



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 40 OF 2015

ABERDARE MAIZE MILLING LTD.....APPELLANT

VERSUS

JULIUS KIAMBATI M'MBURA.....RESPONDENT

JUDGMENT

1. This is an appeal that arises out of the judgment of Hon. Wilbroda Juma Magistrate in Nyeri CMCC No.312 of 2012 wherein the respondent had sued the appellant for a sum of Kshs.1,788,275/- in lieu of payment for maize supplied to the appellant; the respondent had also sought special damages in the sum of Kshs.10,000/- towards advocates fees for issuance of a demand notice; the appellant had denied the claim and stated that the debt had been paid off through a set off with a lorry;

2. After a full hearing the trial court found in favour of the respondent and awarded him the sum claimed for the unpaid maize and the specials claimed together with costs and interest;

3. The appellant being dissatisfied with the trial court's decision filed its Memorandum of Appeal; and listed the Grounds of Appeal which are summarized hereunder;

(i) The trial court erred in finding that the respondent had proved his case on a balance of probabilities;

(ii) The trial court failed to critically analyze the evidence on record; and it gave no cogent reasons for rejecting the appellants case;

(iii) The trial court erred in finding the appellant liable while there was evidence on record to the contrary; the trial court delved into extraneous matters thus arrived at an erroneous decision;

4. At the hearing hereof the appellant was represented by Learned Counsel Mr. Muchiriwa Gathoni whereas the respondent was represented by Learned Counsel Mr. Mwanzia; both counsel made oral presentations; hereunder is a summary of their respective submissions;

APPELLANT'S SUBMISSIONS

5. The appellant's contention is that the goods supplied by the respondent had been paid for; the documentary evidence relied upon by the respondent was in the form of cheques that had been duly presented and returned unpaid; and it denied being indebted to the respondent;

6. That the parties had on the 30/09/2010 entered into an Agreement for Sale for the sale of a motor vehicle registration KBJ 301Y; the appellant was the vendor and the respondent the purchaser and had agreed to pay the appellant Kshs.1.5 Million and to pay an outstanding loan of Kshs.3,822,800/- to Eco Bank which was a co-owner of the motor vehicle; the respondent was to offset the debt owed by the appellant by paying the outstanding amount to the bank;

7. The respondent confirmed having paid Kshs.520,000/- to the appellant; the balances of the monies were not paid as had been agreed; the serial numbers on the delivery notes for the goods delivered by the appellant were altered and the mutilated cheques had nothing to do with the respondents claim which had already been settled; the trial court did not take into consideration the evidence on the issue of set off and rejected the evidence on the mutilated cheques;

8. The appellant prayed that the appeal be allowed and the judgment of the lower court be set aside and the respondents case be dismissed

RESPONDENT'S SUBMISSIONS

9. In response the respondent had clearly outlined the goods delivered to the appellant and the breach; the mode of payment was by cheques which were all dishonoured; the respondent attempted to recover the amount through criminal proceedings but his efforts were

thwarted by the appellant as it filed a suit to bar the proceedings but in those proceedings the appellant admitted to being indebted to the respondent;

10. There was no evidence tendered to demonstrate that the lorry was to be paid for through the maize deliveries; the appellant did not give any specific figures of payments; there would have been no reason for the cheques to have been issued if the lorry was to be used to set off; there was no reason for the respondent to steal the dishonoured cheques as alleged by the appellant; the lorry was only brought in so as to confuse issues;

11. The respondent prayed that the appeal be dismissed with costs.

ISSUES FOR DETERMINATION

12. After hearing the respective submissions of learned counsel for the appellant and respondent this court has framed the following issues for determination;

(i) Whether the respondent failed to prove his claim for the unpaid maize supplied to the desired threshold;

(ii) Whether the costs in the sum of Shs.10,000/- was properly awarded;

ANALYSIS

13. This being a first appeal the duty of this court is to re-evaluate the evidence on record, re-analyze it and come up with its own findings and conclusion, bearing in mind that it didn't observe the demeanour of the witness during trial; in the case of **MWANASONIK vs KENYA BUS SERVICES LTD. (Mombasa) Civil Appeal No. 35 of 1985 (unreported):Hancox, J.A. stated that;**

“Although this Court of Appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary.”

14. The respondent filed a suit against the appellant for the sum of Kshs.1,788,275/-; the appellants defence was that it had paid off the amount due through a set off with its lorry;

15. The trial court stated in its judgment that the respondent had set out his claim in a very clear way and set out why he was demanding the amount from the appellant company; whereas the appellant did not dispute the fact that the maize was supplied it brought in the issue that the maize was traded in with a lorry;

16. The appellant contends that the trial court failed to take the issue of set-off into consideration; but contrary to this contention it is noted that the trial court is found to have analyzed the appellants evidence on the issue of set off and made an observation that the ***‘arithmetic didn't add up’***; and pointed out that;

‘What is claimed is over Shs.1.7 million and the lorry was Shs.1.5 millio. Where does the difference go? The defendant does not explain this.’

17. The appellant went on to state that it had paid the respondent in cash; again the trial court observed that the appellant did not come up with specific figures of payments made;

18. The respondent on his part raised the issue of payments made by the appellant in the form of cheques and it is noted that he set out with clarity the number of cheques which were meant for payment for specific supplies of maize; whereas the appellant on its part could not justify the why the cheque payments were made when there was a lorry that is purported to have sorted out the debt;

19. The appellant at first alleged that the cheques were stolen from him by the respondent but when pressed admitted to having drawn the said cheques; and upon examining the cheques the trial court was satisfied that the cheques bore bank stamps in support of presentation and made a determination that there was sufficient evidence to demonstrate that the said cheques were duly presented and were actually dishonoured and returned unpaid;

20. The appellant states that the maize was delivered but insists that the respondent made up or altered the deliveries and the Goods Received Notes; but failed to produce its version of the genuine documents showing deliveries, receipts and payment;

21. To cut a long story short in the present case the applicable law is found at Section 107 of the Evidence Act which reads as follows;

“Who ever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

22. Upon perusal of the Agreement signed by the parties with respect to the lorry nowhere does it include any clause of set off or trade in with maize supplied; the lower court correctly narrowed the issues and stated in its judgment that the lorry was not the issue in dispute but rather it what was in dispute was the consideration for the maize supplied;

23. that the respondent supplied maize to the appellant; the appellant paid the debt through the use of post-dated cheques which were

presented on the due dates but were dishonoured and returned unpaid; that the debt remains unpaid and that there is an admission indebtedness to the respondent by the appellant in the criminal proceedings filed for the recovery of the monies;

24. The demeanour of **DW1** comes out as being that of an untruthful and unbelievable witness; the issuances of the cheques though denied defeats the appellants claim of set off with the lorry; this court is satisfied that the appellant failed to produce any evidence to challenge the respondents case; and finds that the appellant did not raise a proper counterclaim on the alleged set off even on a balance of probabilities;

25. Upon re-evaluating and re-assessment of the evidence on the court record this court finds no reason to interfere with the trial courts finding that the respondent proved its case on a balance of probabilities;

26. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the costs in the sum of Shs.10,000/- was properly awarded:

27. This court notes that the trial court awarded the respondent the sum of Shs.10,000/= for the demand letter and also awarded costs of the suit;this is tantamount to double compensation as ordinarily costs include such expenses; for this reason this amount is found to have been improperly awarded;

FINDINGS AND DETERMINATION

28. For the forgoing reasons this court makes the following findings and determinations;

(i) This court finds that the respondent proved its case on a balance of probabilities;

(ii) The judgment entered in favour of the plaintiff/respondent in the lower court in the sums of Kshs.1,788,275/- and Kshs.10,000/- all totaling Kshs.1,798,275/= is hereby set aside and substituted with a judgment in his favour in the sum of Shs.1,788,275/- with costs; interest on the principal amount is from the date of filing the suit; interest on the costs shall be from the date of judgment;

(iii) Apart from the issue of costs the appeal is found lacking in merit and it is hereby dismissed with costs to the respondent;

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 17th day of December, 2020.

HON.A.MSHILA

JUDGE