**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 292 OF 2018**

**MOTOR LINE LIMITED.....APPELLANT**

**VERSUS**

**SILVER GREENS LIMITED .....RESPONDENT**

**JUDGMENT**

By his plaint dated 25th February, 2016 the appellant sought Kshs.177,514/80 being alleged cost of repairs to the respondent's vehicles. The trial court dismissed the appellant's suit and this triggered the filing of this appeal. The grounds of appeal are THAT:-

> **1. The honourable magistrate erred in law and fact in dismissing the plaintiff's case against the defendant by finding that the plaintiff had not proved their case on a balance of probabilities.**
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> **2. The honourable magistrate erred in law and in fact in finding that the electronic communication between the plaintiffs and the defendants with regards to the defendant's indebtedness were not admissible in evidence and so proceeded to disregard them in her judgment in complete disregard of Article 159 of the Constitution**
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> **3. The honourable magistrate erred in disregarding the fact that there existed a business relationship between the plaintiff and defendant despite all facts pointing to a long standing business relationship between them and the plaintiffs Mr Imtiaz Majid having in his personal capacity dealt with the defendant on a previous transaction that the defendant termed as its executive to refuse to honor its obligation to the plaintiff.**
>
> **4. The honourable magistrate misconceived the evidence adduced by the plaintiff by coming to a conclusion that there existed no dealings between the plaintiff and the defendant despite the defendant not having led any evidence to rebut the plaintiff's evidence.**
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> **5. The honourable magistrate erred in law and in fact by finding that the invoices by the plaintiff were never received by the defendant despite the plaintiff having produced delivery note signed for and on behalf of the defendant and the defendants having lead no evidence to rebut the same.**
>
> **6. The honourable magistrate erred in law and fact in finding that there was no evidence to prove that the defendants were the owners or in possession of the suit motor vehicles despite finding that the same motor vehicles were the subject matter of the dealings between the defendant and the plaintiff's Mr. Imtiaz Majid for whose repairs the defendant had previously paid.**
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> **7. The honourable Magistrate erred in law and in fact by finding that the plaintiffs had not proved the repairs despite the defendants having not led any evidence to challenge the same, received invoices in respect of repairs and electronically admitted indebtedness to the plaintiff.**
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> **8. The honourable magistrate misconceived the evidence adduced by the plaintiff against the defendant, imposed on herself extraneous consideration and irrelevant factors thereby coming to the wrong conclusion that the plaintiff had not proved its case on a balance of probabilities.**

The appeal was determined by way of written submissions. Counsel for the appellant submitted that the trial court erred in law and fact by finding that the electronic communication between the appellant and the respondent relating to the latter's indebtedness was not admissible evidence. Counsel maintain that there was no need for the appellant to produce a certificate as provided under Section 65(8) of the Evidence Act. Counsel relies on the case of **GEORGE ONYANGO & ANOTHER –V- REPUBLIC (2012) eKLR** where Justice J.M. Ngugi held:-

> **"The singular question for determination is whether a computer print-out is admissible in evidence when it is not accompanied by a certificate issued by a person holding a responsible position in relation to the operation of the computer or the management of the activities to which the document relates in the ordinary course of business. I have come to the conclusion that there is no mandatory requirement that such a certificate accompanies the computer print-out before the print-out itself becomes admissible. However, where there is a question whether a computer print-out qualifies to be admitted under any of the carve-outs provided in section 65(6) of the Evidence Act, then such a certificate might be needed, and if one is presented, it shall be admissible under section 65(8) of the Evidence Act. In my view, this is the correct reading of section 65(8) of the Evidence Act. I find no evidence in that section that a certificate would be required every time a computer print-out is sought to be admitted in evidence. Instead, I read the provisions of section 65(8) as being permissive: a certificate is admissible to aid in the process of a computer print-out qualifying for admission under the other provisions of the Act.**

**Section 65 of the Evidence Act deals with primary evidence. Section 65(5)(c) provides that a computer print-out shall be admissible in any proceedings "without further proof of production of the original" if the conditions stipulated in Section 65(6) are satisfied. Section 65(6), on the other hand provides as follows:**

**(6) The conditions referred to in subsection (5) in respect of a computer print-out shall be the following namely:**

**a) the computer print-out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer;**

**b) the computer was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived;**

**c) the computer was operating properly or, if not, that any respect in which it was not operation properly was not such as to affect the production of the document or the accuracy of its content;**

**d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of business.**

**The import of Section 65(6) is that a computer print-out is admissible "without further proof of production of the original" if the four conditions mentioned there are satisfied. In my view, when read together Sections 65(6)** and **65(6) of the Evidence Act are self-executing; they require no further formalities to be operational. There is certainly no requirement that a certificate be produced before a computer print-out which satisfies the four conditions is admitted into evidence. If the legislature intended that to be a *sine qua non* to the admissibility of a computer print-out, it should have said so plainly and it would have included that condition in Section 65(6). We find no constraints under that section.**

It was further submitted that the appellant proved its case and that there was sufficient evidence that the two parties had previous business dealings. PW1 testified that he sold a motor vehicle number KBU 360H to the respondent and produced a sale agreement to that effect and cheques showing that he was paid out of that transaction. The appellant produced invoices for repair of the respondent's six (6) motor vehicles totaling Kshs.177,514/80. The respondent failed to pay on the allegation that the motor vehicle KBU 360H Chevrolet Colorado sold by PW1 was in poor mechanical condition which caused the respondent to incur repair costs. There was further evidence that the appellant had previously repaired the respondent's motor vehicle registration number KBA 432 Toyota Noah and payment was done through cheque number 859.

Counsel for the appellant also submitted that the respondent did not call any evidence to dispute the appellant's evidence. Counsel referred to the case of **NICHOLAS KING'OO KITHUKA –V-JAP QUALITY MOTORS LIMITED & ANOTHER (2021) eKLR** where Odunga J held:-

**Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.**

**In the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J (as he then was) held that:**

**"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon".**

**In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:**

**"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".**

**Similarly, in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.**

**If one is still in doubt as to the legal position reference could be made to the case of Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the**

**deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.**

Counsel urged that the matter proceeded by way of oral testimony and it was not enough for the respondent to simply file the defence and deny the appellant's claim. The trial court acknowledged that the respondent closed its case without calling any witness. The defence was therefore unsubstantiated.

The appellant additionally faulted the trial court for finding that it was not clear that indeed the appellant repaired the respondent's motor vehicles. The evidence on record did establish a business relationship between the parties. Invoices for the repairs were raised and were received and signed by the respondent. The trial court misconstrued the appellant's evidence and also considered extraneous and irrelevant factors.

The appeal is opposed. Counsel for the respondent maintain that the trial court correctly disallowed the alleged electronic evidence. No certificate was produced as to how the electronic evidence was processed. According to the respondent, the appellant failed to discharge its burden of proof during the trial. There was no evidence that the appellant was instructed to repair the respondent's vehicles. There was also no evidence that the vehicles were delivered to the appellant's garage or that the vehicles belong to the respondent. According to counsel, even if the defence did not call any evidence, the appellant did not prove its case to the required standard. Counsel referred to the case of **ALFRED KIOKO –V- TIMOTHY MIHESO & ANOTHER (2015) eKLR** where it was held

**"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."**

**Black's Law Dictionary 8th Edition defines a pleading as:**

**"A formal document in which a party to a legal proceeding especially a civil law suit sets forth or responds to allegations, claims denials or defenses."**

**It therefore follows, and I reiterate, that a pleading is not evidence. Further, Section 3 of the Evidence Act Cap 80 Laws of Kenya defines evidence as:**

**"Evidence denotes the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includes statements by accused persons, admission and observation by the court in its judicial capacity."**

It was argued for the respondent that the invoices do not show they were for which motor vehicle, were not signed by the respondent and were not accompanied with a copy of instructions from the respondent. Counsel for the respondent urged the court to dismiss the appeal as being incompetent as the decree of the trial court is not part of the record.

This is a first appeal. The court has to evaluate the evidence and record of the trial court before drawing its own conclusion. Two witnesses testified for the plaintiff. **PW1 IMTIAZ SHEIKH** testified that he owns a motor garage with his wife. He knows one Burhaan who is his neighbor and director of the defendant company. He replaced Mr. Burhaan's motor vehicle gearbox and was paid through cheque number 859 drawn by Diamond Trust Bank. The two engaged on another business relating to exchange of his motor vehicle number KBU 360H and Mr. Burhan's vehicle number KAM 010L, Nissan patrol. His vehicle was valued at Kshs. 2 million while the Nissan patrol was valued at Kshs.800,000. He was issued with cheques worth Kshs.400,000. The appellant started sending its vehicles to be repaired at his garage. He repaired some vehicles that were collected on 10th April,2014. The respondent paid for three vehicles but failed to pay for six vehicles. He had issued invoices totaling Kshs.177,574/80 and this was the basis of the claim. There was no written agreement on the repair of the motor vehicles. There was no Local Purchase Orders (LPOs). The respondent was a walking in client.

**PW2 NADEEMA SHEIKH** is a co-director of the appellant company. She raised the invoices for the repair of the respondent's vehicles. The first three (3) invoices were paid. She followed up payments through whatsup and e-mails. The respondent promised to pay. The respondent later refused to pay alleging that they had incurred repairs on the vehicle sold to them by PW1.

The respondent closed its can without calling any witness.

The main issue for determination is whether the appellant proved its case on a balance of probabilities.

The respondent filed its defence dated 31st March, 2016. Apart from admitting the description of the parties, the defence denies all of the plaintiff's averments. A witness statement by Ananda Prakash Mishra dated 31st March, 2016 equally denies the appellant's claim. It is stated that the respondent never contacted the appellant to undertake the alleged repairs.

The witness statements of PW1 and PW2 were adopted as part of their evidence. According to PW1, the appellant repaired several vehicles belonging to the respondent but were not paid for the services. A summary of the vehicles repaired and the amount charged was as follows:-

| DATE | MOTOR VEHICLE REGISTRATION | AMOUNT |
|---|---|---|

| | | |
|---|---|---|
| 24/8/2014 | KBA 432K Toyota Noah | 26,042 |
| 24/9/2014 | KBU 360H Chevrolet | 27,724 |
| 27/10/2014 | KAM 387E Pajero | 47,676 |
| 30/10/2014 | KAM 387E Pajero | 23,200 |
| 18/11/2014 | KAG 868S Kia | 15,776 |
| 18/11/2014 | KBU 227J Nissan Wingroad | 11,948 |
| 24/4/2015 | KAG868S Kia | 1,832,80 |

Paragraph 6 of the witness statement of PW2 states as follows:-

> **"The defendants M/s Aryan Mishra in an email addressed to me and copied to our lawyers admitted the provision of the services and gave the indication that they would not be settling the claim on account of "repair set off" from Mr. IMTIAZ MAJID by PHOUL KESHARI MISHRA on motor vehicle make CHEVROLET COLORADO registration number KBU 360H sold on "AS IT IS" by the former to the latter."**

During the trial the appellant tried to produce e-mails between the parties but in its ruling delivered on 2/8/2017 the trial court upheld the respondent's objection indicting that a certificate was required under Section 65(8) of the Evidence Act. Counsel for the respondent submitted that since no appeal was preferred against that ruling, the appellant cannot raise the same issue as it is time barred. In my considered view, since the ruling was made in the course of the trial, the appellant had the option of either appealing against that ruling or raising the issue again on appeal. If every ruling in a hearing should raise an appeal, then matters will stall pending determination of what can be held to be interlocutory appeals. The correspondence between the directors of the appellant and some individuals who are alleged to be directors of the respondent was part of the bundle of documents produced by the appellant. The witness statement by the defence witness did not mention on those e-mails. There was no evidence that no such e-mails were ever sent to the directors of the plaintiff.

I am in agreement with the decision in Machakos Criminal Revision number 336 of 2011 (supra) to that effect that it is not a requirement under Section 65(8) of the Evidence Act that any time a person would like to produce a document in court that is contained in a computer then a certificate has to be produced. The e-mails formed part of the communication in the course of business. The trial court ought to have admitted the e-mails unless there was contrary evidence that no such e-mails were sent by the respondent or its officials or that the e-mails were manipulated or doctored. Both lawyers received one of the e-mails.

The evidence of PW2 is that the respondent refused to pay the invoices alleging that the vehicle sold by PW1 caused them repair costs. One of the e-mails which was copied to counsel for both parties read as follows:-

**Aryan Mishra**

**CC Anjhna 8**

**Imtiaz**

**Attached is the chevrolet colorado file for the fixes that the car had to undergo which your husband lied to us were minor issues. Kindly proceed and issue us with a cheque of the attached amount for us to take this matter further. Should you choose to take us to court, we shall also take action against you for duping us into buying a car from you in poor mechanical conditions. My lawyer is copied herewith and will take action accordingly. Your failure to rectify the faults in the vehicles from day one have forced us to seek redress. As for the invoices attached kindly furnish us with the LPO's from our company to your company requesting for these services as we do not have any of these on record. Also, these invoices are NOT clear. Request clear scanned copies for the same to verify alongside our LPO'**

**Kabue, take note and action accordingly.**

**Aryan CPA(K). ACCA**

**CEO.**

**Silver Greens Ltd www.silvergreensltd.com**

Even if the trial court were to exclude the e-mails, the plaintiff's evidence remained uncontroverted. The defendant opted to close it case without calling any evidence. The plaintiff adduced evidence to the effect that the owners of the respondent company are their neighbours. The two have been dealing with each other for sometime. Evidence was adduced showing how a vehicle was sold to one of the respondent's directors. The trial court found that payment for the vehicle was done by an individual but not the respondent. That is correct. However, the totality of the plaintiff's evidence is that vehicles belonging to the respondent were sent to the appellant's garage and were repaired. The witness statements of PW1 details all forms of repairs done on the vehicles. The plaintiff was not expected to obtain the logbooks of the vehicles to prove ownership. These were people known to each other although they were transacting using their respective companies. The evidence of PW1 and PW2 sufficiently proved the plaintiff's case on a balance of probabilities.

I do agree with the submissions by counsel for the respondent that the appellant had to discharge the burden of proof even if no evidence was adduced for the defence. From the evidence on record, it is established that the defendant was not a stranger to the respondent. The appellant filed a supplementary list of documents on 25/7/2017. The list contains invoices sent to Silver Green Limited from Motorline Limited. There is indication that some invoices were settled by an individual, they were sent to a company and one of the company officials must have settled the debt. The effect of the invoices and their settlement is that the parties used to deal with each other.

I am in agreement with the position by the respondent that the appellant had the onus of proving its case despite the closure of the defence case without calling any evidence. From the evidence on record, even if the trial court were to exclude the e-mails, which decision in my view was erroneous, there was still sufficient evidence that proved the plaintiff's case on a balance of probabilities. This is a civil claim and the standard of proof is on a balance of probabilities. The plaintiffs did not deal with strangers. Details of the repaired vehicles were given and the cost incurred for each vehicle was indicated. The vehicles were released to the respondents as per the evidence of PW1. This evidence was not controverted and it sufficiently proves the appellant's case. The defence on record is a mere denial and is not backed by any oral evidence.

On the issue of decree, page 90 of the record of appeal contains the decree of the court whereby the plaintiff's case was dismissed with costs.

The upshot is that the appeal is merited and is hereby allowed. The Judgment of the trial court is hereby set aside. Judgment is entered for the appellant against the respondent for the sum of Kshs. 177,514/80 plus costs and interest shall run from 24th April, 2015 as prayed in the plaint at the rate of 14% until payment in full. The appellant shall have costs of the suit before the trial court and costs of this appeal.

**DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2021.**

**.....**

**S. CHITEMBWE**

**JUDGE**