REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U, J

CIVIL APPEAL NO. 722 OF 2016

GAS KENYA LIMITED.....APPELLANT

VERSUS

AMBER ENTERPRISES LIMITED.....RESPONDENT

(Being an appeal from the judgement of Hon. D. Mburu (Mr), PM delivered on the 14th October 2016 in Nairobi CMCC No. 1175 of 2014)

JUDGEMENT

1. This appeal arises from the judgment of the Principal Magistrate's Court at Nairobi delivered on 14/10/2016 (Hon. D.W Mburu presiding).

2. The memorandum of appeal lists 8 grounds viz;

> **1. That the learned trial magistrate failed to consider the numerous inconsistencies in the respondent's documents including the fact the Local Purchase Order ("LPO") numbers in respondent's invoices did not correspond to the ones in the appellant's system. The invoices in the appellant's system contained different vendor details, item descriptions and total values.**
>
> **2. That the learned trial magistrate failed to take into account and consider the appellant's evidence and/or submissions regarding its procurement system and the fact that an LPO had to be issued prior to the delivery of goods.**
>
> **3. That the learned magistrate erred in law and in fact by failing to appreciate that the LPO formed the basis of the contract between the appellant and the respondent. In the absence of one, there was no valid contract between the parties.**
>
> **4. That the learned magistrate erred in fact in finding that the appellant's invoices were stamped with stamps which were not denied by the appellant. None of the appellant's invoices were stamped.**
>
> **5. That the learned trial magistrate failed to take into account and consider the appellant's evidence and/or submissions that the goods should only have been delivered at the appellant's stores.**
>
> **6. That the learned magistrate erred in fact in finding that the respondent had demonstrated instances where the appellant made payment for goods delivered before the LPO had been issued and placed undue weight on this finding.**
>
> **7. That the learned magistrate erred in failing to appreciate and find that the respondent had not proved its case on a balance of probabilities as required by law.**
>
> **8. That the learned magistrate erred in failing to properly and adequately consider the appellant's evidence and submissions.**

3. The respondent to this appeal had sued the appellant for a sum of Ksh. 1,597,600.45 being an amount owing in respect of goods sold to the defendant on credit. The claim was wholly denied.

After hearing the testimonies of Amos Njenga (for the respondent) and Stephen Wanjala Wakhungu (for the appellant) the trial magistrate found for the plaintiff and entered judgement for Sh 1,597,600.45 with interest at court rates till payment in full plus costs of the suit.

4. This being a first appellate court, I am duty bound to re-evaluate the evidence and make my own conclusions thereon. In **Selle –vs-**

Associated Motor Boat Co. Ltd [1968]EA 123 the court stated;

> *"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."*

5. A summary of the evidence comes in handy in that endeavour.

PW 1 testified that he had worked for the plaintiff for 19 years as a sales representative. He stated that the plaintiff would from time to time supply goods to the defendant. The defendant would issue Local Purchase Orders (LPOs) to the plaintiff and the plaintiff would supply the goods.

6. He further added that at times the defendant's employees would call in advance to communicate the LPO numbers upon which the plaintiff would act and deliver goods and/or services and the defendant would later avail the actual Local Purchase Orders in soft or hard copy.

7. PW 1 produced a bundle of documents constituting delivery notes and invoices in support of the claim. PW 1 named Obadiah Mathangu, Josephat Gitau, Stephen Wakhungu, Mr. Mutungi and Frida Kanyoko as some of the defendant's workers who would receive such goods.

8. On his part DW 1 outlined the procurement procedure at the defendant company. He denied that any purchase orders were issued on phone. He added that all goods were received at the stores. No goods would be received at the central registry of the defendant. DW 1 states that documents in the defendant's bundle of documents at page 1 – 5 purport to be for one procurement. Invoice for Sh 84,111.60 does not correspond with the figures at page 3 and 4. He asserts there must be a forgery. He added that at page 52 – 60 of the plaintiff's bundle a purchase order was issued after delivery was done. The defendant must have issued a complimentary slip.

9. He states that the document at page 63 of plaintiff's bundle shows goods were received at registry. He asserts that the same was not a genuine document.

10. He further states that Mutungi signed at page 52 of defence bundle. The signatures on the plaintiff's documents are not Mutungi's.

11. On cross examination DW 1 stated that at page 52 of the plaintiff's bundle the document shows goods were received. He did not know if they were paid for. He confirmed the purchase order was issued 6 days after delivery.

12. He acknowledged that there was a stamp of Courier Division at the document on page 8. He acknowledges that at times this division received goods.

13. It was his evidence that Mutungi left the company and was not to testify in this case.

14. In their submissions, the appellant's case is that true, the parties herein had been in a trading relationship since 1994. The relationship was governed by an established practice of issuing LPOs before delivery of goods which formed the basis of the contract between the parties.

It is submitted that the respondent's witness Amos Muthama Njenga in his testimony on cross examination agreed with the procedure set out at paragraph 5 of the defence.

15. It is urged that the respondent produced invoices that contained LPOs. These are challenged as invalid and it is stated that they contained discrepancies. Case in point is documents produced from page 91 – 94 of the record which relate to one procurement whose value is Kshs 15,660 and not Sh 84,111.60 as set out in the invoice and delivery note. It is submitted that on cross examination PW 1 confirmed the variance and testified that he could not explain the variance in the figures.

16. It is further submitted that LPO numbers set out in the invoices submitted by the respondents were actually LPOs issued to other suppliers. A case in point is the LPO produced at page 14 of the respondent's bundle which belonged to different supplier – Bhekaris Traders and not Amber Ltd, the respondent.

17. For the respondent, it is submitted that the case is based on **section 49(1)** of the **Sale of Goods Act Cap 41** of the **Laws of Kenya** which provides;

> *" 49. Action for price*
>
> *1) Where under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of contract, the seller may maintain an action against him for the price of the goods."*

18. It is submitted that as acknowledged by the appellant, there was a trading relationship between the appellant and the respondent since 1994. Reliance is placed on the decision in **Finejet Ltd vs. Five Forty Aviation Ltd(2002)eKLR** which demonstrates that discussion and practice between parties can form the basis of a valid agreement for supply of goods under the Sales of Goods Act.

19. It is urged that a practice evolved between the appellant and the respondent whereby orders would be placed orally over the phone by the appellant and the respondent would supply goods on credit. The appellant would then issue LPOs.

20. Obadiah Mathangu, Fridah Kanyoko, Maurice Okita, Josephat Gitau and Stephen Wakhungu are named as staff members of the appellant who represented the appellant in the transactions. It is urged that DW 1, Stephen Wakhungu acknowledged that he knew the other staff members.

21. It is noted that DW 1 acknowledged at paragraph 13 of his witness statement that he received goods under one of the orders which the respondent claimed payment for. It is the respondent's case that this is prove there was a practice between the parties where goods would be ordered orally.

22. It is submitted that failure of the staff of the appellant to follow internal due processes is an internal disciplinary matter between the appellant and its own staff and does not constitute a valid defence for non-payment of goods delivered.

23. The appellant is accused of failure to call evidence from any of the other staff members identified by the respondent as having been involved in the transactions.

24. It is common ground that a trading relationship existed between the appellant and the respondent since 1994, indeed quite a considerable period.

25. Having re-evaluated the evidence and the submissions, I come to the conclusion that the appeal herein turns on broad issues which is;

> **1. Whether through an established practice over time, the respondent supplied goods to the appellant based on oral orders made over the phone with local purchase orders being raised later on.**
>
> **2. Whether, if in the affirmative, the goods allegedly supplied to the appellant as claimed in the plaint were so supplied and if so, whether the necessary payment was done.**

26. I propose to deal with the 2 issues together as they are conjoined like Siamese twins.

27. As an appropriate starting point, this court is alive to the fact that it is a normal occurrence, especially between trading entities with long business relationships to, on mutual trust, establish a practice where goods are ordered orally and supplied and the local purchase orders issued later to formalise the supply in what in trading parlance is known as *"LPO to follow"*.

28. In **Finejet Ltd –vs- Five Forty Aviation Ltd [2012]eKLR** Havalock J. (retired) recognised the legality of such practices by holding that discussion and practice between parties can form the basis of a valid agreement for supply of goods under the Sale of Goods Act (Cap 31).

29. It is trite law that whoever alleges proves.

> **Section 107** of the **Evidence Act** leaves no doubt on the question of the burden of proof. It provides;
>
> "*S 107* **(***1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

30. This being a civil case, the degree of proof is on a balance of probabilities. The respective parties bear the burden of proof as clearly set out in **section 107** of the **Evidence Act**. Ultimately, as held in **Britestone Pte Ltd –vs- Smith & Associates Far East Ltd [2007] 4 SLR (R) 855 at 59**;

> "*The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."*

31. As regards issued No. 1, the burden lay on the respondent to prove that a practice existed between it and the appellant whereby based on oral orders through the phone, supplies were made and LPOs issued later. It was not the duty of the defendant to fill any gaps in the plaintiff's case.

32. Since it is the respondent who asserted that an oral agreement existed from time to time for the supply by the respondent to the appellant of goods before LPOs were issued, the respondent had the duty to prove that the agreement existed. In **Queens Pharmaceutical Ltd –vs- RUP Pharm Ltd [2002]eKLR** it was held that a party who asserts that an agreement existed between the parties bears the burden of proof. The court stated;

> "*The defendant says he paid the amount of Kshs. 345,971/85 to PW 1 as a salary and fuel allowance on behalf of the plaintiff. He says this was agreed upon. He has not stated when the agreement took place; with whom this was discussed and agreed upon; who were present in case it was an oral agreement ... The defendant had a duty to prove the allegation in the counterclaim. He has not proved the same within the balance of probability."*

33. It was incumbent upon the respondent to show that such call(s) were made and proceed to link such calls to particular LPOs that were issued later. A call is made at a specific time and to a specific person. Other than a generalised statement by PW 1 that sometimes calls were made to make orders, no evidence of such calls either through a record of calls showing the date, the time of the call and to whom was availed.

34. PW 1 acknowledged that the normal procedure was for the appellant to issue LPOs to the respondent and then the goods and services would be supplied. At page 76 of the proceedings of the trial court he states;

> *"The plaintiff supplied goods and services to the defendant. The defendant issued local purchase orders to the plaintiff. The goods and services are then supplied. Sometimes, they call in advance to communicate the local purchase order numbers to the company."*

35. By this statement, PW 1 acknowledges that the normal process was the issuance of LPOs before supply. Since the alternative mode of orders through oral calls is denied, it was incumbent on the respondent to present evidence of particular calls made. A demonstration that the call(s) were made would have been the surest way of establishing that the practice of supplies to the appellant based on oral orders existed.

36. To buttress this point, I take refuge in a text, from **Chesire Fifoot and Firmstones Law of Contract (9th Edition)** where the author states;

> *"If the contract is wholly by word of mouth, its contents are matter of evidence normally submitted to a Judge ...* ***It must be found as a fact what exactly it was that the parties said*** *...."*

37. An argument may ensue that the said practice existed on the basis of mutual trust between the parties. However, the moment the oral orders are denied, the respondent is left exposed if they never covered their backs by keeping records.

38. The statement of PW 1 that *"sometimes they call in advance to communicate the local purchase numbers to the company"* remains a generality without particulars and this court cannot be left to speculate on the *"sometimes"* when the calls if at all were made.

Due diligence would demand that the respondent backed up the evidence of calls with a reliable record.

39. In the trial court's judgement, the trial magistrate stated;

> *"The plaintiff has through evidence established that the defendant would at times place orders on phone and issue purchase orders after delivery of the goods."*

40. I have painstakingly scoured through the recorded evidence. The statement by PW 1 that calls would be made by PW 1 is not backed by evidence. Once denied, the respondent needed to go the extra mile to prove that specific calls were made to particular persons and link such specific calls to specific LPOs.

41. I am persuaded that the conclusion by the trial court reproduced at paragraph 37 above was not based on any evidence before the court and the court fell into error. The finding negated the holding in ***Britestone Pte Ltd (supra)*** that the court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.

42. Even where the defence evidence may be weak or non-existent, the burden of proof on the plaintiff is not lessened. In **Charterhouse Bank Ltd –vs- Frank N Kamau [2016] eKLR**, the Court of Appeal citing its decision in **Karugi and Another –vs- Kabiya & 3 Others [1987] KLR 347** held that the burden of proof on a plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended and that the burden of proof is no way lessened because the case is heard by way of formal proof.

43. In our instant case the practice alleged by the respondent to exist was denied. The burden was on the respondent to show by way of evidence the practice existed.

44. The veracity of the existence of the alleged practice is cast into doubts by the discrepancies found in the documentation produced. In his own words under cross examination, PW 1 stated at page 8 of the proceedings;

> *"The purchase order nos shown in the invoices are different from those shown on the local purchase orders (The court noted: documents by plaintiff and the ones by the defendant have different purchase orders). The purchase orders refer to different suppliers."*

45. At page 9 of the proceedings PW 1 continues to state;

> *"Page 5 shows that payment of Kshs 15,660 was received by Ambar Ltd despite being at variance with the Delivery and Invoice. The details in the Local Purchase Order, Delivery Note and Invoice should all match. The purchase order at page 8 is for a different supplier. It appears in our invoices and delivery. Page 14 is Local Purchase Order (sic) to Bhekaris Traders; not Ambar Ltd. Same case applies at Page 17. There appears to be a problem with documentation....."*

46. I have gone to great lengths to reproduce these extracts of the evidence to demonstrate the degree of discrepancies and uncertainties surrounding the alleged supplies. The said discrepancies are not explained away or otherwise resolved.

47. The effect of the above is that the documentation produced by the respondent in support that orders were made on strength of calls made by the appellant falls short of proving that such orders were made and supplies made.

48. Had the trial court addressed its mind to these discrepancies, it could have reached a different finding. On the documents, the trial court stated at page 3 of the judgement;

> "*The defendant's defence is a mere denial seeing that all the invoices and deliveries are stamped."*

It is clear that the court did not consider the discrepancies raised above and therefore ended up reaching a finding not supported by evidence.

49. The respondent having shown through the evidence of PW 1 that there was an established mode of trading between the parties through the raising of LPOs followed by supplies bore the duty to demonstrate through reliable documentation that indeed an alternative practice of supplies through oral orders existed. The appellant's contention that the respondent was not entitled to supply goods, before an LPO was raised remains uncontroverted.

50. Thus, the discrepancies above lower the evidential value of the documents relied on by the respondent and renders the respondent unable to discharge the burden of proof shouldered by it. A text by the author in **Colin Taper**, **Cross on Evidence** (**8th Edition, Butter Worths Publishers, 1995) at 156** states;

"*Once the party who bears the burden of proof must discharge it by adducing evidence sufficient to justify consideration of a particular issue, it becomes necessary for the party bearing the persuasive burden on that issue, the proponent, to persuade the trier of fact that is should be decided in his favour." (Emphasis added) (page 31 of the bundle of authorities.*

51. In the end and upon re-evaluation of the evidence I am satisfied that the respondent fell short of proving its case against the appellant to the required degree. I proceed to allow the appeal, set aside the judgement of the trial court and in place substitute thereof a judgement dismissing the respondent's (then plaintiff) case.

52. Orders;

1. **The appeal herein is allowed.**

2. **The appellant shall have the costs both at the trial court and on appeal.**

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

A. K. NDUNG'U

JUDGE