REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 110 OF 2018

(Being an appeal from the judgment of Hon. Mrs. L. Ambasi (CM) delivered on 19th February, 2018 in MERU CMCCC No. 320 of 2013)

(CORAM: F. GIKONYO J.)

STEPHEN MUTHAURA.....APPELLANT

-VS-

GEMS OIL LTD.....RESPONDENT

JUDGMENT

1. The appellant being the defendant in the trial court was sued by the respondent, then the plaintiff, for refund of the deposit for the untaken lease of Kshs.1,500,000/- plus interest at court rates and outstanding amount in respect of goods supplied and delivered of Kshs. 1,617,600 plus interest at 15% per month from 29th April 2013. The defendant in his amended statement of defence and counter-claim denied that the amount of Kshs. 1,500,000/- was refundable and as for the sum of Kshs. 1,617,600/- he put the plaintiff to strict proof. In his counter-claim he sought damages for loss of business, cost of renovations and room hiring charges.

2. The trial magistrate awarded the plaintiff Kshs. 1,500,000/-, Kshs. 1,617,600/- as well as cost of the suit. The appellant being aggrieved by the award instituted this appeal based on four grounds:

a. The learned Magistrate erred in law and fact in finding that the respondent's claim had been proved to the required standards

b. The learned Magistrate erred in law and fact in finding the contract between the parties was clear and unequivocal

c. The learned Magistrate erred in law and fact in failing to find that the evidence by the appellant's witness was clear on what the parties did after the contract was signed

d. The learned Magistrate erred in law and fact in failing to consider the appellant's counter-claim.

3. This appeal was canvassed by way of written submissions. But only the respondent filed their submissions which I have considered.

Duty of court

4. This being a first appeal, the court is to re-evaluate, re-assess and re-analyze the evidence on record and make its own determination except having in mind that it did not have the advantage of hearing witnesses or to observe any nuance of demeanor in witnesses; these are best observed by the trial court. Accordingly, this court has carefully considered the record of appeal and submissions brought before this court.

5. PW1 No. 230060 Chief Inspector Michira Ndege was documents examiner based at the Director of CID headquarters documents section. He told the court that he came to the conclusion that the signature on the letter dated 2nd November 2012 by Martin Muriuki was not made by him compared with the other signatures and the specimen signature.

6. PW2 Martin Muriuki managing director of GEMS Oil Company Limited told the court that the defendant was to lease to them the petrol station. But the company was to do a feasibility study before leasing which was conducted by Muthoka. They had an agreement on the intention to lease and they paid the defendant Kshs. 1, 500,000/- which was refundable. They were to decide whether to take up the premises

within 30 days; they made calls to notify the defendant that they will take up the premises. Muthoka notified them that the lease was not viable and so they made a demand of Kshs. 1, 500,000/-.

7. Also, the company supplied premium motor spirit and diesel to the defendant from 2012 to 2013; the supplies were made by salesmen. The recipient from the defendant would sign the confirmation to the period to the defendant. The outstanding amount is Kshs. 1,617,600/-.

8. PW3 Naftaly Mutuma stated that he was employed by the plaintiff on April 2010 to August 2015 as a sales supervisor and used to escort the products to customers. Upon delivering the produce, they issued a delivery note; the terms of payment were immediately or within 7 days in default 15% interest per month. The defendant was to pay the plaintiff but no cash was received in payment. His duty was to ensure products reached the customer but not to follow up payment. They supplied to Kenol Petrol Station where the recipient supervisor Makena, was the sister to the owner, and provided products from 2012 – 2013.

9. At the close of the plaintiff's case the defendant gave a sworn testimony and called one witness. **DW1 Isaiah Muthoka Kisilu** stated that he was at the station for a month to determine the profitability of the station and he made a report on it which he gave to Martin Muriuki. He recommended that the station was ok and signed it on 5th October 2012. During cross-examination he stated that he was at the station from 1st October to 30th October 2012.

10. DW2 Stephen Muthaura told the court that on 22nd September 2012 he and the plaintiff entered into an agreement for leasing of a petrol station and he was given a down payment of Kshs. 1.5 M for one month. Prior to that he was selling petrol products and he was running it with his sister who was the main operator. He has had over 10 meetings on the lease and on 5th September 2013 he got a letter saying that they wanted him to pay the deposit back and Kshs. 1.6 M less Kshs. 250,000 but does not know for what. The plaintiff refused to take over the station although they had been promising him. His counter-claim is that he retains the Kshs. 1.5 M for loss of business costs and other rations.

Issues

11. The issues in controversy are: (1) the respondent's authority to institute the suit; (2) whether the appellant owes the respondent Kshs. 1,500,000/- and whether the appellant owes the respondent Kshs. 1,617,600/- plus interest at 15 % per month from 29th April 2013 as the outstanding amount in respect of goods supplied and delivered.

12. The respondent is a corporation and authority to institute the suit is relevant consideration. By the board's resolution of the respondent dated 11th September 2013 (Exh.2) it was resolved that the company shall take legal action against the appellant for the full recovery of the money he owes to the company. It was signed by both the chairman and director. Consequently, due authority to initiate the suit against the appellant was given.

13. For further illumination on this subject see also **Order 4 Rule 1(4) of the Civil Procedure Rules** which provides that:

> **"(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."**

See also the case of **Mavuno Industries Limited& 2 Others Vs Keroche Industries Limited[2012]eKLR** it was stated that:

> **"As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit."**

Proof of case

14. The second issue is whether the appellant owes the respondent Kshs. 1.5 M as refund of the deposit for untaken lease. According to the acknowledgement receipt dated 22nd September 2012 which was signed by both parties, the respondent was paid Kshs. 1,500,000/- as payment for lease of the petrol station for a period of one month. But in the event that the lessee does not take up the lease of the petrol station the amount paid shall be refundable.

15. The court cannot re-write contracts between parties. The court only interprets the contract and enforces the intention of the parties. This was so expressed by the Court of Appeal in the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR**

> **"38. We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."**

16. From the agreement it is clear that the amount of Kshs. 1,500,000/- was refundable if the respondent did not take up the lease. Evidence shows that the respondent did not take up the lease after conducting a feasibility study and was duly advised by Muthoka. This means that the said amount is refundable.

17. That said, the appellant is of a contrary view; that the amount is not to be refunded. He stated in his counter-claim that after signing of the agreement he gave the respondent restricted access; its agent was given a room at an agreed rate of Kshs. 10,000/- per month. That owing to the respondent's assurances and instructions the appellant went ahead to renovate the premises as specified by the respondent and was unable to lease the premises to willing third parties thus suffered loss and damage.

18. The appellant relied on a letter dated 2nd November 2012 from the respondent and signed by the managing director. It referred to a meeting the appellant and respondent had. According to the report the respondent perceived the petrol station as viable business which made the appellant to carry out renovations on the premises.

19. When **PW1** examined a copy of the said document he established that the signature did not belong to Martin Muriuki. Hence, it is a forgery. From the proceedings the court on 7th December 2017 declared that the letter was a forgery for it was established so by an expert witness. Consequently, the assertions made by the appellant cannot be relied upon. Furthermore, **DW1** who was the respondent's agent at the station testified and stated that he was at the station from 1st October to 30th October 2012. He then made a report of the station dated 5th October 2012 stating that the station is a viable business. His assignment was for a month after which he was to make a report. How then could **DW1** make a report 4 days after starting his assignment that was to last for 30 days? He had barely begun when he made the report. This demonstrates the deceitful nature of the appellant.

20. Consequently, I am in agreement with the trial court that the contract was clear and unequivocal in its terms as was agreed between the parties; that is, that if the respondent does not take up the lease the appellant ought to refund the sum Kshs. 1.5 M which was paid to him.

21. The third issue is, whether the appellant owes the respondent Kshs. 1,617,600/- plus interest at 15 % per month from 29th April 2013 as the outstanding amount in respect of goods supplied and delivered. The appellant stated that he does not know what this amount is for. According the **PW3** who was the sales supervisor. When he provided products to the respondent from 2012 to 2013 the recipient supervisor of the station was the sister's owner. The appellant confirmed that her sister was running the petrol station.

22. The respondent produced invoices for the period running from 24th August 2012 to 18th September 2013 which shows the goods it supplied. The bank statements produced by the respondent shows that the last payment it received from the appellant was on 2nd March 2013. On 2nd March 2013 the respondent was paid Kshs. 580,000/-. There eight invoices between the 7 days payment window as explained by **PW3**. From the original in voices dated 25th February to 1st March 2013 the total amount is Kshs. 828,000/-. But, as one continues to calculate the amounts up to the last receipt the money is above and beyond what was claimed by the respondent. This may be explained by the payment made by the appellant. The invoices and bank statements show that the respondent supplied goods to the respondent. It is therefore, dishonest of the appellant to state that he did not know what the amount claimed was for. What was he paying for in the first place?

23. Whoever alleges must prove. In this case the respondent proved it supplied goods to the appellant and some were not paid for. Therefore, the trial magistrate did not err when she awarded the respondent Kshs. 1,617,600/- plus interest at 15% per month from 29th April 2012 based on the available evidence.

24. From the foregoing, I uphold the judgment and decree of the trial court. The appeal lacks merit and is dismissed with costs to the respondent.

Dated signed and delivered in open court on 28th day of May 2019

F. GIKONYO

JUDGE

In presence of -:

M/S Mwilalia for respondent

M/s Munga for Gatari for applicant

F. GIKONYO

JUDGE