REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO 49 OF 2015

S.M. GACHOKI.....APPELLANT

VERSUS

ERASMUS. S. MUNYI.....RESPONDENT

JUDGMENT:

This appeal arises out of the Judgment and decree in the Chief Magistrate's Court at Kerugoya in Civil Case No. 57 of 2005 . The appellant who was the plaintiff in the case had filed a plaint dated 10-2-2005 claiming Kshs; 75,000/= and interests at 35% per annum from 22-1-2001 against the respondent who was the defendant in the suit.

The respondent filed a statement of defence dated 14-3-2005. He later filed a statement of defence and counterclaim dated 21-9-2005. The appellant filed a reply to the defence and counter claim.

The pleadings closed the matter proceeded to full hearing. The trial magistrate dismissed the plaintiff's suit with costs and allowed the counterclaim.

The appellant was aggrieved by the Judgment of the trial magistrate and filed his appeal based on the following grounds.

1. **That the learned magistrate erred in law and in fact in making the judgment against the weight of evidence.**

2. **That the learned magistrate erred in law and fact in reading judgment in the absence of and without notice to the appellant and his advocate.**

3. **That the learned magistrate erred in law and fact in failing to analyze and fairly consider the evidence adduced and exhibits produced by the parties before arriving at his decision.**

4. **That the learned magistrate erred in law and f act in disregarding the evidence adduced by the appellant and the exhibits produced by him.**

The appellants prays that the appeal be allowed. The Judgment of the lower court be set aside and be substituted with an order allowing the appellant's case and dismissing the respondents counter claim. That costs be provided for.

The brief facts of the case are that on 22-1-2001 the respondent went to the office of the appellant and saw he had a Rank Xerox Machines. The respondent got interested in one big machine which would copy 1000 copies a day and he got interested. They entered into negotiations and settled on a price of Kshs; 75,00/=. The respondent agreed to buy the machine and a letter of undertaking dated 22-2-2001 was written. The respondent promised to pay by 23-2-2001. The defendant failed to pay as agreed. The plaintiff issued a demand notice. The respondent issued a voucher of Kshs; 10,000/= to the appellant but it was dishonored by the bank. The appellant and the respondent agreed that the respondent would pay KShs; 35,000/= which he agreed to pay on 10/9/2002. If payment was not done immediately he would get the money with 35% interest.

See Exhibit -7: The respondent did not agree on 30% interest but accepted 2% per year. The appellant did not accept the offer and wrote to withdraw the terms. The respondent did not pay anything.

The appellant did not see any letter to collect the photocopies and it was never taken back to him. The machine was in good working condition. They had not agreed on storage charges.

On the part of the defence it was contended that the appellant took the machine to his office in his absence and left a technician to assemble it as it was in pieces. It was indicated that the price was Kshs; 75,000/= and was serviceable. That he had been

told he would pay if the machine was okay. The machine did a lot work and efforts to get the plaintiff service it failed.

The respondent called a technician but he said the machine could not be repaired. He wrote to the appellant saying that he would charge Ksh; 50 for storage.

The appellant asked the respondent to repair the machine and reduce the price to Kshs; 35,000/=. That the plaintiff made a misrepresentation as the machine was not in good working condition and there were no spares in Kenya.

The trial magistrate dismissed the plaintiff's claim and entered judgment for the respondent in the counter claim.

When the appeal came up for hearing, the parties agreed to proceed by way of written submissions.

Submissions for the appellant were filed by Magee Law LLP. He highlighted **the following grounds:**

1. That the learned magistrate erred in law and in fact in making the judgment against the weight of evidence.

2. That the learned magistrate erred in law and fact in reading judgment in the absence of and without notice to the Appellant and his advocate.

3. That the learned magistrate erred in law and fact in failing to analyse and fairly consider the evidence adduced and exhibits produced by the parties before arriving at his decision.

4. That the learned magistrate erred in law and fact in disregarding the evidence adduced by the Appellant and the exhibits produced by him.

He prays that the appeal be allowed;

- The Judgment of the lower court be set aside and substituted with an order allowing the appellants case and dismissing the respondents counterclaim.

- The costs of the appeal be provided for.

Counsel submitted to submit in the first issue which is whether there is a valid contract within the parties and he submitted that;

The parties verbal agreement which the appellant acted upon and delivered a photocopying machine to the respondent for a consideration of Kshs; 75,000/= but in the light of the foregoing Section 3(1) of the Sales of Goods Act Cap 16 Laws of Kenya defines a sale of goods contract as follows;

"a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money in consideration called the price."

He submits that despite the respondents averments the appellant did not sell him the said photocopy machine, the appellant sworn testimony in the lower court shows that both parties entered into a verbal agreement.

The said agreement perfectly fits the sale of goods contract as stipulated in the law of sale of goods.

He further submits that the co-elements of a valid contract which are offer, acceptance, consideration, intention of the party to be legally bound and parties must have the capacity to enter into legally contract are the guiding principles.

He also relies on an extract in an introduction **To the law of contract PS Attire 3rd Edition** which he finds persuasive and relevant to the instant appeal where it stated as follows;

" an offer is in effect a promise by the offerer to abstain from doing something provided that the offeree will accept the offer, and pay or promise to pay the price of the offer. The price of course may not be a monetary one. In fact in bilateral contracts the mere promise of payment of the price suffices to conclude the contract."

He submits that there was indeed a valid contract between the parties as the appellant made an offer which was accepted by the respondents, and he undertook to pay the agreed upon price.

He submits that the appeal has merit and should be allowed in favour of the appellants.

Issue Two

Whether the respondent breached the said contract and had a good cause for not paying the machine delivered by the

appellants?

It is submitted that the respondent breached the contract and also mislead the lower court

He submits that having established that a valid agreement existed between the parties page 139 of the record of appeal despite undertaking to pay for the photocopying machine on 21st of February, or soon thereafter, the respondent had not remitted the agreed purchase price to the appellant on the agreed time. HE relies on Section 199 of the Evidence Act Chapter 80 of the laws of Kenya

Provides t hat;

" when one person by his declaration act or omission, intentionally caused or permitted another person belief a thing to be true and to act upon such belief neither her nor his representatives shall be a llowed in any suit or proceedings between himself, and such person or his representative to deny the truth of that thing"

He submits that on 22nd February, 2001 the respondent undertook to Pay Kshs: 75000/= to the appellant being the purchase price for the photocopier sold to him, he even went ahead and issued a cheque of KShs; 10,000/= in the appellants name being part payment of the purchase price only for it to be dishonored by the bank upon presentation by the appellant.

That unfortunately upon accepting the photocopier and undertaking to pay for it he later relied on hearsay and claimed that the photocopier was absolute and unfit for use.

He submits that the resepondents actions amoutns to breach of contract and yet the learned magistrate erred in law an d fact in issuing a judgment in his favour.

The appellant relies on the doctrine of Estoppel which prevents the respondents from disowning the express terms of the verbal agreement between him and the appellant herein. He relies on the case of ; Basco Products Kenya limited vs- Machakos county Government (2018) eklr where the learned Judge in making his decision relied on the case of;

Noordin Bandari -versus- Lom Bank (1963) EA 304 where it was stated the precise limit of an equitable EStoppol are however by no means clear.

It is clear however that before it can arise, one party may have made to another party a clear and an equivocal representation, which may relate to the enforcement of legal rights with the intention that it be acted upon an d the other party in the belief of the truth of the representation acted upon it. "

As to whether the respondent has a good cause for not paying the photocopying machine delivered by the appellant they wish to reiterate that he does not.

Under section 21 of the ***Sale of goods act (Cap 16***) delivery is defined as " the voluntary transfer of possession from one person to another." That from the evidence on record it is evident that the appellant indeed delivered the photocopier and the same was duly acknowledged by the respondent without any condition thereof.

That the general rule that property passes in accordance with the intention parties which can either be express or implied. Specifically Section **19 (1)** is clear as to when property in specific or certain goods passes. It states where there contract for the sale of specific or ascertained goods the property in t hem is transferred to the buyer at such time as the parties to contract intend it to be transferred.

The goods were delivered to the respondent, he accepted and undertook to pay the purchase price. ***That Section 36 of the sale of*** **goods act,** is clear on what amounts to acceptance, in the legal sense.

"It states;

> **" The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in r elation to them which is inconsistent to the ownership of the seller or when after the lapse of a reasonable time he retains the goods without intimating the seller that he has rejected them."**

The photocopy machine was delivered to the respondent and he accepted without any reservations whatsoever. To again claim that the said photocopy machine was unserviceable and unfit for usage yet the respondent had used it for his own gain is vexatious and frivolous.

He also relies on **Section 22 of the Sale of Goods Act** which is to the effect that if the property of the goods passes to buyer without any conditions then the risk of any damage to any property passes with the property.

When the respondent accepted the photocopier from the appellant and agreed to pay for it and risk thereof duly passed and hence his claim that the machine was not serviceable are misleading.

That the claim by the respondent that the machine was unserviceable after he had used it was a ploy to avoid paying the purchase price for the said machine.

It is the submission by the appellant that the respondent breached the terms of the contract and did not have a good cause for not paying the photocopy machine delivered by the appellant.

That the instruct appeal has merit and the appellant is entitled to the purchase price and the interest accruing thereof for the sale of the photocopying machine.

The third issued;

Whether the appellant claim for action for the price and interest thereof is valid, just and unreasonable.

The appellants submit that having ascertained from t eh evidence on record that the appellant duly adhered to the relevant rules of delivery and acceptance.

It is evidenced that the appellant sold the photocopying machine to the respondent and the purchase price was not remitted to him as per the parties agreement. He relies on **Section 39 A (i) of The Sale of Goods Act** which defines unpaid sellers as follows

"(a) The seller of goods is deemed to be an unpaid seller within the meaning of this act:

(i) When the whole of the purchase price has not been paid or tendered."

Submits that the appellant is in an unpaid seller with legal rights and obligations.

Legally an unpaid seller is entitled to an action for price and damages. He relies on the case of: **Gragan(K) Limited –versus- General Motors (** k) Limited & Another (2016) eKLR where the Judge relied on the case of **National Bank Kenya Limited - versus- PipePlastics SamkoLit (K) Limited & Another (2002) EA 503** where it was stated;

> **" This in our view is a serious misdirection on the p art of the learned judge. A court of law cannot rewrite a contract between the parties.**
>
> **The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.**
>
> **There was not the remotest suggestion of coercions fraud, or undue influence in regard to the term of the clause."**

He submits that an unpaid seller has a right of action for the price of the goods as provided under **Section 49 of the sale of goods Act** which provides

> **"(i) where the property in the goods has passed from the seller to the buyer has refused to pay for them according to the contract (ii) if the buyer has agreed to pay for the goods in a certain day an d refuses to pay for them "**

He submits that the appellant has a right of action for the price of the goods and the interest thereof as against the respondents.

It is submitted that the appellant has adequately proved and made out a strong case where adducing primary evidence that proves that there was a valid contract between him and the respondent and they urge the court that the appellant claim for price and interest thereof is valid just and reasonable.

Issue four

Who should bear the costs of this suit?

Relies on **Section 27 of the Civil Procedure Act** which provides as follows;

> **" Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid, and the fact that the court or judge has not jurisdiction to try the suit shall be no bar to the exercise of those powers, provided that t eh costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."**

He has also relied on the case of Ethics and Anti corruption commission versus NDeritu WAchira & 2 Others (Mis. Civil aPp.

No. 19 of 2015) where the Judge John MAtivo referred to case of; Republic –versus- Rosemary WAirimu Munene ex-parte applicant, versus- Ihururu Daily farmers Co-operative society limited where it was held,

: the issue of costs is the discretion of the court as provided under the above section, the basic rule on attribution of costs, is that costs follow the event….. it is well recognized that the principle cost follow the event is not to be used to penalize th loosing party or rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. Th e court has discretion as to whether costs are payable to one party to antoerth the amount of those costs a nd when they are to be paid.

Where costs are in the discretion of the court, a party has n o right to costs, unless or until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them.

This discretion must be exercised judicially, it must not be exercised arbitrally but in accordance with reason and justice,"

In conclusion they submit that there was indeed breach of contract on the part of the respondent with reference to the sale of a photocopy machine serial number; 804842 /5.

That if it were not for the respondent breach of agreement for the contract the appellant would not have instituted the instant appeal and the lower court suit which judgment was delivered against him.

That the appeal be allowed with costs.

L.W. GITARI

JUDGE

For the respondents submissions were filed by Kiguru Kahiga & Company advocates for the respondents

He submits that; there are <u>five issues for determination which are;</u>

1. **Whether there is a valid an d binding contract between the parties and if so what is the terms of the said verbal contract**

2. **Whether the appellant or respondent was in breach of the said terms of the verbal contract**

3. **What is the remedy available for the breach if any to the innocent party**

4. **Whether the appellant is entitled to the claim**

5. **Whether the respondent is entitled to the prayers in the counterclaim**.

On the issue whether there was a valid contract between the parties the respondents submits that from the evidence on record it is clear that the parties herein had no intention to enter into a legally binding contract for sale of a RANK XEROX machine for a consideration of Kshs; 75,000/= which payment was to be done by the respondent on 23rd February, 2001.

That from the evidence, the respondents was given a warranty and /or guarantee that the machine was in good working condition. The evidence on record shows that the machine was delivered to the respondent by six (6) people including a technician namely Gakuru who was to assemble the machine upon delivery.

That upon been tested the same was found to be defective and not in good working condition an d hence it could not perform the purpose to which it was bought, and there is also evidence that an expert was engaged by the respondent and he confirmed that the machine was absolute and unserviceable since its spare parts are not available in the market and the manufacturer of the machine had phased off.

That the evidence that the machine was obsolete was confirmed by an expert whose evidence was not controverted.

That the respondent never gained from the machine as its meter reading indicated the same reading from the time of delivery to date, and therefore there is none user of the machine and that is why the appellant was notified to collect the machine back.

He submits that the issue of misrepresentation by the appellant on compatibility of the machine was duly proved and hence the appellant was in breach of the verbal agreement and not entitled to payment of Kshs; 75,000 or any sum of it at all.

On the issue of validity and/or binding aspect of the sale transaction herein, the respondent contends that there is no clear contract between the parties capable of been legally enforced.

That the basic principles of a contract are that;

"There must be an offer, acceptance and also consideration as between the parties" and hence in a contract there must be a meeting of the mind or consensus.

That the initial engagement was for the sale of Xerox Photocopier machine Kshs; 75000/= on condition that the machine was in good working condition and/or serviceable.

He further submits that there was an invoice for Kshs; 75,000/= for sale of Rank Xerox machine 1045 Serial number 80484215 in good working condition payable as soon as possible.

The respondent gave a letter of undertaking to pay Kshs; 25,000/= on 23rd February, 2001 or soon thereafter. That on page 139 there is another letter by the appellant addressed to the respondent asking the respondent to pay Kshs; 75000 as per the agreement of 21st February, 2001.

He contends that the above s tate of affairs was supplemented and/or revoked by a further correspondences between t eh appellant and respondents which substantially alters terms of the initial sale agreement dated 22nd February, 2001 on the following aspects.

The respondents re-offered for the purchase /sale for the same machine at an asking price of Kshs; 35,000/= only payable in two installments as follows;

1. Before 10th September, 2002 - 15,000/=

2. Before 10th October, 2002 - 20,000/=

Making a total of **Kshs; 35,000/=** and in default of any installment shall attract interest at 30% each month or part thereof.

That the respondent by the letter dated 29th August, 2002 accepts the same but on condition for payment as follows;

1. Before 30th September, 2002 - 15,000/=

2. Before 30th October, 2002 - 20,000/=

Total ; 35,000/=

And that in the case of default interest chargeable will be **12%** which may only be applied 20% per annum, which may only be applied 30 days after the due date.

The letter dated 13th September, 2002 at page 125 of the record of appeal from the respondent to the appellant also withdraws the offer to purchase the machine at reduced price as the letter dated 29th August, 2002 and informs the appellant to collect the same or else storage charges of Kshs; 50/= will be charged per day.

The appellant reacted to the letter dated 28th October, 2002 at page 144 of the record whereby he withdraw the offer contained in his letter of offer dated 19th August, 2002 and refuses the conditional acceptances by the respondents and proceeds to demand the payment of the initial price of Kshs; 75,000/=.

It is the submissions by the respondent that the parties supplemented and/or revoked the initial verbal agreement and attempted to enter into a fresh sale agreement with reduced prices and still the fresh sale agreement was never achieved as it never materialized to mature into abiding contract and he submits that there is no valid and binding contract between the parties as per the time the suit was filed in the lower court.

He submits that with reference to the decision **of National Bank Of** Kenya Limited -versus - Pipe plastic Samkolit (K) Limited & Another that on the strength of this decision which is to the effect that a court of law cannot re-write an agreement between the parties equally it cannot impart(sic) a contract between parties and proceed to interpret and enforce the same when none existed in the first place like in this particular case.

He submits that although the appellant had made effort to withdraw offers on the new intended contract and revert back to the initial one of Kshs; 75,000/= which was not possible in any event, there was a breach on his part for misrepresentation.

It is further submitted that the goods delivered to the respondents were found to be faulty since it was not good working condition or serviceable as agreed by the parties on 22nd February, 2001. That the defectiveness of the machine was communicated to the appellant, and there were several letters informing the appellant to collect his defective machine from the respondent's premises failure to which he would charge storage costs.

He submits that in this cae there is no evidence of delivery an d passage of the right of the goods to the respondent as the respondent refused to take the machine for good reason and hence he never accepted the machine in issue an d is not liable to pay for the same.

It is further submitted that the appellant cannot benefit from the rights of a seller of goods as stipulated under the **sale of goods act,** or even **the law of contract act**.

The law cited by the appellant in his submissions do not f it in the circumstances of this case, and hence cannot benefit from the same since he is guilty of breaching the initial agreement of 22nd February, 2001 by delivering a defective machine and further that he altered the terms of agreement in material substance including giving a fresh offer of Kshs; 35,000/= which never materialized.

They humbly pray that the court evaluates the evidence tendered before the trial court and make a finding that the learned magistrate was right to dismiss the appellant's case and to uphold the respondents counterclaim.

ANALYSIS AND DETERMINATION;

I have considered the appeal, the records before the lower court and the submissions.

This is the first appellate court and I have a duty to analyze the evidence, evaluate it and come up with my own decision but bearing in mind that I did not see the witnesses, and leave room for that

See the case of**; Mwana Sokoni -versus- Kenya Bus Service Limited (1982 - 1988) 1KAR. 278 and Kiruga -versus- Kiruga (1988) KLR 716** where it was stated on a first appeal it is now well settled the role of the court is to revisit the evidence on record, evaluate it and reach its own conclusion. However, the court will not

interfere with findings of facts by the trial court unless they were based on no evidence at all or misapprehension of it, or the court is shown demonstrably to have acted wrong principles in reaching its findings.

From the submissions by the parties, two issues emerge for determination.

- **Whether there was a valid and binding contract between the parties.**

- **Whether if the answer to the first issue is affirmative the second issue is whether the respondent breached the terms of the said contract or had a good cause for not paying for the goods delivered by the appellants.**

The genesis of this case is the sale of a Rank Xerox Serial Number 804842/5 to the respondent at a consideration of Kshs; 75,000/= shillings.

The agreement was verbal From the record, the machine was delivered to the respondent.

The respondent wrote a letter dated 22nd February, 2001 which is a letter of undertaking whereby he confirmed receipt of one Xerox 1045 photocopier serial number 804842/5 delivered to me today.

I undertake to pay Kshs; 75,000/= on 23rd February, 2001 or soon thereafter. By this letter the respondent confirmed that he accepted the offer from the appellant by acknowledging receipt and further undertaking to pay the purchase price of Kshs; 75,000/= on 23rd February, 2001.

It should be noted that when he acknowledged receipt of this letter he never alerted the appellant that the machine was not in good working condition instead the appellant issued an invoice stating that there was sale of the rank Xerox machine in good working condition payable as soon as possible.

The respondents did not pay as promised, and on 11th of April, 2001 the appellant wrote to the respondent stating that it was now over 1and ½ months since a no payment has been remitted.

This delay was not anticipated and that it was important that he address the issue of payment which should be made without further delays.

From these letters it is clear that the parties entered into an agreement which was verbal. The appellant delivered the goods to the respondent and issued an invoice stating that the goods were delivered in good working conditions.

There was a legal relationship which was entered into by the parties and there was a clear intention by the parties that the appellant would deliver the photocopying machines and the respondent would pay the agreed consideration.

There are essentials of a valid contract which are;

- Offer, acceptance and consideration.

Where it is established that the three essentials of a valid contract exist then a party cannot run away from the contract. In the case of;

it was stated that:

> 'offer and acceptance supported with consideration equate a contract,

where parties enter a contract on all terms of contract they regard as essential a contract is deemed to have been formed.

It is Trite that an agreement will be deemed to have been duly formed and binding where there is consideration an d acceptance having been made to the offer.

The respondent raised a defence of misrepresentation by alleging that the machine was in good working condition.

Where a party denies the existence of a contract he has to prove the laid down conditions.

What defeats a contractual liability is well laid out and includes illegality, duress, fraud, and undue influence. This are the factors to vitiate contractual liabilities and constitute a defence and they must be pleaded.

In his defence dated 14th of March, 2005 he had denied ever buying or receiving a photocopying machine valued at Kshs; 75,000/=. The defence was generally a mere denial.

The respondent filed an amended defence and this time he admitted that there was a verbal agreement to buy a rank Xerox machine in good working condition and a further admits that the purchase price of Kshs; 75,000/= if the machine was working.

The defendant admits that the machine was delivered to his working place, and upon testing the machine it was found not to be working he allege s misrepresentation and gave particulars.

This defence was amended on 21st December, 2005. It is clear from the statement of the defence and counter claim that the respondent never alleged that there was illegality, duress, fraud or undue influence which are matters that are required to be proved in order for a party to raise a defence to defeat his contractual liabilities and this was stated in the case which was cited by the appellant that is: **National Bank of Kenya limited -versus- Pipeplastics Sankolit & Another (supra)** where the Court of appeal states inter-alia

> **" the parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved. There was not the remotest coercion, fraud, or undue influence in regard to terms of the clause."**

The defendant never pleaded this matter. In the case of ; G. Passy Trentham Limited -versus- Archital luxfer limited (1993) Lloyds Rep. 25

Lloyd 10 said;

> " it is important to consider briefly the approach to be adopted to the issue of contract formation. It s eems to me that all matters are of importance.
>
> The first is that;
>
> " law generally adopts an objective theory of contract formation. That means that in practice, our law generally ignores the subjective expectation and the unexpressed reservations of the parties.

Instead the government criterion is the reasonable expectation of honest men…… that means that, the yardstick is the reasonable expectation of reasonable businessmen.

Secondly

> " it is true that the coincidence of offer and acceptance will in the first majority of cases represent the mechanism of contract formation, it is so in the case of a contract alleged to have been made by an exchange of correspondence, but it is not necessary so in the case of a contract, alleged to have come into existence during and as a result of performance.

The third matter " is the impart of the fact that the transactions is executed rather than executory. It is a consideration of a number of levels. ***See British Bank for foreign trade limited -versus- Novinex 1949 (1) KB 628 at page 630.***

A fact that a transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically the

fact that the transaction is executed makes it easier to imply a term resolving any uncertainty or alternatively it may make possible to treat a matter not finalized in negotiations as essential.

In this case fully executed transactions are under considerations. Clearly similar considerations may sometimes be relevant impartly executed transactions.

Fourthly if a contract only comes to existence during and as a result of performance of the transactions it will frequently be possible to hold that the contract impliedly and retrospectively covers re-contractual performance.

In another case in the Supreme court of United kingdom in the case of: **RTS Flexible Systems limited -versus- Molkerei Aloise Muller GMBH & Company KG UK Production (2010) UK SC 14.** IT was stated that:

> **" the general principles ar e not in doubt, whether there is a binding contract between the parties and if so, upon what terms depends upon what they have agreed."**

It depends not upon their Subjective state of mind but upon a considerable that was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of a legally binding relations.

Even certain terms of economic or other significance to the parties have not been finalized an objective appraisal of the award and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.

The above decisions were quoted with approval in the case of; MAHAJAN suing on behalf of the Estate of late Peeus Premall Mahajan -versus- Yashwant Kumari Mahajan (2017) eklr where the court stated that the decisions though persuasive they set out sound and the correct legal principles applicable to common law jurisdictions on contract law.

In the present case there is no dispute that the parties entered a verbal agreement as the defendant has admitted in the amended statement of defence that"

> " the defendant admits that there was a verbal agreement to buy a Rank Xerox machine in good working conditions. The plaintiff had guaranteed but on delivery the above stated machine was not in working condition or serviceable. The defendant further admits that the purchase price was agreed with the purchase price at KShs; 75,000/= if the machine was working."

Further paragraph 3A.

> " the **defendant admits that the machine was delivered in his business premises without his notice and left there……."**

From the foregoing it clear that the parties entered into an agreement which was verbal, the essential of a valid contract were met as there was an offer, acceptance and consideration and there existed a legal relationship between them which was binding on the parties. The defendant had no valid defence that there was no valid binding contract.

The answer to first issue for determination was that there was a binding and a valid contract between the parties.

The second issue is whether the respondent breached the terms of the said contract for not paying for the machine delivered to him by the appellant.

The appellant submitted gave evidence in the lower court and stated that the photocopy machine was serviceable. The learned trial magistrate in his judgment stated that;

"according to the respondent the machine was not serviceable"

The respondent as evidenced in the letter dated 22nd February, 2001 acknowledged delivery of the machine and undertook to pay. The respondent never paid as promised and never raised the issue with the appellant that the machine was not serviceable vide a letter by the appellant dated 19th August, 2002 the appellant offered the sale of the photocopying machines at a price of Kshs; 35,000/=.

On 29th August, 2002 the respondent wrote a reply accepting the offer at the quoted price and offered to pay by two installments.

It is sticking to note that in this letter the respondent stated that

> **' in the meantime we shall start affecting (sic) repairs on the machine to make it serviceable since the machine is currently inoperative and new spare parts are not readily available. Every effort will however, be made to make the**

payments on schedule.'

The appellants wrote and stated that though the letter dated 28th October, 2002 to withdraw the terms of offer of the letter dated 19th August, 2002, and stated that the respondents conditional acceptance letters are totally unacceptable, please make the necessary arrangement to pay the sale price of Kshs; 75,000/=.

The defendant in the two letters had accepted to pay for the machine, and it is his contention that the machine was not serviceable at the time of delivery can only be an afterthought. The respondent never wrote to the appellant informing him that the machine was not serviceable nor did he return the machine to the appellant. **Section 100 of The Evidence Act Chapter 80 of The laws of Kenya (**supra) applies as the respondent had by his conduct allowed the appellant to believe that he would actually pay for the machine.

This letter shows that the respondent was ready to pay for the machine. In the letter he did not state that in the machine has not been inoperative. This letter is dated 29th August, 2002, while the letter of undertaking by the respondent was written on 22nd February, 2001. It is after one year and six months that he was saying the machine is "**currently inoperative,"** and so the respondent did not say that the machine had been in his premises for all that period without being in use.

The letter must be interpreted that, it was at the time of writing the letter that the machine was not operative, and it defeats his defence that the machine was not serviceable at the time of delivery.

The respondent had issued a cheque of Kshs; 10,000/- in the appellant's name being part payment of the purchase price only for it to be dishonored by the bank upon presentation by the appellant.

The conduct by the respondent show that he received the machine and accepted to pay only to backtrack and relying on hearsay to say that the photocopier was obsolete and unfit for use.

The circumstances of this case show that the respondent had agreed to pay and his contention which was made one year and six months later that the machine was not serviceable cannot be accepted. Though he claims that the machine was not serviceable at the time of delivery, further that it was obsolete he was willing to pay Kshs; 35,000/= for it, that is one and half years later, and as such to claim that the machine was unserviceable and obsolete was not in good faith. He could not pay for something he claims could not be repaired.

The respondent has alleged his misrepresentation in his defence. The misrepresentation is that the machine was in good working condition a fact that the appellant knew was wrong. I however, find that the agreement was not vitiated by any factor and therefore the agreement was not voidable.

There was a valid agreement which the appellant entered into freely without coercion, force or duress and misrepresentation was raised too late in the day and cannot therefore be a credible defence.

I have also considered the submission by the respondent that the legal relationship that existed between the parties was revoked and/ or supplemented by the further correspondence between the parties and materially altered the terms of the initial sale agreement dated 22nd February, 2001. I do not agree with this submission since the appellant made an offer which was not accepted in the terms proposed by the respondent.

The appellant wrote back and informed the respondent that he did not accept the terms and demanded payment of Kshs; 75,000/= as per the initial agreement.

Therefore, since the offer by the plaintiff was not accepted by the defendant, it cannot be said that the letter had the effect of terminating the initial agreement.

The respondent unilaterally sort to terminate the agreement as per the letter dated 29th August, 2002 and demanded that he will charge Kshs; 50/= per day. This did not discharge him from performing the agreement which he had entered with the appellant.

The appellant was bound to perform his part of the contract and the doctrine of Estoppol applies to prevent him from disowning the express terms of the verbal agreement between him and the appellant, See the Case of ; **Basco Products Kenya Limted - versus- Machakos County Government (2018) ekLR** which the learned Judge in making his decision relied on the case of; Noordin Bandari -vs- Lom Bank (supra).

The appellant did not have a good cause for not paying for the machines which had been delivered to him and as submitted by the appellant, ***Section 21 of The Sale of Goods Act*** applies to show that the machine was delivered to him.

The respondent accepted the machine when it was delivered to him and he is deemed to have accepted the goods **Section 36** of the Sale of Goods Act cited above refers.

The respondent accepted the goods and offered to pay. The respondent accepted the goods without any reservations however.

As submitted by the respondent to claim that the machine was unserviceable and unfit for usage after he had accepted it and used it for his own gain for one and a half years, is vexatious and frivolous.

It is also true that under Section 22 of The sale of goods act which is to the effect that if the goods passes to the buyer without any conditions then the risk of any damage to the said property passes with the property.

So when the machine was delivered to the respondent the property and the risk passed to the respondent and his claim that the machine was not serviceable cannot be accepted.

The doctrine of estoppol applies to the circumstances of this case. Since there was a valid contract between the appellant and the respondent there was no basis for the respondent to aver that he is entitled to storage charges to 50/- per day and the trial magistrate erred by allowing the claim for storage charges.

The respondent after keeping the machine for a period of one and a half years unilaterally claimed storage charges which was without any basis and his claim for storage charges should not have been allowed.

I find that from the circumstances of this case the respondent breached the agreement and contrary to what he submits that the circumstances of this case does not avail the appellant to the benefit from the rights of a seller of goods as prescribed in the sale of goods act or even the law of contract act cannot hold any water.

The appellant has demonstrated that the provision of the law of contract and the sale of goods act applies to the circumstances of this case.

The appellant had also raised the issue as to whether he had a claim for action for the price and interest.

The respondent has demonstrated that he was a seller of goods who was unpaid as provided under **Section 39 A (i) of The sale of goods act** which defines unpaid seller. The respondent never paid the price for the photocopier.

A legally an unpaid seller is entitled to an action to recover the price of the goods and damages based on the agreement. Section 49 of The sale of goods act provides that the un paid seller has right of action for the price of the goods where the property in the goods has passed in the buyer and the buyer refuses to pay for them. Where the buyer has agreed to pay for the goods at a certain day and he wrongfully refuses to pay for them. The appellant been an unpaid buyer had a right of action for the price and the interest against the respondent.

The appellant had a claim against the respondent which was based on cogent evidence which the trial magistrate dismissed without any legal basis. The judgment can therefore not be supported.

On the issue of costs as it has been submitted they are at the discretion of the court and it is trite law that they follow the event.

A successful litigant is entitled to cost to compensate him for the expenses he has undergone in prosecuting or defending the case.

In conclusion I find that the appellant has proved his claim on a balance of probabilities and judgment ought to have been entered in his favour.

I therefore order that;

- The Judgment of the trial magistrate is set aside and is substituted with and Order that Judgment is entered for the appellant in the sum of Kshs; 75,000/= from the date of filing the suit with interest at court rates from the date of filing the suit till payment in full.

- The counterclaim is dismissed with costs to the appellant.

- The costs of this appeal and in the lower court are awarded to the appellant.

Dated at Kerugoya this 29th day of May 2020.

L.W. GITARI

JUDGE