REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 95 OF 2018

HARDWARE TRADING STORES LTD.....APPELLANT

VERSUS

CHRISTOPHER ORINA.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nakuru (Hon. Y.I. Khatambi) delivered on 13/07/2018 in Nakuru Civil Case No. 497 of 2015)

JUDGMENT

1. The Appellant commenced the suit in the Court below vide a Plaint sounding in breach of contract. The claim was simple: The Appellant claimed that the Respondent was its customer at its hardware store in Nakuru and that on diverse dates between 02/08/2009 and 09/11/2009, it supplied various goods and/or rendered services to the Respondent, at his request. The Plaint further claimed that the Respondent thereafter refused to pay for the goods and/or services all amounting to Kshs. 1,109,825.81.

2. The Appellant, therefore, prayed for judgment in liquidated damages in the amount i.e. Kshs. 1,109,825.81 together with interests and costs of the suit.

3. The Respondent filed a Statement of Defence denying the claim. In part, the Respondent claimed that it had paid all the goods supplied to him by the Appellant upon delivery and that he did not owe the Appellant any monies. He further indicated that at the appropriate time, he would seek better and further particulars namely: local purchase orders, and delivery notes among others as evidence of the alleged indebtedness.

4. After the Respondent survived a motion to strike out the defence and enter summary judgment, the suit was set down for hearing. When it finally took off, the Appellant called one witness, Refendra R. Patel, and then closed its case. The Respondent did not call any witnesses.

5. The Learned Trial Magistrate considered the evidence tendered and arrived at the conclusion that the case was not proved. She dismissed the entire claim with costs. The Appellant is dissatisfied. The filed Memorandum of Appeal contains five grounds of Appeal thus:

> i. That the trial magistrate erred in law and fact in failing to properly evaluate and appreciate the evidence adduced thereby came to an unsound conclusion.
>
> ii. That the Trial Magistrate erred in law and in fact in failing to properly evaluate the evidence and material adduced that clearly demonstrated the Plaintiff's claim against the Defendant.
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> iii. That the Trial Magistrate erred in law in failing to appreciate that oral evidence is admissible and is indeed the first line of and/or mode of proof.
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> iv. That the Trial Magistrate erred in law and in fact in dismissing the Plaintiff's suit when the Plaintiff's witness testified lucidly on the delivery of the items, a fact that was not refuted.
>
> v. That the judgment of the Trial Court is erroneous, unsustainable and it varies with the evidence adduced and the law.

6. The parties agreed to canvass the appeal by way of written submissions and neither party found it necessary to orally highlight.

7. I have read and considered the respective arguments in the parties' written submissions.

8. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

> I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on 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 (**Abdul Hammed Saif – vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

9. The appropriate standard of review established in these cases can be stated in three complementary principles:

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

10. The evidence that emerged from the Trial Court can be easily summarized. Only one witness testified. Refendra R. Patel told the Court that he was the Managing Director of the Appellant Company. He said that he knew the Respondent and that he used to buy goods from the Respondent; that between 02/08/2009 and 09/11/2009 the Appellant supplied him with road construction materials on credit. He said that the Appellant issued the Respondent with invoices for the goods supplied as follows:

i. Invoice No.54045 dated 02/08/2009 for goods worth Kshs. 120,255.93.

ii. Invoice No. 54046 dated 24/08/2009 for goods worth Kshs. 191,638.74.

iii. Invoice No. 54048 dated 24/08/2009 for goods worth Kshs. 196,206.50.

iv. Invoice No. 54210 dated 14/09/2009 for goods worth Kshs. 199,568.00.

v. Invoice No. 54616 dated 09/11/2009 for goods worth Kshs. 202,155.40.

vi. Invoice No. 54618 dated 09/11/2009 for goods worth Kshs. 200,001.10.

11. Mr. Patel produced certified copies of the invoices plus a demand letter dated 03/10/2014. He testified that the Respondent refused to pay any of the invoices despite demands being made.

12. In cross-examination, Mr. Patel said that he is one of four directors of the Appellant and that he was authorized to appear for the Company even though he did not have the authority in Court. He conceded that the invoices had not been signed by the Respondent or anyone on his behalf. He further conceded that he had not produced any Local Purchasing Orders corresponding with the invoices. He said that the Appellant had received the LPOs but that they had been received by one Yayesh Patel who was no longer an employee of the Company. He further conceded that he had not asked Yayesh to record a statement or appear in Court as a witness. Additionally, Mr. Patel conceded that he did not have any delivery notes corresponding with the invoices.

13. In re-examination, Mr. Patel insisted that the documents he had produced were from Company documents and that there was no contrary evidence; that the Appellant supplied the Respondent with goods; that the invoices were issued but not paid and that he had proved that the money was owed.

14. In her judgment, the Learned Trial Magistrate was not persuaded that the Appellant had succeeded in proving that goods had been supplied to the Respondent for which he owed the amounts claimed. In pertinent part, the Learned Magistrate reasoned thus:

> PW1 testified that the goods were delivered to the Defendant. Invoices were presented in evidence. The said invoices are dated, contain the order number, items supplied and the value of the said item. The said invoices have not been signed by the recipient acknowledging receipt of the goods. The burden of proof lies with the Plaintiff. It was imperative for the Plaintiff to provide sufficient proof of the said delivery. The Plaintiff witness confirmed that the said goods were delivered to the defendant. The delivery notes were not presented in evidence. He further stated [that] the Plaintiff received Local Purchase Orders. The said Orders were never presented in evidence. Upon scrutinizing the invoices presented, I note that the invoices were not duly received by the defendant. As a consequence, it is not possible to establish whether the goods were indeed delivered.

15. In other words, the Learned Trial Magistrate concluded that the Appellant had not proved its case because the invoices were not signed by the Respondent; no delivery notes were presented; and no Local Purchasing Orders were presented.

16. It is on this finding that this appeal turns. The Appellant argues that this was a misdirection because the Appellant's witness' unrebutted oral evidence should have been enough in law to establish the Appellant's case on a balance of probabilities.

17. The Appellant is right. Civil cases are decided on a balance of probabilities. The overall burden of proof is on the Plaintiff, who must prove that on the balance of probabilities, his case is true. This merely means that the Plaintiff must satisfy the Court that on the evidence presented, the occurrence of an event was more likely than not.

18. In re H (Minors) [1996] AC 563 at 586, Lord Nicholls of the House of Lords explained the balance of probability in terms of a flexible test thus:

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence.
>
> Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

19. The bottom line, as Lord Denning said in ***Miller v Minister of Pensions [1947] 2 All ER 372*****)**, the evidential threshold in civil cases is a simple one:

> If the evidence is such that the court can say "we think it more probable than not," the case succeeds, but if the probabilities are equal, the case fails.

20. In the present case, the Appellant called a witness who testified that the Appellant delivered various goods to the Respondent on various dates. The witness produced invoices evidencing the alleged deliveries and the amounts the cost. He then testified that although the Respondent accepted the goods and promised to pay for them, after delivery he failed to do so. The Respondent produced no evidence and called no witnesses.

21. On these facts and on this record, there can be no basis for concluding that the Appellant had failed to meet the low evidential threshold of balance of probabilities. At the end of the case, the Court had only the task of asking whether it was more likely than not that the goods were delivered and remained unpaid for.

22. With respect, the Learned Magistrate went far beyond this simple test. In scrutinizing the invoices and deducing that the fact that they were not signed by the Respondent meant that the standard of proof had not been reached, the Learned Magistrate elevated the evidential threshold beyond that required in civil cases. In concluding that failure to produce delivery notes and LPOs elevated the threshold even higher. Rather than simply use the flexible standard suggested above to ask whether on the strength of the un-rebutted evidence presented by the Plaintiff it was more probable than not that the event occurred, the Learned Trial Magistrate embarked on a project to test the un-rebutted evidence produced against an unstated ideal mode of evidential proof.

23. The practical effect of correctly utilizing the "balance of probabilities test" is that in cases where the Plaintiff adduces evidence which is unrebutted by the Defendant, the failure by the Defendant to call evidence has the effect of converting the evidence called by the other party, so long as credible, even if slender, into sufficient proof. So it was here.

24. Other Kenyan decisions on the question are in agreement. In ***Motex Knitwear Mills Limited Milimani HCC 834/2002*** Lessit J. cited **Autar Singh Bahra & Another Vs Raju Govindji HCC 548 of 1998** with approval when she stated that:

> Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail… 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….

25. Ali-Aroni J. reached the same conclusion in ***Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007*****:**

> 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.

26. The Respondent has urged the Court to dismiss the Appeal but spent the entirety of the analytical part of his submissions arguing that the Learned Trial Magistrate should have dismissed the suit in the Court below for a reason other than the one she did: that the suit should have been dismissed because it was unprocedurally instituted without a company resolution authorizing the filing of the suit. Counsel for the Respondent argues that this was a dispositive reason to dismiss the suit because no suit by a company is competent unless supported by a resolution of the Board of directors.

27. I note that the Respondent did not cross-appeal against the decision of the Learned Magistrate. Indeed, this is an issue which is being raised for the first time in the Written Submissions filed by the Respondent. It is an argument that cannot be taken up at this late stage. It was not preserved for taking up on appeal and cannot be stealthily introduced at the submissions stage.

28. The upshot is that the appeal filed herein succeeds. The orders that the Court shall make shall be the following:

i. The judgment/decree of the Honourable Court in *Nakuru CMCC No. 497 of 2015* dated 13th July, 2018 is hereby set aside and in its place it is substituted a judgment in favour of the Appellants for the sum of Kshs. 1,109,825.81.

ii. The judgment sum of Kshs. 1,109,825.81 shall attract interests at Court rates from the date of filing of the suit in the Court below.

iii. The Appellant shall have the costs of the suit both in the court below and on appeal.

29. Orders accordingly.

Dated and delivered at Nairobi this 18th day of June, 2020.

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JOEL NGUGI

JUDGE

NOTE: This ruling was delivered by both Zoom video-conference facility and email pursuant to the various Directives by the Honourable Chief Justice urging Courts to consider use of technology to deliver judgments and rulings where expedient due to the COVID-19 Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by email in cases where all the parties have consented to dispense with the requirements of Order 21 Rule 1 of the Civil Procedure Rules. In this case, both the Counsel for the Appellants, Sheth & Wathigo Advocates and Counsel for the Respondents, Oumo & Co. Advocates, consented in writing to the delivery of the ruling by both email and video-conference facility.