



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 296 OF 2013

EAST AFRICAN CHAINS LIMITED.....APPELLANT

-VERSUS-

P.C WORLD LIMITED.....1ST RESPONDENT

AGGREY ADEMAH.....2ND RESPONDENT

JUDGEMENT

1. The Appellant who was defendant in the lower court was sued by the 1st respondent claiming a sum of Kshs. 339,000/= being outstanding debt in respect of goods delivered and not paid for.
2. The appellant who was the defendant denied in its defence requesting for or receiving any such goods and further stated that there was no credit relationship between them averring in alternative that the goods were received by one Aggrey Adema without authority from the defendant.
3. The defendant sought and was granted leave to issue third party notice to the said Aggrey Adema.
4. The third party notice was issued but Aggrey Adema never appeared nor filed defence.
5. After the matter was heard, the trial court entered judgement against defendant for Kshs. 339,000/= together with interest thereof and costs. It also entered judgement for defendant against third party for sum of Kshs. 339,000/= with costs and interest.
6. Being aggrieved by the above verdict, the Appellant lodged instant appeal and set out the following grounds of appeal;
 - (i) **The trial magistrate erred in finding and holding that the 2nd Respondent's acts were carried out within the scope of what was authorized by the Appellant.**
 - (ii) **The trial magistrate erred in law and in fact by failing to consider the weighty issues raised by the Appellant.**
 - (iii) **The trial magistrate erred in law and fact by failing to take into consideration that no evidence was adduced to show that there was existence of a credit arrangement between the Appellant and the 1st Respondent.**
 - (iv) **The trial magistrate erred in holding that as a result of the 2nd Respondent being an employee of the Appellant, all his actions were ratified by the Appellant.**
 - (v) **The trial magistrate erred in law and in fact in finding that the Appellant was liable for 2nd Respondent's acts even if the acts carried out by the 2nd Respondent were deliberate and criminal and were for the 2nd Respondent's own benefit.**
 - (vi) **The trial magistrate erred in law by awarding the 1st Respondent Kshs. 339,000/= together with costs of the suit without having regard to the evidence presented before the court.**
 - (vii) **The trial magistrate erred in law and in fact in deciding that the 2nd Respondent was at the time of the transaction authorized to carry out the transaction contrary to the weight of the evidence.**
 - (viii) **The trial magistrate erred in law and fact in failing to take note of the fact that the Appellant had not authorized the acts of 2nd Respondent and therefore his actions could not bind the Appellant.**

(ix) The trial magistrate misdirected herself in disregarding the documentary evidence provided by the Appellant in support of its claim and in particular the fact that the Local Purchase Order had been altered by the 2nd Respondent.

(x) The trial magistrate erred in law by failing to appreciate the relevant law.

7. The parties were directed to file record of appeal and the submissions but none complied.

EVIDENCE ADDUCED

8. Antony Njuguna, an accountant working for the appellant company, told the court that the Respondent took to them a genuine Local Purchase Order duly stamped by the Respondent asking for supply of six HP DV5 laptops at a cost of Kshs. 56,500/= each. That the Respondent operated a credit account with them and they therefore supplied the laptops with the total value of Kshs. 339,000/=.

9. He told the court the money had never been paid saying they had no reason not to supply as the LPO was genuine, that at the time the laptops were supplied the person who procured the same was still an employee of the Respondent and as such they ought to pay and pursue him. The Appellant's list of documents was produced in evidence as exhibit 1.

10. Mark John Tilbury, the Managing Director of the Respondent Company told the court in turn that he oversaw the running of the Respondent Company and made the final decisions which in his absence would be made by the General Manager or his wife the Financial Director.

11. He testified that they began doing business with the Appellant company in the year 2005 buying mainly toners and desktop computers. The head of department, he told the court would source what they required, go to them for an LPO which was either signed by himself or the general manager and goods would be collected with the original LPO.

12. With respect to the transaction the subject matter of the instant suit he told the court he was not aware of it, that the LPO used to obtain the laptops had been issued to another company, Synergy Systems. He told the court that when he received a call on the 31/3/09 from a representative of the Appellant company he did inform them he was not aware of the order and the LPO though bearing his signature, the name and date had been altered.

13. That they called the third party who wrote a confession on the matter saying the laptops had been taken elsewhere. The confession was produced as defence exhibit 1 and the book copy of the LPO to Synergy Systems was produced as defence exhibit 2. He told the court he had not authorized the transaction and further did not have a credit arrangement with the Appellant's company.

14. The 3rd party, he told the court had been charged in Makadara Criminal Case No. 1602 of 2009 which matter was pending hearing. It was his testimony that the 3rd party was only authorized to source for items but could only receive goods with the genuine LPO.

ISSUES, ANALYSIS AND DETERMINATION

15. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to its own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial. (***See Selle vs. Associated Motor Boat Company Ltd (1968) EA 123.***)

16. In the case of ***Mbogo vs. Shah & Another (1968) EA 93*** the Court clearly stated thus:

“.... It is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

17. In civil cases the plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of ***Kirugi & Anor. vs Kabiya & 3 Others [1987] KLR 347*** wherein the Court of Appeal stated that, ***“the burden was always ...on the appellant to prove his case on the balance of probabilities...”***

18. After hearing the testimonies of the parties and reviewing the evidence adduced, as well as the submissions by rival counsels there is no doubt that, an LPO duly signed by the Managing Director of the 1st Respondent company was presented to the Appellant company on the strength of which six laptops with the total value of Kshs.339,000/= were supplied.

19. That the said procurement was done by an employee of the Respondent's company the 3rd party herein, that the laptops did not reach the respondent company and the said 3rd party did not act with the authority of the Respondent and the matter was indeed actually subject to criminal proceedings.

20. The only matter calling for determination in the circumstances then is when is a master vicariously responsible for the acts of the servant?

21. On this issue the Appellant had in trial court submitted that the Respondent ought be held liable citing ***Lochab Brothers Limited & 2 Others vs John Ndegwa Kariuki HCCC No. 42 of 2006*** where the court restates the words of the learned **Justice Mwera** that;

“...as long as the drivers act is committed in the course of his duty even if he is acting deliberately, wantonly, negligently or criminally or even if he is acting for his own benefit or even the act is committed contrary to instructions the master is liable....”

22. The Respondent in turn submits that the Respondent who was not part of the instant transaction cannot be held liable citing the case of *Collen vs Wright [1857]* where the court held;

“Wherever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal or if he exceeds the authority delegated to him, he will be personally responsible therefore to the person whom he is dealing.”

23. The Judicature Act, (Cap.8 Laws of Kenya), imports the common law of England, to be applied in Kenya, subject always to the Constitution, and our written laws. The Common Law of England as learned from Standard Reference Books such as *Halburys Laws of England, 3rd Edition Vol. 22, pp 225-230 paras 403-409*, and text books such as *Salmond on Torts Edn.p.* say;

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either;

(a) A wrongful act authorized by the master; or

(b) A wrongful and unauthorized mode of doing some act authorized by the master.”

24. And *Salmond* at p.90 when dealing with same topic says;

“...if the unauthorized and wrongful act...is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible for in such a case the servant is not acting in the course of his employment, but has gone outside it.”

25. It was established in evidence that the third party was at the time of the transaction an employee of the Respondent, in cross-examination the 1st Respondent's Managing Director stated that the 3rd party was authorized to source for items needed and could take delivery with an original LPO.

26. The Appellant avers such LPO was delivered to them and the laptops released. On the evidence adduced it was established on a balance of probabilities that the acts of the 3rd party were so carried out within the course and scope of what he was authorized to do by the 1st Respondent that the 1st Respondent was liable for those acts even if he was acting deliberately wantonly, negligently or criminally or even if he was acting for his own benefit.

27. In the case of *Bingham and Benyman's Motor Claims Cases 11th Edition Page 267* where it was held, citing the decision in *Mckean vs Raynor Bros Ltd Nottingham[1942] 2 ALL ER 650, 167 LT 369, 86 SOL JO 376* that:

“ a servant who was a general utility hand was instructed by his employer to take and drive one of the employer's lorries and meet a convoy and deliver a message to them. Without permission from his employer, he used his father's private car and was involved in an accident. He had used a private car on other occasion on the employer's business and had never been told not to use a private care for that purpose.”

28. It was also held that the workman was doing an authorized act in an unauthorized but not a prohibited way, and the employer was liable. In the case of *HILBEY J* cited in *Bayley vs Manchester Sheffield and Licdnshire RLY Co. [1873] LR 8CP 148, 42 LJCP 78 28LT 366 par [6.56]* the court held that:

“Where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the done may be the very reverse of that which the servant was actually directed to do.”

29. Also in the case of *Limpus vs London General Ominibus Company [1862] 1 H & C 526, 32 LJ EX 34, 7LT 641*, it was held that;

“The law casts upon the master a liability for act of the servant in the cause of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability.”

30. Thus this court agrees with the finding of the trial that the 1st respondent was entitled to the judgement in the sum of Kshs. 339,000/= together with interest thereon from the date of filing suit.

31. The third party herein was duly served but never did enter appearance, he was deemed to have admitted the validity of the decree obtained against the Respondent to the extent claimed in the 3rd party notice filed in court on the 6th October, 2009 pursuant to the provisions of Order 1 Rule 17 of the Civil Procedure Rules.

i. Thus the court finds no merit in the instant appeal and dismisses the same with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE