to the Appellant.
 - c. THAT the learned Trial Magistrate erred in law and fact in holding that the Respondent was not involved in the collection of the sample taken to Kenya Bureau of Standards for analysis when he failed to consider the evidence of PW1, Robert Njoka Muthara to the effect that the Respondent's witness was duly informed about the collection of the samples but he refused and/or failed to avail himself.
 - d. THAT the learned Trial Magistrate erred in law and fact in that he failed to enter Judgment in favour of the Appellant in respect of the Counter-claim which had been proved by the evidence adduced and the documents produced and hence arrived at a wrong conclusion.
 - e. THAT the learned Trial Magistrate erred in that he failed to consider all the evidence, documents produced and submissions by the Appellant and thus arrived at a wrong conclusion.
 - f. THAT the said Judgment is contrary to the relevant law and is not supported by evidence tendered during the hearing.
13. The Appellant has urged this Court to grant the following prayers: -
- a. THAT the Judgment and/or Decree dated July 30, 2019 be set aside and the Respondent's suit in the subordinate court be dismissed with costs and Judgment be entered in favour of the Appellant as per the Counter-claim.
 - b. The Respondent be condemned to pay costs in the subordinate court to the Appellant.
14. On March 8, 2022, the parties were directed to dispose of the appeal by way of written submissions and both parties filed their respective submissions in support and in opposition to the Appeal. The Appellant's submissions are dated March 16, 2022 while the Respondents' submissions are dated April 27, 2022.



Analysis and Determination

15. I have carefully considered the Appellant's appeal by reading through the pleadings, proceedings and Judgment of the trial Court alongside the grounds and submissions filed in support and in opposition to the appeal together with the cited authorities. I find that the only issue arising for determination by this Honourable Court is:-
 - a. 'Whether the Appellant has made out a case to warrant the interference of Judgment and Decree delivered by the trial Court.'
16. In determining this issue, it is important to note that this being a first appeal, this Court has a duty to analyze and re-evaluate the evidence that was adduced before the trial court and reach its own conclusions while bearing in mind that it neither saw nor heard the witnesses testify before the trial court. In the case of *Abok James Odera T/A AJ Odera & Associates -vs- John Patrick Machira T/A Machira & Co Advocates [2013]eKLR*, the court held as follows:-

' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'
17. It should be noted that an appellate Court will only interfere with a trial Court's Judgment or decision, if the same is founded on wrong legal principles or wrong interpretation of the law. This is a position that was stated by the Court of Appeal in the case of *Bashir Ahmed Butt -vs- Uwais Ahmed Khan [1982-88] KAR*, where it held that:

' An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.'
18. In the instant appeal before Court, in the Grounds of Appeal, the Appellant has raised an issue on whether or not the Respondent delivered contaminated produce to the Appellant for use in the boiler or instead of delivering Industrial diesel that damaged the Appellant's boiler.
19. From the pleadings, parties had agreed on the supply of industrial diesel for use in the Appellant's boiler. It was in the terms of the contract that the Appellant confirms the seals are intact before the Respondent offloads the diesel. The Appellant was also required to lodge any complaint in writing regarding the deliveries which ought to have been done within 24 hours.
20. In his testimony, PW1 stated that he made seven supplies to the Appellant between 2015 to March 25, 2016. The same averments were confirmed by DW2 in his testimony before the trial Court.
21. On the second Ground of Appeal, the Appellant has faulted the trial court for holding that the product and samples analyzed by Kenya Bureau of Standards were not the products that were delivered by the Respondent.
22. It was evidenced by DW1 that on May 9, 2018, he received a sample of industrial diesel oil from Quality Assurance at Kenya Bureau of Standards (KBS) requiring that they be tested for ash content, calorific value, density, flash point and kinematic viscosity. He carried out the analysis and the product failed



to meet the density and the calorific value tests. In his testimony, DW2 stated that Kenya Bureau of Standards collected the samples in 2018 while the Respondent last supplied diesel in 2016.

23. Based on the testimony given by PW1 in support of, it is undisputed that the Respondent supplied industrial diesel for the Appellant from 2015 to March 25, 2016. And the two witnesses for the Appellant testified that the samples collected for analysis were obtained from the Appellant in 2018 yet the last time the Respondent supplied diesel was in 2016.
24. With such evidence on record, there is clearly a doubt as to whether the samples which were submitted and analyzed by Kenya Bureau of Standards were from the diesel supplied by the Respondent to the Appellant in 2016. Having considered the submissions and the authorities relied upon by counsel for both parties, I am entirely in agreement with the trial Court's Judgment that the Appellant was bound to pay the Respondent the balance of Kshs 1,490,000/= as claimed.
25. There is no reason to delve on the rest of the grounds as the appellant has failed to convince this court for it to interfere with the decision by the Trial court. As earlier pointed out, this court will only interfere with a decision by a lower court if it is founded on wrong principles or improper interpretation of the law in view of the facts of a case.
26. In the circumstances the Appellant's appeal is found to be without merit and is hereby dismissed with costs to the Respondent.
- 27 It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS ...17TH ... DAY OF ...FEBRUARY,... 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Mudaye holding brief for Mr. Kinyua Muriithi for Appellant

Mr. Kariuki counsel for the Respondents

Court Assistant - Simon

