



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL No. 85 OF 2014

(Consolidated with Civil Appeal No. 30 of 2015).

FARM ENGINEERING INDUSTRIES.....APPELLANT

VERSUS

SUNIPULIMITED.....1ST RESPONDENT

BARCLAYS BANK OF KENYA LTD.....2ND RESPONDENT

JUDGEMENT.

This is an appeal from decision of chief magistrate court, (D.C Mutai) dated 10.10.2014 to pay to Plaintiff/Respondent herein Kshs.500,000/= as damages for breach of contract between the Plaintiff/Respondent Sunipu Limited and the defendants Farm Engineering Industries and Barclays Bank of Kenya Limited.

Background of the appeal

Brief background of this appeal can be gleaned from plaint dated 31st August 2009 supported by an affidavit sworn by the Respondent, is that under paragraph 4 of the plaint] Respondent avers that on or about 1st July, 2004 the appellant offered to sell a Bill Cane Loader Registration No. KAH 806T and the 2nd Defendant agreed to finance the purchase of the loader for valuable consideration. Respondent stated that it was implied term of the contract between the parties that all documentation and title of ownership were in order and due diligence of all documentation had been completed at the time of handing over of the Bill cane harvest. The Plaintiff averred that she serviced his loan on demand that the logbook of the cane loader be availed for transfer to the plaintiff but the defendants jointly and severally been unable to avail the log book and as a consequence the plaintiff claims it has been unable to use it as a collateral to secure any borrowing and/or dispose of the same to third parties hence the plaintiff has suffered loss and damage due to Defendants breach of the agreement and fiduciary relationship between the parties.

The Appellant filed his defence on the 26.1.2011 in which he denied the Respondent's claim and stated that it is the Respondent who is in breach by failing to pay the entire agreed price and thereof making it impossible for the 1st defendant to perform its part.

The 2nd Respondent filed defence on the 18.01.2011 in which it denied the 1st respondent's claim save paragraph 4 of the plaint where it admitted that it financed the purchase of the loader only and therefore the contract was between the plaintiff and 1st defendant where the 1st defendant was to carry out the transfer into Plaintiff's name. The 2nd Defendant/Respondent averred that it has never been in custody of the log book and the same got lost while ownership was with Sony Out growers Limited which was a fact within the knowledge of the plaintiff.

During hearing of the suit the 1st Respondent testified as PW1 and did not call any other witnesses and he testified that in July 2004 he went to the firm of engineering office in Kisumu where they agreed on sale of a loader KAH 806T and Respondent was to pay the purchase price over 48 months and will do so through a loan facility the 2nd Respondent and the loader was delivered to him. He testified that the bank was asked for the log book to be registered in their joint names and the respondent paid the loan in full but the bank could not release the log book and nobody handed down the log book to him yet he had complied with all the requirements. He testified that he has been unable to dispose of the same and thereof blames both the defendants. Under cross-examination the Respondent stated that the purchase was between him and the bank and there was no agreement from purchase of loader only a delivery note and voucher and that the bank was the financier and he was the purchaser.

Joseph Kimani Wahigi testified on behalf 2nd Defendant/Respondent and stated that he wished to adopt his boss statement as to the case and on cross examination he testified that they financed the 1ST Respondent for Kshs.3.7 Million and he stated that they were not aware about abstract of loss of logbook and they wrote to KRA and gave a list of requirements and he stated that the Appellant ought to have followed it up.

Fredrick Otieno testified on behalf of the 1st Defendant/Appellant and he stated that the loader was delivered to it on 6.6.2004 and at time of sale registered owner was Sony Outgrowers Co. Ltd and the logbook had been misplaced by Sony Outgrowers and at the time of purchase the 1st and 2nd Respondent were aware of non-availability of the logbook.

Both parties thereafter filed and exchanged written submissions. The learned magistrate having evaluated the evidence on record, rival written submissions and the law reached the verdict thus awarded the Respondent Kshs.500,000/= as damages for breach of the contract by 1st defendant.

The appellant felt aggrieved and filed this appeal faulting the judgement on the following grounds:

- i. That the learned trial magistrate erred in law toward kshs.500,000/= as general damages for breach of contract.*
- ii. That learned trial magistrate did not appreciate the facts or the law and arrived at an erroneous decision.*
- iii. That the learned trial magistrate failed to appreciate the law as regards breach of contract and award damages where non was provided for between the parties.*
- iv. That the award of Kshs.500,00/= being general damages for breach of contract be set aside.*

When the appeal came up for hearing before me on **19.11.2018** learned counsels **Ms. Isiye** and **Ms. Mmbake** appeared for the appellant and respondent respectively. They agreed to ventilate the appeal by way of written submissions. Subsequently they filed and exchanged their respective written submissions which I have carefully read and considered alongside cited authorities.

This is a first appeal to the court and the duty of the court in that sort of situation has long been settled. **Sir clement De Lestang, V.P.** in the then court of appeal for East Africa put that duty thus in the case of **Selle V Associated motor boat Company (1968) E.A. 123 at page 126 letters H-1:-**

***“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 demeanor of a witness is inconsistent with the evidence in case generally.*”**

I shall in deciding this appeal bear true allegiance to those principles.

The issue for determination before this court to my finding is whether:

- i. The Appellant was liable to deliver the logbook of KAH 806T to 1st Respondent for purpose of registration in the name of Respondent.*
- ii. Whether the trial court properly assessed damages to be paid by appellant to Respondent for breach of contract.*

Determination

From pleadings and evidence, it is not in dispute that the Appellant sold a loader registration no. KAH 806T to the respondent herein. The issue that arises is that who was responsible to deliver the logbook to the said loader to the Respondent upon fulfilment of his obligation. It is the respondent contention that the sale was between the Respondent and appellant and the 2nd Respondent acted as a loan facility in the agreement. The Respondent testified and tendered evidence that he performed his obligation under the agreement but the log book was never deliver to him as agreed.

The Appellant on the other hand stated that the log book was never delivered to Appellant because he failed to complete his purchase price no evidence was tendered before trial court to prove the allegation. The appellant also stated during hearing that at time of the purchase of the loader by the 1st Respondent the ownership of the loader was with Sony Outgrowers Limited who had misplaced the log book and that the same was within knowledge of all parties therefore it cannot be held to be in breach of the contract but the 1st Respondent stated that it was not aware of the loss and that the appellant only stated that they had purchase the loader from Sony Outgrowers who were to avail the log book.

In this circumstance since there was no written agreement on terms of the sale with regard to the log book I will consider the evidence on record and it is clear that the appellant sold the loader to Respondent and in fact through a letter dated 16.8.2004 it is the appellant who asked for release of funds upon delivery of the loader and this makes me to believe they had good title to the loader and they were going to pass the same to the buyer who had already performed his obligation in the agreement. I have also perused the transfer form filed in respect of transfer of loader from Sony outgrowers Ltd to 1st Respondent the same was filed before report of loss of log book on 27.7.2004 thereof it is clear that the appellant knew he had the log book ready and claiming that the same has been misplaced I consider it as afterthought action.

It is hereby my finding that appellant herein was in breach of the said agreement and should be held liable for failing to deliver the log book to the appellant as expected and the trial magistrate was right in his finding. It is also my finding that Barclays Bank Limited could not be

held liable for breach of the contract because it only acted as a Loan facility to the respondent herein in the transaction and was not party to the agreement.

On award of damages it is my finding that at all material time the Respondent herein was in possession of the subject matter to the dispute and was also using it thereof the only damages that he suffered were on delay to submit the logbook by the appellant which amount to breach of the contract thereof an assessment of award for Kshs.500,000/= as general damages was high considering no financial loss had been proved by the Respondent and I will hereby review the amount to Kshs.200,000/= as damages of breach of the contract by the appellant.

I so order.

Dated and Delivered at Bungoma this 29th day of May 2019.

S.N.RIECHI

JUDGE