

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 96 OF 2015

THE BOARD OF MANAGEMENT

ST. LUKES EKWARE SECONDARY SCHOOL.....APPELLANT

=VRS=

KEROKA HYPER STORES LTD.....RESPONDENT

Being an appeal against the Judgement & Decree of the Hon. N. Kahara - RM in Keroka PM

Civil. Case No. 283 of 2014 dated and delivered on the 18th day of September 2015

JUDGEMENT

The appellant being aggrieved by the lower court's judgement and decree which ordered it to pay a sum of Kshs. 298,130/= to the respondent for goods the latter allegedly supplied but was not paid for has urged this court to set aside that judgement and substitute it with an order dismissing the suit with costs.

The respondent's case in the lower court was that she had orally applied to the appellant to be allowed to supply goods and that she did in fact supply goods worth Kshs. 398,130/=; that the goods were duly received and an undertaking made to pay for the same. However, the appellant only paid a sum of Kshs. 100,000/= and because the Principals of the school changed twice a query was raised as to whether the school was indebted to the respondent and so the balance of Kshs. 298,130/= was never paid. According to the respondent's director who is herself an Advocate of the High Court she was required to prove to the school that the defendant had supplied goods worth the sum claimed to the school. It was her evidence that she produced delivery notes, invoices and note book entries proving that her company had supplied the goods. However, no payment was forthcoming. At the hearing she narrated how the appellant through the then Principal, a Mr. Gekonge, paid the sum of Kshs. 100,000/=. It was her evidence that the Principals would personally go to the shop or send people to her shop to place orders whereupon the goods ordered would be supplied to the school. The person receiving the goods on some occasion the Principal and once a Secretary called Grace would then acknowledge receipt of the goods by stamping the invoices. It was the respondent's evidence that upon the transfers of the school Principals an issue arose as to whether she had in fact supplied goods to the school and that she was asked to prove her debt; that later on 24th October 2012 the issue was discussed and her claim was dismissed. However, sometimes in February 2015 and more especially on 10th February 2015 the Board of the appellant school met and in one of the minutes it was admitted that she was owed a sum between Kshs. 100,000/= and Kshs. 150,000/=. She produced the minute in evidence.

On its part the appellant school denied that the respondent supplied goods to the school. It contended that it did not owe the respondent; that there was no privity of contract between them and that if any goods were delivered to it that was in breach of the Public Procurement and Disposal Act and the school was not liable to pay. The above was maintained by the appellant in this appeal.

This being a first appeal I have a duty to evaluate and re-consider the evidence so as to arrive at my own independent conclusion – **See Selles & Another Vs. Associated Motor Boat [1968] EA 123.**

Section 74 of the Public Procurement and Disposal Act permits a public entity to use direct procurement in certain circumstances and **Section 75** permits the procuring entity to negotiate with a person for the supply of the goods; works or services being procured. The only condition is that the entity should not use direct procurement in a discriminatory manner and that the resulting contract must be in writing and signed by both parties. The minutes of the Board of Management of the appellant school's meetings held on 24th October 2012 and also on 10th February 2015 confirm that there was a business relationship between the parties. They show that the respondent used to supply goods to the school and that the school would pay for the same. Given the provisions of **Section 74 of the Procurement and Disposal Act** this would have been quite in order save that the parties did not sign a contract yet **Section 75 of the Act** made it mandatory to do so. Moreover, contrary to the submission by counsel for the respondent there is no admission by the school that it owed her a sum between Kshs. 100,000/= to Kshs. 150,000/=. A reading of the whole of Minute 2/Feb/2015 shows that in the end the Board Members were not convinced that the school was indebted to the respondent and that the latter was required to prove the debt. That minute alone does not therefore prove that the appellant admitted the debt and the respondent was therefore liable to prove its case on a balance of probabilities.

At the hearing the respondent produced two delivery notes and 2 invoices. The delivery notes filed together with the plaint do not have the appellant's stamps but the ones contained in the record of appeal have the appellant's rubber stamps. Be that as it may I am not persuaded that any of those exhibits prove the debt. Firstly, the dates and the description of the goods are overwritten to the extent that they are not legible and as for the invoices the dates are not legible. The delivery notes contained at pages 10 and 11 of the record of appeal have a school stamp dated 10th February 2015. This is very suspect given that the delivery notes themselves are dated 18th November 2009 and 27th November 2009. Given this scenario it is my finding that the trial Magistrate's findings of fact were based on no evidence and that the respondent did not prove her case on a balance of probabilities.

Accordingly, this appeal is allowed and the judgement and decree and all subsequent orders are set aside and in their place there shall be an order dismissing the suit in the lower court with costs to the appellant who shall also get the costs of this appeal. It is so ordered.

Signed, dated and delivered in Nyamira this 23rd day of May 2019.

E. N. MAINA

JUDGE