



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 431 OF 2014**

**(CORAM: F. GIKONYO J.)**

**E.P. COMMUNICATIONS LIMITED.....APPELLANT**

**VERSUS**

**EAST AFRICA COURIER SERVICES LIMITED.....RESPONDENT**

**(Being an appeal from the decision and judgment of Hon. Teresia Ngugi (Mrs) SPM,**

**delivered on 29<sup>th</sup> day of August 2014 in the Milimani CMCC No. 2527 of 2012)**

**JUDGMENT**

[1] The appellant being the plaintiff in the trial court sued the respondent for the sum of Kshs. 408,203/- together with interest at court rates as well costs of the suit with interest. On 29/08/2014 the trial court entered judgment in favour of the appellant only to the extent of Kshs. 114,055/- and costs of the suit.

[2] The appellant being aggrieved by the said decision filed this appeal based on six (6) grounds which may be summarized into two (2) issues:

**a) Whether the appellant supplied the goods in question to the respondent on credit**

**b) Whether the said goods supplied were paid for by the respondent**

**Submissions**

[3] This appeal was canvassed by way of written submissions. The appellant submitted that it and the respondent engaged in a business relationship where it supplied scratch cards to the respondent on credit. It supplied goods between the period of 23/1/2008 and 9/12/2009 for which the respondent failed to pay the sum of Kshs. 408,203/-. The Local Purchase Orders (hereinafter 'L.P.O'), invoices and delivery notes support the appellant's claim. The respondent failed to call any evidence or to point out any particular transaction where goods were not supplied by them.

[4] They argued that under **the Sale of Goods Act (CAP 31)** the mere proof of supply and acceptance of delivery of goods even in the absence of any memorandum or contract in writing constitute a valid contract entitling the seller to lay a claim for non-payment for supplied goods.

[5] The respondent submitted that the appeal ought to be dismissed as it lacks merit as there was no error in law or fact in the decision made by the trial court. Special damages ought to be specifically pleaded and strictly proved by supportive documentary evidence. The appellant failed to produce proper and/or sufficient documentary evidence in support of his claim in spite of them not having called any witnesses.

**ANALYSIS AND DETERMINATION**

[6] As the first appellate court, this court will evaluate, assess and analyze the extracts on the record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

## Supply of goods

[7] Did the appellant supply the goods in question to the respondent on credit? According to **PW1 Timothy Kamau Mwangi**, general manager at E P Communications told the court that they had a business relationship with the respondent who they were supplying with airtime between January 2008 and December 2009. The respondent ended up being unable to clear some of the invoices. They stopped supplying them with goods and demanded they clear their balance. They negotiated and agreed to settle the balance in installment of Kshs. 100,000/-. They only paid Kshs. 100,000/- and they renegotiated for Kshs. 30,000/- which can be seen from the statement. He produced the following to support the appellant's claim:

- a) Invoices dated 23/10/08 for **Kshs. 145,190/-** (PEXh. 1), 20/08/09 for **Kshs. 147, 962.50/-** (PEXh.2a), 6/11/09 for **Kshs. 114, 055/-** (PEXh. 3a), and 9/12/09 for **Kshs. 135, 695/-** (PEXh. 4a).
- b) The Local Purchase Orders (LPOs) produced by the respondent dated 31/08/09 for **Kshs. 3,500/-** (PEXh.2b), 20/08/09 for **Kshs. 144,672.50/-** (PEXh. 2c) , 3/11/09 for **Kshs. 114,055/-** (PEXh.3b) and 30/1/09 for **Kshs. 135,695/-** (PEXh.4b).
- c) Delivery notes dated 06/11/09 and 9/12/09 (PEXh. 3c and 4c respectively),
- d) Statement (PEXh.5)

[8] The respondent in spite of not calling any witness they filed a statement denying the debt and put the appellant to strict proof.

[9] **Section 107 and 109 of the Evidence Act** provides that whoever alleges must prove. The burden of proof is therefore on the person who wishes the court to believe existence of a fact. The evidence adduced by the appellant shows that they did engage in business with the respondent for supply of goods. This fact was not denied or controverted by the respondent. This being a contract of sale, **Section 6 of the Sale of Goods Act** is relevant. It states that:

**“Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties:**

**Provided that nothing in this section shall affect the law relating to corporations.”**

[10] According to the appellant, the contract between the two was for supply of goods on credit. The appellant produced documents to show the indebtedness by the respondent. Cases are decided on proven facts and the law applied to those facts. See the case of **Alfred Ndogi Mata –vs-Hellen Siemeko Adede, (2005) eKLR** where the court stated that:

**“ Legal disputes are determined on the basis of facts proved by evidence and law applied to the facts.”**

[11] The evidence shows that a business relationship existed between the parties herein. There is also evidence that goods were supplied to the Respondent during the business relationship on credit. However, two issues abound: Were the goods alleged to have been so supplied actually supplied and received? And, for the goods supplied and delivered, were they paid for by the Respondent?

[12] The appellant produced invoices, LPOs and delivery notes. The purpose of an invoice is that it is issued by a seller to request for payment for purchase. An LPO is sent by a purchaser to the seller to confirm, order and authorize the purchase. A delivery note is proof of delivery of goods. See the **Black's Law Dictionary Tenth Edition** on these terms below:

- a) Invoice at Page 956 is described as **an itemized list of goods or services furnished by a seller to a buyer, us. Specifying the price and terms of sale; a bill of costs**
- b) Receipt at page 1459 – 1460 as **the act of receiving something, esp. by taking physical possession <my receipt of the document was delayed by two days>. A written acknowledgment that something has been received; esp., a piece of paper or an electronic notification that one has paid for something.**

[13] Therefore, invoices and LPOs alone do not prove delivery or receipt of the goods. The appellant produced two delivery notes. The one dated 9/12/2009 relates to the invoice dated 9/12/09 for Kshs.135, 695/- **PW1** stated that the invoice was settled but for Kshs. 995/- that remained unsettled. The other delivery note is dated 6/11/09 and relates to the invoice dated the same date for Kshs. 114, 055/-. The delivery note bears the stamp of the respondent as well as a signature of approval. The other invoices dated 23/10/08 and 20/08/09 were not supported by any delivery note or notes to show receipt of the goods stated therein. The Appellant may have supplied the goods, but courts of law act on hard evidence not sympathy or speculation. In the absence of a delivery note or evidence of receipt of the goods, it becomes doubtful whether the goods were delivered.

[14] I am aware that the appellant produced a statement of accounts to show the respondent's indebtedness. **Section 37 of the Evidence Act** states:

**“Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”**

[15] The Court of Appeal in the case of Five Continents Ltd v Mzata Investments Ltd [2003] eKLR held:

**“The plaintiff mainly relied on the accounts analysis to show the defendant’s indebtedness. That accounts analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability (see Section 37 of the Evidence Act). It follows that the accounts analysis on which the learned judge relied has no evidential value.”**

[16] Only entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements alone are not sufficient evidence to hold a person liable. Personal statements authored by the Appellant is not sufficient evidence to prove liability especially considering the supporting documentation relied on is invoices and LPOs without the evidence of delivery of the goods. The appellant failed to prove on a balance of probability the extent to which the respondent was liable.

[17] Accordingly, there is no justification of interfering with th decision by the trial court. As a consequence, this appeal is not meritorious and is dismissed. Given the circumstances of this case, I order each party to bear own costs of the appeal. It is so ordered.

**Dated and signed at Meru this 14<sup>th</sup> day of November 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 27<sup>th</sup> day of November 2019**

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**L. NJUGUNA**

**JUDGE**