



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 493 OF 2011

SAMMER AFRICA LIMITED.....APPELLANT

VERSUS

KITA GENRAL STORES LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. A.K. Ndung'u (Mr) SRM

in Milimani Civil Case 4997 of 2009 delivered on 24th August, 2011

by Hon. R.A Oganyo PM)

JUDGMENT

The appellant sued the respondent in the lower court claiming Kshs. 1,259,682/= being the sum due and payable for tyres sold and delivered to the respondent. Upon delivery of the said goods with a credit allowance of 30 days, respondent refused and or neglected to pay the said sum. This led to the filing of the said suit. The respondent denied the claim and added that any transaction between the parties had been finalised, and the appellant had given its statement of account showing the respondent did not owe any money.

The suit proceeded for hearing and in a judgment delivered on 24th August, 2011 the appellant's suit was dismissed with costs to the respondent. In the lower court each party called one witness. In effect it was the word of the appellant as against that of the respondent.

It is my duty as the first appellate court to evaluate the evidence presented before the trial court and arrive at independent conclusions. In the memorandum of appeal, dated 30th September, 2011 the lower court was faulted for finding that the claim was not supported by evidence, and that it was only based on one single transaction when there was evidence to the contrary. The court was also found to have erred in law and in fact, in failing to find the appellant was owed the said sum despite documentary and oral evidence adduced during the trial. The issues were also said not to have been addressed, and on a balance of probability, the appellant had proved its case.

The grounds raised in the memorandum of appeal call for the examination of the pleadings and relate the same to the evidence adduced during the trial. I say so because, a litigant's case is anchored on the pleadings and supported by evidence during the trial. In the event a party wishes to adduce evidence not related to the pleadings, it is common practice that an amendment is sought either formally or orally, so that the evidence is aligned to the pleadings.

The appellant was specific that the claim was for Kshs. 1,259,682/= being the price of tyres and tubes sold to the respondent and which were received and accepted.

Paragraph 5 of the plaint set out the particulars. These particulars are important in the final decision of this appeal. The date of the transaction was said to be 31st December, 2006. The invoice number was DSI/12400 for the sum of Kshs. 1,259,682/=. In support of that pleading, P.W. 1 Aphiid Kariuki, who was the Credit Manager of the appellant, gave evidence to the effect that the appellant supplied goods worth Kshs. 2,028,325.65 against 4 invoices. The respondent is said to have issued two cheques which were dishonoured. These cheques amounted to Kshs. 1,430,279/=.

It is clear from the outset that the said evidence was a complete departure from the plaint, and in particular paragraph 5 thereof. In the judgment of the lower court, the trial court observed as follows,

“I have had occasion to consider the pleadings the evidence and submissions on record.the pertinent issue is whether the pleading herein (plaint) is supported by the evidence adduced or it is departure therefrom. It is trite law that

parties are bound by their pleadings. “

The trial court then set out in full paragraph 5 of the plaint which I have referred to above and went further to state as follows,

“This pleading is total inconsistency with the evidence produced. In his own word, P.W. 1 told the court that they supplied the defendant with goods worth Kshs. 2,028,325.65 on four invoices. These four invoices were produced in evidence. These invoices are totally different from the invoice No. TDSI/12400 pleaded in the plaint. There is no mention of Kshs. 2,028,325.65 in the plaint being the worth of goods supplied. There is no mention in the plaint that the Kshs. 1,259,682/= pleaded as a balance from the sum of Kshs. 2,028,325.65. There is no mention at all in the plaint of the part payments made by the defendant as conceded in the evidence. The framing of paragraph 5 of the plaint is totally inconsistent with the evidence of PW1. There is no evidence in support of a transaction dated 31/12/06. The plaint is the basis of the claim and if no evidence is added in its support then such a claim must fail in view of the inconsistencies in the plaint and evidence.”

Having considered the evidence adduced before the trial court, I am unable to fault the trial court in its analysis of the evidence and the conclusions reached in the above extract of the judgment. The appellant failed to prove its case based on its own plaint and therefore no blame can be attributed to the trial court.

This appeal is lacking in merit and therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE