



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 164 OF 2016**

**CAPE SUPPLIES LIMITED.....APPELLANT**

**VERSUS**

**TREADSETTERS TYRES LIMITED.....RESPONDENT**

*(Being an appeal from the judgment delivered by Honourable Kasan on behalf of Honourable H.R. Lorot (Mr.) (Ag. Senior Principal Magistrate) on 2<sup>nd</sup> December, 2015 in CMCC NO. 8389 OF 2007)*

**JUDGMENT**

1. The respondent was the plaintiff in CMCC NO. 8389 OF 2007. The said respondent filed a plaint dated 24<sup>th</sup> September, 2007 seeking payment of Kshs.621,114.34/= plus interest at the rate of 17% and costs thereon against the appellant.
2. In brief, the respondent pleaded that on various dates in the year 2006, the respondent supplied the appellant with motor vehicle accessories and/or tyres at the appellant's request.
3. The respondent also pleaded that the appellant made several payments but that the sum of Kshs.621,114.34/= remains unpaid to date.
4. Through its defence filed on 24<sup>th</sup> October, 2007, the appellant denied that the amount pleaded in the plaint is owed to the respondent and instead pleaded that the appellant had paid any monies owed to the respondent in full.
5. At the hearing, the parties called one (1) witness each and at the close of the hearing, the parties filed submissions and the trial court ultimately entered judgment in favour of the respondent in the sum of Kshs.576,114.37/= together with interest thereon at the rate of 17% p.a. plus costs.
6. Being aggrieved, the appellant filed the memorandum of appeal dated 5<sup>th</sup> April, 2016 in which it put forward the following grounds:
  - i. THAT the learned trial magistrate erred in law by delivering the judgment yet there was no evidence of service of a judgment notice, hence rendering the judgment nugatory.*
  - ii. THAT the learned trial magistrate erred in law and in fact by awarding the respondent a sum over and above what was claimed.*
  - iii. THAT the learned trial magistrate erred in law and in fact by placing the burden of proof on the appellant by requiring it to prove that it did not issue certain invoices.*
  - iv. THAT the learned trial magistrate erred in law and in fact in finding that the respondent had proved its case on a balance of probabilities.*
  - v. THAT the learned trial magistrate erred in law and in fact by dismissing the appellant's evidence and ignoring the fact that the appellant had denounced certain documents produced by the respondent at the trial.*
  - vi. THAT the learned trial magistrate erred in law and in fact by computing interest from the date of filing the suit yet the delay in the delivery of the judgment was occasioned by both the trial court and the respondent.*

7. The parties recorded a consent to have the appeal disposed of by written submission. I have considered the grounds of appeal together with the submissions filed by the respondent. I have also re-evaluated the case as presented before the trial court.

8. In the first ground of appeal, the respondent contended that the initial judgment date was given in court on 24<sup>th</sup> July, 2014 in the presence of the appellant, indicating that the judgment was scheduled for delivery on 15<sup>th</sup> August, 2014 but that the learned trial magistrate handling the matter was soon thereafter transferred to a different station, thereby resulting in a delay in its delivery.
9. I have perused the record of appeal and it is apparent that on the said 24<sup>th</sup> June, 2014, the trial court fixed the matter for judgment in the presence of the appellant. The record also shows that the respondent was indicated as being absent from court.
10. There is nothing on record to explain why the judgment was delivered on 2<sup>nd</sup> December, 2015 as opposed to the scheduled date. It is also not clear whether a judgment notice was issued previously or how the parties came to be aware of the existence of the judgment.
11. Having re-evaluated the evidence together with the respondent's submissions on appeal, I am of the humble view that the failure, if any, to issue a judgment notice cannot in itself render the judgment nugatory but that ground can be used to seek for leave to appeal out of time which is not the case here
12. On the second ground of appeal as to whether or not the trial court awarded a sum exceeding that sought by the respondent. In response to the appellant's submission the respondent argued that though it had prayed for the sum of Kshs.621,114.34/= in its plaint, the court awarded a less sum of Kshs. 576,114.37/=.
13. Having carefully perused the trial court's record and the impugned judgment, it is clear that the trial court awarded the respondent sum of Kshs.576,114.37/= on the basis of the documentary evidence presented by the respondent by way of invoices. It is apparent that the sum awarded was in fact lower than that sought in the plaint. The second ground of appeal therefore crumbles.
14. The third and fourth grounds of appeal shall be determined together. It is the respondent's submission on those grounds that it proved its case on a balance of probabilities, having established that there was a business arrangement between the parties as shown by the evidence in form of L.P.Os (Local Purchase Orders) and the invoices submitted in evidence.
15. It is also the respondent's submission that the appellant's witness before the trial court confirmed the issuance of the L.P.Os by the appellant for the supply of goods by the respondent and that a driver of the appellant would come and collect the said goods once requested for.
16. The respondent in turn contended that the learned trial magistrate correctly applied the legal principles on burden of proof in view of the documents produced by the respondent.
17. Having re-evaluated the evidence adduced before the trial court and having considered the submissions, it is clear that the learned trial magistrate considered the invoices produced by the respondent's witness at the trial and also established that the L.P.Os were issued by the appellant which L.P.Os bore the stamp and signature of the appellant.
18. The trial magistrate also identified that though the appellant's witness denounced the invoices produced by the respondent in addition to denying knowledge of the driver who collected the goods on its behalf no list of employees or other relevant evidence was presented to support its argument.
19. The learned trial magistrate further took into consideration the account given by the respondent's witness that a cheque for Kshs.50,000/= was issued to the respondent by the appellant, which goes to ascertain that a business relationship existed between the parties while at the same time appreciating that the standard of proof had been met by the respondent.
20. In view of the foregoing, I am satisfied that the learned trial magistrate was correct in finding that the respondent had proved its case on a balance of probabilities.
21. The appellant further raised the fifth ground that the learned trial magistrate ignored the fact that it had denounced certain documents produced by the respondent at the hearing. On this ground, the respondent submitted that its witness before the trial court had every authority to produce the invoices and L.P.Os since in any case, a company cannot act on its own accord and requires its officers, servants or agents to act for it.
22. I have examined the proceedings of the trial court it is noteworthy that in the course of the hearing, the appellant objected to the production of the L.P.Os and various invoices on the basis that the witness was not the author of the same. In the end, the trial court overruled the objection for the reason that the said documents were originals and the witness was producing them on behalf of the respondent.
23. The proceedings also revealed that the above mentioned witness testified that he worked as the respondent's accounts assistant in charge of handling accounts receivables, that is, the debtors.
24. It is clear from the record that the appellant's objection to the production of the aforesaid documents was raised at the hearing and taken into consideration but in the end, the learned trial magistrate judiciously exercised his discretion in overruling the same. In any case, the appellant was granted the opportunity of cross-examining the respondent's witness on the said documents.
25. This leads me to the final ground on computation of interest.

The respondent on its part supports the computation applied by the trial court, arguing that the same was done in accordance with Section 26

(1) of the Civil Procedure Act.

26. I have perused the plaint filed by the respondent and ascertained that the same did not specify when the interest was intended to accrue. The learned trial magistrate in his judgment ordered that interest do accrue from the date of filing the suit.

27. *Section 26 (1)* (supra) illustrates the three (3) instances when a court can calculate interest:

***a. Prior to filing of the suit;***

***b. From the date of filing the suit until the date of judgment; or***

***c. From the date of the judgment/decree until payment in full.***

28. It therefore follows that the calculation of interest lies with the discretion of the court.

29. The applicability of the aforesaid *Section 26 (1)* has been approved in various authorities, including *Panthion Limited v Industrial And Commercial Development Corporation [2008] eKLR* as well as the Court of Appeal case of *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Limited [1988] eKLR*, both referenced by the respondent.

30. In view of the foregoing, the learned trial magistrate correctly exercised his discretion in computing interest as he did. I therefore find no reason to allow *ground vi* of the appeal.

31. The upshot is the appeal is lacking in merit and is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of March, 2019.

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**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent