



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 431 OF 2016

KENNEDY MASINDE.....PLAINTIFF

- VERSUS -

ANN WANJA T/A KANINI MERCHANTS.....DEFENDANT

JUDGEMENT

1. It is not denied that the plaintiff **KENNEDY MASINDE** (Masinde) supplied maize to the defendant **ANNE WANJA t/a KANINI MERCHANTS** (Wanja) from March 2015 to February 2016. Masinde's claim against Wanja is for Judgment for Ksh 6,824,750 which Masinde alleges represents the amount due for unpaid supply of maize. Wanja has also counter-claimed against Masinde for Ksh 489,000 which she alleges is the value of 200 bags of maize that were stolen from her by Masinde, alongside her employees.

2. Masinde by his testimony before court stated that he began the business of supplying Wanja with maize in March 2015. Wanja mills the maize in her posho mill at Jamuhuri show ground. She runs her business there under the name Kanini merchants.

3. Masinde stated that he would collect maize from farmers in TransNzoia County which he would supply to Wanja. Masinde would agree the price per bag with the farmers. That that price was dependent on the prevailing market rate at the time of supply. Masinde would pay the farmers on receiving payment from Wanja. This trading progressed until September 2015 when Masinde said Wanja failed to pay him for the maize he had supplied her business. By then and up to February 2016 Masinde said he had supplied Wanja with bags of maize worth Ksh 11,084, 550. For that period Wanja had paid Masinde on diverse dates Ksh 4,263,800. Wanja made payments through Bank transfer or mobile money transfer (Mpesa).

4. Masinde's evidence is that Wanja failed to pay for that maize delivered, for the value of Ksh 6,824,750 and because he was under pressure from the farmers who had supplied him with the maize he persistently made demand for payment from Wanja. That around March 2016 Wanja told him to travel to Nairobi to collect his cheque for final payment of the balance she owed him. Masinde stated:

“...but unknown to me this was a trap. When I got to Nairobi I was arrested and detained for two weeks and later charged at Kibera Law Courts for allegedly breaking into the defendant's (Wanja's) business premises and committing a felony..... I am without doubt that this criminal case which is currently pending in Kibera Law Courts is an attempt to silence me from pursuing the unpaid balance.”

5. Masinde stated that when he arrived, in Nairobi, at Wanja's place of business, to collect his cheque as promised by Wanja, Wanja asked him to surrender to her all his documents relating to their transactions. He handed over to Wanja all documents, that is, invoices, deliveries and his record of purchase of maize from farmers. When he gave Wanja the document he stated she walked out of the office, at her business, leaving Masinde there as she made a phone call and talked in her mother's language, Kikuyu. Masinde thereafter saw a man enter the office, where he was with Wanja, and that man asked him whether he was Kennedy Masinde. That man accused Masinde of stealing Wanja's maize. It was then that he realized that man was a police officer. That police officer handcuffed him and arrested him. Masinde denied having committed the offence.

6. Wanja testified in support of her case. She stated that she runs the business Kanini merchants a posho mill at a rented store in Jamuhuri show grounds. She procures maize from different sources which includes transporters, middlemen, agents and directly from farmers which she would mill and supply to different government organizations in the County of Nairobi.

7. In March 2015 Masinde approached her and they agreed Masinde would supply her with good quality maize from Trans Nzoia County. That since Masinde had no capital to start that business Wanja advanced him money in cash to purchase 130 bags of maize and if he was able to purchase more than that she agreed to send him money through his bank or mpesa. They agreed that Wanja would pay for the maize at the market rate at the time of delivery.

8. Wanja stated that as she carried out a routine stock check in her store, between September 2015 and February 2016 she noted she was missing 200 bags of maize. She carried out investigation and established that the said maize was stolen by Masinde and two of her employees namely Nicholas Kiplagat Koech and Robert Kiprono Koech together with others who were not arrested. Wanja reported the matter to Kilimani Police Station who carried out investigations and arrested Masinde and her two employees.

9. She further stated that during the proceedings of that criminal case in Kibera, Masinde applied for prosecution's witness statements and exhibits which he obtained. That it is those documents Masinde has "contrived and manipulated to be the basis of his claim in the present case." Wanja proceeded to state that it was suspicious that Masinde did not claim in this case for maize he supplied Wanja from March to September 2015 but only claimed for maize he supplied from September 2015 to February 2016. Wanja stated:

"This was occasioned by the fact that he did not have records to support his claim for the said months March to September 2015 and the records he had for the months from September 2015 to February 2016 as indicated were the records furnished to him in the criminal case."

10. Wanja after stating that she had fully paid Masinde for the maize supplied she stated further:

"I state that the plaintiff's (Masinde's) claim has no basis as he had been paid in full, has no documents of his own and could not access my documents for this period....the plaintiff did not keep any records whatsoever."

ANALYSIS AND DETERMINATION

11. In my view there two issues that need determination in this matter. The first is: whether the plaintiff has proved his claim for Ksh. 6,824,750 and/or whether the defendant has proved her claim for Ksh 480,000. The second issue is: who will bear the costs.

FIRST ISSUE:

12. The claim of Masinde is that he is owed by Wanja the amount claimed in this suit being the balance for the maize he supplied to her. Masinde stated that when he was summoned by Wanja she took from him his documents relating to their transactions which proved Wanja's indebtedness to him. Wanja did not deny, in her examination in chief that she took those documents from Masinde. Indeed when cross examined on that issue Wanja was very evasive and all she stated on being pressurized to answer was:

"I totally deny". There was no details from Wanja on the circumstances surrounding the arrest of Masinde at her place of business.

13. It will also be recalled that Masinde stated that he brought all his documents evidencing the transaction he had with Wanja to her place of business because Wanja asked him to bring them on pretext that she would then pay him what she owed him.

14. Wanja on testifying before the Kibera Law Courts in the criminal case where Masinde and others are charged stated:

"3rd accused (Masinde) was arrested later in March 2016. He was arrested at my house. I tricked him to come".

15. Before this court Wanja on being cross examined denied tricking Masinde to go to her place of business when he was arrested. She however did not, even in re-examination, state how she convinced Masinde to go to her business which then led to his arrest. The statement, before the criminal court, by Wanja to the effect that she tricked Masinde to go to her business place, which led to his arrest, was made on a date before the hearing of this case. It is in my view the more reliable statement than what Wanja stated in this case when she denied tricking Masinde. That is more so because Wanja failed to state how she convinced Masinde, who resides in Trans Nzoia county, to travel to Nairobi which led to his arrest. In view of the fact that I find that Wanja did indeed trick Masinde, as afore-stated, and that is supported by the evidence of Masinde in examination in chief which was not subjected to cross examination, it need to be determined what 'trick' Wanja used to lure Masinde to his arrest. According to Masinde his life was next to impossible because the farmers who he had been unable to pay, because Wanja had failed to pay for the Maize he delivered to her, were disturbing him and his wife to the extent that some of those farmers were demanding Masinde to pay their children's school fees. It follows that Masinde on being promised by Wanja to be paid the amount he was owed was probably more than willing to deliver all documents evidencing the transactions he had with Wanja. This is what Masinde stated and I believed him.

16. The fact that Masinde had no independent documents evidencing the transactions was repeatedly, and even irritably so, made an issue in the cross examination of Masinde and even in the examination in chief of Wanja. It seems that Wanja was confident that Masinde did not have those documents to prove his case against her and she testified that he did not keep documents of their transaction. One would wonder how she could so state with such finality and conviction. After all he could have kept documents which Wanja did not know of. The conviction that Masinde had no document could only be made by one who knew that Masinde would not be able to access his documents.

17. Even if Masinde did not have such documents, after all he admitted that he had limited education because his family could not afford to educate him, one would expect that Wanja who prided herself in keeping record of her business would at least have receipts or, as Masinde stated, petty cash vouchers which proved she made payment to Masinde. She did not have.

18. I had the opportunity to see and hear both Masinde and Wanja testify. I found Masinde to be more forthright in his answers to questions, even when he was interrupted, in cross examination, or persistently questioned over and over again about the lack of his independent documents. The court had to interrupt that line of questioning on the lack of independent documents. Masinde was in my view an honest witness. I believed him.

19. To the contrary I found Wanja as unreliable and untruthful witness. She denied having tricked Masinde to travel to Nairobi when Masinde said he surrendered his documents to her, yet under oath in the criminal trial that is exactly what she said. She said, that is “**I tricked him to come**”.

20. Wanja’s unreliable character was seen in her contradictory evidence. When she was cross examined about her claim, before the Criminal Court, where she asked how much Masinde owed her Wanja said Masinde owed her Ksh 180,000. Before this court Wanja’s evidence and her claim is that she is owed Ksh 480,000. She was unable to give convincing evidence of the difference between those two figures. But perhaps more telling is her total failure to inform the court the price per bag of what she was claiming. She failed to tell the court and even her counsel who tried to coax her to give an answer, she was unable, and yet that is the very basis of her claim. One wonders whether the counter claim filed herein was genuine. I watched Wanja testify and her demeanor did not show of someone who is credible and believable. A Canadian case where demeanor is discussed is worth considering at this time. It is the case **R – V- Bar which 2001 BCSC 1623** (CanLii). It was stated in that case thus:

*“[11] The Ontario Court of Appeal also cited with approval another British Columbia Court of Appeal decision **Faryan v. Chorney**, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 at pp.356-7, quoting as follows:*

If a trial Judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness...

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge’s finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.”

21. That case shows that for me to determine this first issue I need to do more than discuss my view of credibility of parties.

22. The claims of both Masinde and Wanja are claims in special damages. Both claims are specifically claimed. They needed to be specifically proved. This is indeed the position in law: see the case **KENYA POWER & LIGHTING COMPANY LIMITED V QUENTIN WAMBUA MUTISYA t/a BONDENI WHOLESALER** thus:

“It is trite that for the plaintiff to be entitled to special damages, which loss of income is, the same must be specifically pleaded and strictly proved. This was the position in Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal number 23 of 1991, where it was held that:

“Special damages must be pleaded with particularity and must be strictly proved. Loss of income is special damages, which must be pleaded and proved.”

48. However, it was held in Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited [2004] 2 KLR 269, that:

“Whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.”

23. Wanja did not produce any evidential proof of indebtedness of Masinde. Her evidence is that her claim is representative of the amount allegedly stolen from her by Masinde and her two workers. She failed to state whether discovery of loss of 200 bags of maize was a one event or a series of events from September 2015 to February 2016. She failed to state the price of maize per bag. I did not believe her testimony in that regard.

24. Although as stated before and repeatedly stated by Wanja and her counsels that Masinde did not have documents to prove his claim Masinde’s claim is proved by the documents Wanja produced as exhibit in this case. Before I go into the details of how it is proved Wanja more than once stated that she relied on her documents and that they were authentic. She so stated while being cross examined by Mr. Wasike counsel for Masinde whether her documents confirmed her trading with Masinde, which questioning went like this:

“Wasike: okay. You confirm that the records you have supplied to court are authentic, record of its (sic) a mirror image of your transactions with my client (Masinde)?”

Wanja: Yes I do.”

25. Wanja owned the documents she produced before court and confirmed they were genuine. With that in mind Wanja needed to explain the presence of the account (at page 25 of her documents) which showed how much she purchased from Masinde from September 2015 to

February 2016, the total value being Ksh 11,088,550 which, after deduction of the amount Wanja paid showed a debit balance of Ksh 6,824,750. This is the amount Masinde claims hereof. Wanja needed to prove she paid the amount shown as outstanding in that statement. It was not enough for Wanja to 'throw' to the court bank statements without explaining them and how they related to the claim before court. For example Wanja produced Masinde's statement of bank account and she offered no explanation in her testimony how this related to her transaction with Masinde. That statement did not assist Wanja, just like the others she produced without indeed giving evidence of their relevance to her case. To recap on my finding earlier, the fact that Wanja had in her possession the bank statement of Masinde further leads credence to Masinde's statement that Wanja took away from him his documents. Otherwise what other explanation is there of Wanja having Masinde's bank statement.

26. On the whole I find that Masinde, by consideration of the statement both in his page 25 of plaintiff's exhibit No. 1 and at Wanja's documents page 112, proves that Wanja owed him Ksh 6,824,750. He met the civil standard of proof under section 107 of the Evidence Act. He met the standard of proof discussed in the case **Ignatius Makau Mutisya v Reuben Musyoki Muli (2015) eKLR** thus:

“On the issue of the burden of proof, we need to examine whether the appellant discharged his burden of proof on a balance of probability to prove that he was actually not the owner of the motor vehicle in question as at the time the cause of action, the subject of this appeal arose. We can borrow from the wise words of Denning J. in Miller –vs- Minister Of Pensions [1947]2 All ER 372, discussing the burden of proof where he

said:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

27. Burden of proof was also discussed in the case **Eastern Produce (K) Ltd Chemomi Tea Estate v Bonfas Shoya [2018] eKLR** where the court had this to say of civil burden of proof:

“The burden of proof in civil cases on the balance of probability was defined in the case of KANYUNGU NJOGU VS DANIEL KIMANI MAINGI [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.”

28. The defence erred to state that Masinde's case is defeated because it was not in writing as provided under section 6(1) of the Sale of Goods Act Cap 31. That section provides:

6. (1) A contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf. (Emphasis mine)

29. Wanja on her own testimony stated that she had been in business with Masinde from March 2015 to February 2016. In all that time she confirmed she received maize from Masinde which she paid for. A close re-look at Section 6 (1) of Cap 31, particularly the parts emphasized, will show that the exception of a contract to be in writing is where goods are actually received or there is part payment. Wanja's transaction with Masinde falls within the exception of section 6(3) of Cap 31 which provides:

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not

30. It is the finding and the holding of this court that Masinde has proved his claim for Ksh 6,824,750 but that Wanja failed to prove her claim for Ksh 480,000. Masinde however failed to prove lost profit of Ksh 88,530 per week.

SECOND ISSUE

31. Section 27 of the Civil Procedure Act provides that the costs should follow the event unless for good reason the court otherwise orders. In other words costs will be awarded to the successful party, whoever it may be, unless for good reason shown. In this case Masinde has succeeded. There being no good reason to deny him costs, costs are awarded to him.

CONCLUSION

32. In the end the judgment of this court is:

a. Judgment is entered in favour of the plaintiff for Ksh 6,824,750 plus interest at court rate from the date of filing suit until payment in full.

b. The defendant's counter claim is dismissed with costs.

c. Costs of the suit are awarded to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the defendant:

ORDER

This decision is hereby virtually delivered this 28th day of July, 2020.

MARY KASANGO

JUDGE