



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 66 OF 2018

ALOONA INDUSTRIES KENYA LIMITED.....APPELLANT

-VERSUS-

CROWN BEVERAGES LIMITED.....RESPONDENT

(Being an appeal from the judgement delivered on 15th January, 2018 by Hon. D. O. Mbeja, SRM, in Nairobi Civil suit No. 1118 of 2013)

JUDGEMENT

1) By an amended plaint dated 20th April 2016, Aloona Industries Kenya Ltd, the appellant herein, sought for judgement in the sum of kshs.92,568/= against Crown Beverages Ltd, the respondent herein. The aforesaid amount is said to be in respect of service charges for retreading tyres by the appellant for the respondent.

2) It is said that the retreading of those tyres were done at the respondent's request for its flagship water brand, **Keringet Pure Mineral Water**.

3) The respondent filed a defence denying the appellant's claim. Hon. D. O. Mbeja, learned Senior Resident Magistrate heard the case and he eventually dismissed the suit.

4) Being aggrieved by the dismissal order, the appellant preferred this appeal and put forward the following grounds:

i. THAT the learned trial magistrate erred in law and fact by finding that specific documents had to be produced by parties in the suit in order to establish that there was a business transaction between them in complete disregard of the parties right to their own business practices.

ii. THAT the learned trial magistrate erred in law and fact by holding that the appellant had to produce a letter of inquiry, quotation order, acknowledgement note, advice note, delivery note and an invoice in order to establish a business transaction between the appellant and the respondent.

iii. THAT the learned trial magistrate erred in law and fact in finding in favour of the respondent that specific documents such as a letter of inquiry, quotation order, acknowledgement note, advice note, delivery note and an invoice needed to be produced as proof that the respondent procured the appellant's services based on alleged business practices of the respondent where the respondent did not produce any evidence that this was indeed its business practice.

iv. THAT the learned trial magistrate erred in law and fact in finding that privity of contract between the parties was not established because the appellant did not produce a letter of inquiry, quotation order, acknowledgement note, advice note and delivery note.

v. THAT the learned trial magistrate erred in law and fact in subjecting the appellant's evidence to a standard of proof beyond that required by the law in civil cases.

vi. THAT the learned trial magistrate erred in law and fact in failing to find the respondent liable based on the invoices from the appellant that were addressed to Keringet Pure Mineral Water despite the respondent's own admission to being a producer of Keringet Pure Mineral Water and the respondent's witness' testimony that any transaction involving Keringert Pure Mineral Water was binding on the respondent.

vii. THAT the learned trial magistrate erred in law and fact in finding in favour of the respondent whose witness gave hearsay

evidence and admitted not being familiar with the specific transaction between the appellant and the respondent or even the operations of the respondent in the particular branch where the transaction was conducted.

viii. THAT the learned trial magistrate erred in law and fact in failing to find that the invoices produced by the appellant which bore the respondent's office stamp was prima facie evidence that the respondent received retreaded tyres from the appellant that were delivered to the respondent simultaneously with the invoices to which the respondent did not deny receiving but failed to pay for services rendered.

ix. THAT the learned trial magistrate erred in law and fact in disregarding evidence of negotiations between the appellant's and respondent's advocates, which was evidence of a contractual relationship between the two which was in the full knowledge of the respondent.

x. THAT the learned trial magistrate erred in law and fact by failing to award the appellant herein costs of the suit against the respondent.

xi. THAT in all the circumstances of the case, the findings of the learned trial magistrate are insupportable in law and fact and/or on the basis of the evidence adduced.

5) When the appeal came up for interpartes hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

6) I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. Though the appellant put forward a total of 11 grounds of appeal, those grounds can be determined in two broad grounds. **First**, whether there was a contract between the appellant and the respondent.

Two, whether the appellant tendered sufficient evidence before the trial court to prove that the appellant provided tyre retreading services for the respondent.

7) On the first ground, it is the submission of the appellant that it presented evidence in form of invoices and other correspondences to show that it rendered retreading services to the respondent.

8) It is pointed out that the invoices were stamped and signed by employees/officials of the respondent. It is on the basis of the aforesaid evidence that the appellant is of the submission that there was a contract between it and the respondent which contract was not reduced into writing.

9) It is the submission of the respondent that the appellant entered into a contract with Keringet Pure Mineral Water and not with the respondent.

10) The appellant pointed out that in the proceedings before the trial court, the respondent admitted being the producer of Keringet Pure Mineral Water. The appellant further stated that having affixed its rubber stamps on its invoices, the respondent was a third party in the dealings between the appellant and Keringet Pure Water, therefore it could enforce the contract between the two as well as become liable under it.

11) The trial magistrate analysed the evidence presented before him and came to the conclusion that there was no clear evidence that there was an intention to create legal relationship by the parties which crystallised.

12) He also stated that it was not clear when the tyre retreading services were sought from the appellant by the respondent.

13) It was also pointed out that the invoices made out by the appellant were addressed to Keringet Pure Mineral Water which is not a party to this suit. It is further pointed out that the retreaded tyres were received by Crown Foods Ltd.

14) Having re-evaluated the evidence tendered before the trial court and having taken into account the rival submissions, I have come to the conclusion that there was no cogent circumstantial evidence to prove that there existed a contractual relationship between the appellant and the respondent.

15) The learned Senior Resident Magistrate was therefore right to come to the conclusion that there was no contractual relationship between appellant and respondent.

16) The second issue which commends itself for consideration is whether there was prove that the appellant provided tyre retreading services to the respondent. It is the submission of the appellant that there was evidence that the appellant retreaded tyres for Keringet Pure Mineral Water whose offices were situated at Industrial area and a neighbor to the appellant.

17) It is submitted that the appellant would collect tyres from Keringet Pure Mineral Water, retread them and deliver them back accompanied with invoices that were addressed to Keringet Pure Mineral Water Ltd. It is the appellant submission that before the respondent's stamp was appended on the invoices, a physical inspection of the retreaded tyres supplied was done and thereafter signed.

18) The respondent is of the submission that the rubber stamps on the invoices were just acceptance of service of invoices and not acceptance of liability for the transactions.

19) The appellant is of the submission that the trial magistrate ignored the fact that there were attempts by the respondent to have the matter settled out of court therefore stretching the respondent's acknowledgement of liability.

20) Having re-evaluated the evidence presented before the trial court, it is apparent that the process in the respondent's supply team when procuring goods and services was not followed. That process includes receiving and approving a quotation, making a purchase order and finally making payments.

21) The appellants witness (PW1) confirmed that it did not receive a purchase order or a quotation from the respondent. It can be inferred that there was no request for service and therefore there was not invitation to enter into a contract. The appellant produced invoices which were received and stamped with the respondent's stamp.

22) I agree with the respondent's submission that that was not a confirmation of deliver of goods and services. In the end, I find no fault in the decision of the learned Senior resident Magistrate.

23) This appeal is found to be without merit. It is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 22nd day of November, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent