REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 80 OF 2019

WAMA PHARMARCY (K) LTD……APPELLANT

VERSUS

MONSANTO KENYA LTD……...……..RESPONDENT

(Being an appeal from the Judgment of the Hon. Mrs. L. Ambasi (CM) delivered on 14/6/2019 in the Meru CMCC No. 109 of 2014)

J U D G M E N T

1. By a plaint dated 1/4/2014, the respondent from the appellant claimed a sum of Kshs.6,059,540/= being the balance of the amount due on 20,000 bags of seeds allegedly sold and delivered to the appellant between the years 2010-2012. The respondent contended that the appellant had partly paid for the seeds but had failed to pay the outstanding sum.

2. By a defence dated 11/6/2014, the appellant denied the appellant's claim in *toto*. It denied having been supplied with any seeds by the respondent. It further denied making any payment either as alleged or at all.

3. After trial, the trial Court found for the respondent and entered judgment for the said sum of Kshs.6,059,540/-plus interest and cost. Aggrieved by the said decision, the appellant preferred the present appeal raising eight (8) grounds which can be summarized as follows: -

a) That the trial Court erred in failing to find that the respondent's case was invalid and bad in law for lack of authority and resolution to bring the same and/or appoint its advocate.

b) The judgment of the trial is against the provisions of the law, to wit, the sale of Goods Act and the Companies Act.

c) ***That the judgment of the trial Court was against the weight of evidence.***

4. This is a first appeal. It is therefore the duty of this Court to re-evaluate the evidence afresh, draw its own conclusions and make its own independent findings. (See **Selle -v- Associated Motor Boat Co. Limited 1968 E.A. 123)**.

5. **Peterson Mwangi (Pw1),** the respondent's head of credit, testified that, the respondent supplies seeds and other agricultural inputs to various countries including Kenya on both credit and cash terms. That on 20/8/2010, the appellant ordered seeds valued at Kshs.12,540,000/= which was discounted to Kshs. 12,294,000/=. The seeds were then supplied to the appellant on credit to be settled within 90 days. The appellant took delivery thereof and acknowledged the same.

6. Subsequently, the appellant made partial payments towards settlement of the debt but failed to settle the full amount. That the amount outstanding was Kshs.6,059,540/= which had been demanded but not settled.

7. In cross-examination, he told the court that respondent had given its authority to the filing of the suit and appointed one Japheth to swear affidavits. He was aware that the appellant's managing director died before the supplies were made to the appellant. He concluded that the firm of Ogola Mujera, Advocates were properly appointed to represent the respondent.

8. The first ground of appeal was that, the trial Court erred in failing to find that the respondent's case was invalid and bad in law for lack of authority and resolution to bring the same and/or appoint its advocate

9. It was submitted by **Mr. Rimita**, Learned Counsel for the appellant that, the suit was invalid as there was no authority and company resolution to bring the suit or appointing the person to sign the pleadings for the appellant or appoint the advocates on record. That this was in breach of ***Order 4 Rule 1 of the Civil Procedure Rules.***

10. The decisions in the cases of **Bugerere Coffee Growers Ltd v. Sebanduka and Another [1970] EA, Britind Industries Limited v Apa Insurance Limited [2017] eklr, Ann Wanjunu Mwihaki v Mwihaki Waruiru & 2 OTHERS [2018] EKLR** among others, were relied on in support of those submissions.

11. On her part, **Ms. Kimani,** Learned Counsel for the respondent submitted that the resolution attached to the verifying affidavit was signed by the directors of the respondent. That the propriety of the resolution was not properly raised before the trial Court as it was never pleaded in the appellant's defence.

12. The cases of **Galaxy Paints Company Limited v Falcon Guard Limited (2000) eklr, Daniel Toroitich Arap Moi v Mwangi Stephen Murithii & another [2014] eklr** and **Independent Electoral Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eklr** were relied on in support of those submissions.

13. I have looked at the original record. The plaint was accompanied by a verifying affidavit of **Japheth Mutulu Fredrick** sworn on 1/4/2014. Annexed to that affidavit was an extract of the minutes of the respondent authorizing the said **Japheth Mutulu Fredrick** to swear affidavits, file and defend suits on behalf of the respondent. It was alleged that the same was not sealed.

14. The question is whether the said resolution is adequate for the purposes of the suit before the trial Court. ***Order 4 rule 1 (4) of the Civil Procedure Rules*** provides: -

"Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so."

15. In **Affordable Homes Africa Ltd v Henderson & 2 others [2004] Eklr,** the court held that in the absence of a board resolution sanctioning the commencement of an action by a company, the suit is fatally defective as the company is not before the court.

16. The commentary in **4th Edn. Halsbury Vol. 7 paragraph 767** observe: -

> ***"As regards litigation by an incorporated company, the directors are, as a rule, the persons who have authority to act for the company; but, in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of a company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.".***

17. In the case of **Mavuno Industries Limited & 2 Others v. Keroche Industries Limited [2012] Eklr,** it was held: -

> ***"As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents, which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit".***

18. In the present case, there was a board resolution signed by the respondent appointing **Japheth Mutulu Fedrick**. The same was signed by two directors of the appellant. Japheth Mutulu Ferdrick signed the verifying affidavit. In Paragraph 2 of that affidavit, he averred that he had read and understood the plaint filed therewith by the firm of **Ogola & Co. Advocates** on the plaintiff's instructions. To this Court's mind, that was sufficient authority to the effect that the said firm of advocates had instructions to file the suit on behalf of the respondents.

19. The purpose for requiring a resolution giving authority to file suit is for the company to own the proceedings. This is so because, the filing of a suit has legal consequences including the issue of costs. There should be certainty as to whether the company will be bound by the consequences of the filing of legal proceedings. This is so usually in cases where either an individual director or shareholder commences proceedings on behalf of the company.

20. In the present case, there is a resolution which the respondent owned through its witness. The challenge in my view was not merited.

21. In any event, the Court agrees with the submission of the respondent that the issue was not properly raised. It was not an issue before the trial Court. This is so because the appellant did not raise it in its defence. Cases are tried on the basis of the pleadings lodged by the parties. Raising issues in cross-examination, as it happened in this case, or in submissions is unknown in law and is unacceptable. ***See Galaxy Paints Company Ltd .v. Falcon Guard Ltd (Supra).***

22. The cases relied on by the appellant are not applicable in the circumstances of this case. They involved situations where either individual directors or some of the shareholders purported to institute proceedings on behalf of the company. In the present case, there was a resolution to commence the proceedings in question. Ground 1 therefore fails.

23. The second ground was that the judgment of the trial court is against the provisions of the law. This was captured in ground nos. 2 and 5 of the Memorandum of Appeal.

24. It was submitted for the appellant that the respondent's suit fell foul of the ***Sale of Goods Act*** and the ***Companies Act.*** That there was no evidence to show that there was any valid contract between the parties. That the deliveries occurred way after the managing director of the defendant had passed on, a fact well known to the respondent. That there was no evidence that the cheques produced were issued by the appellant.

25. On the other hand, it was submitted for the respondent that; by the conduct of the parties, there was a valid contract between them. That the evidence tendered before court proved that there was an offer, acceptance and consideration. That there was part performance on the part of the appellant as evidenced by the cheques that were produced by the respondent. As regards the death of the managing director of the appellant, it was submitted that the respondent was not required to inquire into the internal workings of the appellant in order to deal with it.

26. The cases of **Abdikadir Shariff Abdirahim & Anor v. Awo Shariff Mohamed t/a A. S. Mohamed Investments [2014], Basco Products Kenya Ltd v. Machakos County Government [2018] Eklr** and **Joseph Kobia Nguthari v. Kiegoi Tea Factory Company Ltd & 2 Others [2016] Eklr,** were relied on in support of those submissions.

27. According to the respondent, the appellant made an order for supply of seeds which was followed by deliveries of the same, issuance of invoices and part payment therefor. On record is an Order No. 058 dated 20/8/2010 for seeds valued at Kshs.12,274,000/-. There are also invoices and deliveries that are signed for.

28. It was the sworn testimony of the respondent's witness that the sale of the subject goods was on credit terms of 90 days. That the appellant took delivery of the goods from the respondent's premises at Nairobi. He produced two cheques, *viz,* nos. 106670 and 106672 dated 31/10/2012 and 31/12/2012, respectively.

29. This evidence was neither challenged nor controverted. The appellant closed its defence without calling any evidence. That being the case, that evidence remained as the only evidence available on which the trial Court had to determine the matter.

30. In **Trust Bank Limited v. Paramount Universal Bank Limited [2009] eKLR**, it was held: -

> ***"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. The 2nd and 3rd Defendant's were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged".***

31. In this regard, the denials in the appellant's defence were not enough to displace the respondent's sworn testimony.

32. This Court does not think that the absence of a written contract between the parties vitiated the respondent's claim. In ***Ali Abdi Mohamed v Kenya shell & company limited [2017] eKLR*** the Court of Appeal held: -

> ***"There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the law of Contract Act is one such provision."***

33. ***Section 3*** of the sale of goods Act is clear that a contract is formed where there exists an offer which is accepted and acted upon with valuable consideration. In the case cited by the respondent of **Basco Products Limited v. Machakos County Government [2018] Eklr,** the court held: -

> ***"Thus having acted on the LPO and supplied valuable consideration in the form of goods that were duly delivered to the Defendant, there can be no doubt that a valid and binding contract was thus created. This is why Section 100 of the Evidence Act, Chapter 80 of the Laws of Kenya is provides that:***
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> > ***"When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."***
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> ***Thus, I take the view that, in the circumstances, the doctrine of equitable estoppel would come into play to prevent the Defendant from disowning the express terms of their Agreement with the Plaintiff. In this respect, it was held to be the case in Nurdin Bandali vs Lombank [1963] EA 304, that:***
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> ***"The precise limits of an equitable estoppel 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 unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it be acted upon and the other party in the belief of the truth of the representation acted upon it."***

34. In the present case, there was an order which was accepted and was accompanied by delivery of the subject goods. In my view, there was a binding contract between the parties.

35. As regards the cheques, there was no evidence to rebut the prima facie evidence that they were issued by the appellant. They bear the name of the appellant on the face of it. It was not denied that the appellant holds account no. […] with Consolidated Bank, Maua Branch. Accordingly, the trial Court was entitled to hold that there had been part performance of the contract on the part of the appellant.

36. It was submitted that the supply of the goods was after the demise of the managing director of the appellant. That the respondent dealt with persons not known to the appellant. Firstly, these were mere submissions that were not supported by any evidence. That in the view of this Court was not a serious contention. It should have been raised in the defence for it to be a substantive issue for determination by the trial court. This was not the case.

37. Secondly, the fact that the managing director of the respondent had died did not lead to the demise of the appellant as a legal entity. The appellant continued to exist as a business entity. That is why it was able to trade and appoint an advocate to act on its behalf in these proceedings. The company continued to exist as a separate entity from its managing director. In any event, it was not the business of the respondent or any other person for that matter, who as to deal with the appellant to go behind the legal personality of the appellant to inquire as to its internal dealings.

38. In **Joseph Kobia Nguthari v. Kiegoi Tea Factory Company Limited & 2 others [2016],** Gikonyo J observed: -

> ***"This follows after the greatest legal innovation of separate corporate legal entity which was formulated in the case of SALOMON vs. SALOMON [1897] AC 78, that: -***
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> ***The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same person are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act".***
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> ***This long-standing legal principle is until today true and has been adopted in national legislation and a great number of judicial precedents within the common law tradition including Kenya. I only cite the case of VICTOR MABACHI & ANOTHER vs. NURTURN BATES LTD, CIVIL APPEAL NO. 247 OF 2005[2013] eKLR, where the court held that a company***
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> ***"….as a body corporate, is a personal jurisdica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."***

39. In view of the foregoing, I find that the trial Court cannot be faulted for finding that there was a lawful contract between the parties. The judgment was sound and in accordance with the sale of Goods Act and the Companies Act. That ground also fails.

40. The final ground was that that the judgment of the trial Court was against the weight of evidence and that the trial Court shifted the burden of proof to the appellant. It was submitted that while the burden was upon the respondent to prove its case, the trial Court shifted the same to the appellant. ***Section 107 of the Evidence Act*** and **Halsbury's Laws of England, Vol 17, at paras 13 and 14** were cited in support of those submissions.

41. On the other hand, it was the respondent's submission that it had proved its case to the required standard. That it had proved that there existed a contract between the parties. That by the appellant not calling any witness in support of its defence, it failed to disprove the respondent's case. The case of **Shannebal Limited v County Government of Machakos [2018] eklr** was cited in support of those submissions.

42. I have already found that there was a contract between the parties in terms of ***section 3(1) of the Sale of Goods Act, Chapter 16 of the Laws of Kenya***. The respondent had proved that there was an offer by way of an order No. 058 which was accepted and acted upon. There were deliveries that were followed by part payment.

43. The agreement between the parties was embodied in the orders placed, the delivery notes, the invoices and the receipt of the delivery (See **Haul Mart Kenya Limited v Tata Africa Holdings (Kenya) limited [2017] eKLR).** The respondent had set out its claim in paragraph 5 of its plaint and called evidence in support thereof.

44. The appellant did not call any evidence to dispute the deliveries and/or dispute the fact that the appellant's representatives received the deliveries. Without any credible evidence to controvert the respondent's claim, the claim was proven to the required standard. Once the evidence was led by the respondent as it did, the evidentiary burden of proof shifted to the appellant to rebut the same. It failed to call any evidence in rebuttal and the trial Court was correct in its findings.

45. In view of the foregoing, the trial Court cannot be criticized by finding for the respondent in this case. There is nothing on record to show that the trial Court shifted the burden of proof to the appellant as alleged. The evidentiary burden of proof had shifted to the appellant which it failed to discharge the moment it failed to call any rebuttal evidence. The third ground is therefore without merit and is dismissed.

46. The upshot therefore is that the appeal is without merit and is hereby dismissed with costs to the respondent.

DATED and **DELIVERED** at Meru this **25th day of June, 2020.**

A. MABEYA

JUDGE