Dovey Pharma Limited v Nderitu & another (Civil Case E108 of 2021) [2023] KEHC 2908 (KLR) (Civ) (28 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2908 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E108 OF 2021

JK SERGON, J

MARCH 28, 2023

BETWEEN

DOVEY PHARMA LIMITED ..... PLAINTIFF

AND

PATRICK MACHARIA NDERITU ..... 1ST DEFENDANT

PIMP MY RIDE EAST AFRICA LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff in the present instance filed the plaint dated 29th April, 2021 and sought for judgment against the 1st and 2nd defendants in the following manner:

    a. The sum of Kshs.5,600,000/=

    b. Interest at 18% from the date of cause of action from 3rd June, 2018 until payment in full.

    c. General and exemplary damages for loss of business due to the fraud and issuance of bouncy cheques.

    d. Costs of the suit.

    e. Interest at court rates from the date of filing suit.

    f. Any other relies this Court may deem fit.

2. The 1st defendant is sued in his capacity as the Director of the 2nd defendant.

3. The plaintiff pleaded in the plaint that sometime in May, 2018 the defendants agreed to lease out to it a shop situated on Kenyatta Avenue LR. NO. 209/918 Nairobi ("the subject premises") which was allegedly owned by the 1st defendant through the 2nd defendant.

4. The plaintiff pleaded in the plaint that it was a term of the agreement that the plaintiff would pay rent quarterly at the sum of Kshs.300,000/=; quarterly deposit in the sum of Kshs.300,000/=; and goodwill in the sum of Kshs.5,000,000/= amounting to a total sum of Kshs.5,600,000/= and which sum was duly paid on 24th May, 2018 through the various cheques particularized in the plaint.

5. It is pleaded in the plaint that upon making the requisite payments, it discovered that the defendants did not have a good title or authority over the subject premises. Consequently, the plaintiff sought for a refund of the abovementioned sums of money, from the defendants.

6. It is also pleaded in the plaint that sometime on or about the 12th day of August, 2018 the defendants issued various cheques to the plaintiff totaling the sum of Kshs.5,600,000/= but which cheques bounced.

7. According to the plaintiff, the defendants obtained the monies from the plaintiff through fraud and illegality, by setting out the particulars thereof in the plaint.

8. The plaintiff is therefore seeking a refund of the abovementioned sum from the defendants, in addition to the other reliefs mentioned hereinabove.

9. The record shows that interlocutory judgment was entered against the 1st and 2nd defendants on 23rd June, 2022 for failure to enter appearance and file their statements of defence. Consequently, the assessment on general and exemplary damages would be undertaken upon the formal proof hearing.

10. At the formal proof, Harun Muiruri Ndung'u who was the sole plaintiff witness adopted his signed witness statement as evidence and produced the plaintiff's list and bundle of documents as Plaintiff Exhibits 1-21.

11. The witness testified that he was introduced to the 1st defendant in 2018 by a friend named Mr. Githinji while in the process of looking for a space to expand his business.

12. The witness testified that the 1st defendant took him to the subject premises and instructed him to make the requisite payments directly to the 2nd defendant company, of which the 1st defendant and his wife are Directors.

13. It is the evidence by PW1 that upon later discovering that the 1st defendant was not genuine, he reported the matter to the Directorate of Criminal Investigations (DCI) and that the cheques which were issued by the 1st defendant in an attempt at refunding the sums paid were dishonoured.

14. The witness therefore prays for this court to grant the reliefs sought in the plaint, on that basis.

15. Upon close of the formal proof hearing, the plaintiff put in written submissions. Therein, it argues that the defendants acted fraudulently and misrepresented the facts pertaining to the subject premises since they did not disclose to the plaintiff their lack of ownership/title to the subject premises at the time of contracting with and receiving the monies from the plaintiff.

16. The plaintiff urges this court to consider the rendition in the case of Derry v Peek (1889) 14 App Cas 337 to the effect that fraud is proven when it is shown that a false representation has been made knowingly, without belief in its truth, or recklessly, whether it be true or false.

17. It is the submission by the plaintiff that as a result, its representatives made a complaint at Central Police Station accusing the defendants of obtaining money by false pretences.

18. It is also the submission by the plaintiff that the 1st defendant filed two (2) separate causes before the Judicial Review Division of the High Court, namely Misc. Application No. 347 of 2018 and Misc. Application No. 326 of 2018 seeking to stop his arrest/prosecution.

19. The plaintiff contends that the defendants do not deny owing the sums of money pleaded and hence the plaintiff is entitled to a refund thereof.

20. The plaintiff argues that it is entitled to general damages arising out of the fraud and/or breach of contract, even though nominal. The plaintiff has referred this court to Anson's Law of Contract, 28th Edition at page 589 and 590 where it is stated thus:

> " Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal."

21. The plaintiff further contends that it is entitled to costs of the suit and interest on the damages to be awarded.

22. I have considered the plaintiff's submissions alongside the authorities relied upon and the evidence tendered at the trial.

23. The key issues for determination therefore are as follows:

    i. Whether the plaintiff and the defendants enjoyed a contractual relationship at all material times;

    ii. Whether the plaintiff has made a case against the defendants on the basis of fraud and misrepresentation; and

    iii. Whether the plaintiff is entitled to the reliefs sought.

24. To address the first issue, upon my examination of the pleadings and evidence collectively, I observed that the plaintiff tendered the letter of offer dated 23rd May, 2018 which sets out the terms of the agreement between the 2nd defendant and the plaintiff in the manner pleaded in the plaint and reiterated in the oral testimony of the plaintiff's director, Harun Muiruri Ndung'u.

25. Upon my further examination of the pleadings and evidence. I observed that the plaintiff tendered correspondences between the parties herein through their respective representatives, which indicate that an acceptance was made on the letter of offer.

26. For the foregoing reasons and in the absence of any contrary evidence, I am satisfied that the plaintiff has proved the existence of a contractual relationship between itself and the defendants at all material times.

27. Concerning the second issue for determination, upon my study of the pleadings and material placed before me, I note that the plaintiff adduced credible evidence by way of the various cheques particularized in the plaint to show that it made the requisite payments towards the lease of the

subject premises totaling the sum of Kshs.5,600,000/= and which payment was acknowledged by the defendants, thus meeting its contractual obligations.

28. Upon my further study of the pleadings and material placed before me, I equally note that the plaintiff through its advocate later demanded a refund of the abovementioned sum from the defendants, on the basis of rescission of the contract following the claims by the plaintiff that the defendants were not the true landlords/owners of the subject premises, despite representing themselves as such.

29. In the absence of any contrary evidence, the abovementioned averments and evidence support the plaintiff's claim on fraud and misrepresentation on the part of the defendants in the manner set out in *Derry v Peek* (1889) 14 App Cas 337 referenced in the case of *Sachin Shaha v Jagat Mahendra Kumar Shah & another* [2020] eKLR:

> " ...fraud is proven when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."

30. From my perusal of the pleadings and evidence, it is apparent that the defendants issued cheques in the name of the plaintiff but which cheques were dishonoured. It is also apparent that to date, the defendants are yet to refund the abovementioned sum to the plaintiff.

31. In this sense and in the absence of any contrary evidence by the defendants, I am satisfied that the plaintiff has reasonably demonstrated that the defendants fraudulently misrepresented themselves in respect to the subject premises and ultimately, on the contract, thereby entitling the plaintiff to rescind the contract.

32. In view of all the foregoing circumstances and on the basis of the interlocutory judgment on record, I hereby enter a finding of liability against the 1st and 2nd defendants jointly and severally.

33. I now wish to address the third issue touching on whether or not the plaintiff is entitled to the reliefs sought as hereunder.

34. Concerning the sum of Kshs.5,600,000/= sought, upon my finding hereinabove, I am satisfied that the plaintiff is entitled to a refund of the aforesaid sum.

35. Concerning the general damages, I considered the case of *Peri Formwork Scaffolding v White Lotus Projects Limited* [2021] eKLR in which the court held thus:

> " On general damages, in Anson's Law of Contract, 28th Edition at page 589 and 590, it is stated: -
>
> "Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal."

36. Upon my consideration of the circumstances of this case, I did not come across any credible evidence to demonstrate the nature and extent of loss suffered by the plaintiff herein.

37. All the same, I will award the plaintiff nominal damages amounting to the sum of Kshs.100,000/= upon considering the case of *Ronyad Enterprises Limited v Kenya Commercial Bank Limited* [2019] eKLR where an award of Kshs.100,000/= was upheld under this head and the case of *Supinder*

Singh Sagoo v Kenya Commercial Bank [2020] eKLR in which the court awarded a nominal sum of Kshs.100,000/= on general damages.

38. On exemplary damages for loss of business, in the absence of any credible evidence to demonstrate the loss of business/income suffered, I decline to make any award here.

39. In the end therefore, I hereby enter judgment in favour of the plaintiff and against the 1st and 2nd defendants jointly and severally in the following manner:

    Liability 100%

    a. The defendants to refund Kshs.5,600,000/=.

       To the plaintiff forthwith

    b. General damages Kshs. 100,000/=

       Total Kshs.5,700,000/=

    c. The plaintiff shall also have the costs of the suit, interest on the general damages at court rates from the date of judgment until payment in full and interest on the sum of Kshs.5,600,000/= at court rates from the date of filing suit until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH, 2023.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant