REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT ELDORET

CIVIL APPEAL NO. 108 OF 2009

ANNE WAITHERERO WAWERU.....APPELLANT

VERSUS

KEN-KNIT KENYA LIMITED.....RESPONDENT

[Being an appeal from the original judgment of A. B. Mongare, Senior Resident

Magistrate, in Eldoret CMCC No. 907 of 2004 delivered on 29th June 2009]

JUDGMENT

1. The appellant is aggrieved by the decree of the lower court dated 29th June 2009. The appellant has lodged a *memorandum of appeal* dated 24th July 2009.

2. By an *amended plaint* dated 17th July 2006, the appellant claimed *general damages* for breach of contract by the respondent. She also claimed special damages of *Kshs 310,000*. She pleaded that on 12th February 2004, the parties entered into a contract for supply of *blue-gum* seedlings to the respondent. The agreed price was Kshs 13 per plant. The appellant secured 73,000 seedlings; and, delivered them to the respondent's site at Thika. The appellant claimed that the respondent's agent, Raj Shah, chased away her employees from the site.

3. The appellant further pleaded that on 19th February 2004, the respondent *coerced* her into executing another contract for supply of the seedlings at Kshs 8 per seedling. On 23rd February 2004, the appellant "avoided the contract as she had entered into it under duress". The appellant claimed that she lost her *profit* of Kshs 4 per seedling totaling *Kshs 292,000*; and, costs of hiring two agents amounting to Kshs *18,000*.

4. By an *amended statement of defence* dated 24th July 2006, the respondent denied the claim. The respondent disavowed the original contract or the alleged second contract of 19th February 2004. The respondent also denied the allegations of duress. In particular, the respondent stated that *no* consideration passed. The respondent denied ever receiving a notice to avoid the contract; or, frustrating the contract. In the end, the respondent countered that the appellant breached the original contract which forced the respondent to engage a new supplier.

5. The learned trial magistrate found that the appellant failed to prove her case on a balance of probabilities. The suit was dismissed with costs.

6. The memorandum of appeal raises *eight* grounds. They can be condensed into *five*. First, that the learned trial magistrate misapprehended the oral and documentary evidence. Secondly, that the agreement of 12th February 2004 was wrongly terminated; thirdly, that the defence put forth was inconsistent and full of falsehoods; fourthly, that the evidence led by the respondent went contrary to the pleadings; and, fifthly, that the learned trial magistrate relied on irrelevant and extraneous matters.

7. At the hearing of this appeal, learned counsel for the appellant, *Mrs Khayo,* referred to the original agreement (page 80 of the record). It provided that either party was at liberty to terminate the agreement with 4 weeks' notice. She submitted that on 14th February 2004, the respondent terminated the agreement *before* expiry of the notice; and, contracted a third party to carry out the contract. She submitted that the appellant proved the breach of contract and was entitled to damages.

8. The appeal is *contested* by the respondent. Learned counsel, *Mr. Nyairo,* referred at length to his written submissions filed on 14th November 2017. He was of the view that there was no contract; and, that no consideration passed. Regarding the second contract, he submitted that it was between *different* parties: *Raj Shah*; and, the *appellant*. I was implored to dismiss the appeal with costs.

9. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

10. The appellant testified that she bought the seedlings at Karura Forest at the price of Kshs 8 per seedling. Her profit was to be Kshs 5. Upon cross examination, she conceded that she did not have a receipt for purchase of the trees. She said she hired a lorry that transported the 73,000 seedlings. She claimed that when Raj Shah realized she was a broker, he frustrated the performance of the contract.

11. Upon further cross examination, the appellant stated as follows-

> *"The 1st agreement was between me and Ken-Knit. The 2nd agreement does not concern Ken-Knit. I did not sue Raj Shah. I was watering the trees and nurturing them. I did holes the following week for 3 days from 21. 2. 2005 to 23. 2. 2005. I decided to continue working as per our agreement. I did a few holes on ¼ an acre. Raj Shah stressed me a lot. He started abusing and harassing me. I decided to stop working. I was chased away from the site. I spent 15,000 to transport the trees from Karura. I took the trees on credit. I was to pay Kshs 8 per seedling. Raj paid the company direct. I never spent any other money save for 18,000"*

12. PW2 was the appellant's sister. She testified that after the plaintiff signed the contract, they sent the appellant's husband to procure the seedlings. She was present when the latter received 73,000 seedlings at Karura. She said that Raj coerced her and her sister to execute the 2nd agreement; and, that he finally chased them away from the site.

13. DW1 was a security guard at Ken-Knit. The only relevant part of his evidence was that he witnessed the impugned agreement; and, that a third party (Aberdare Technologies) delivered 3073 seedlings on 18th February 2004. DW1 never witnessed the agreement between the respondent company and Aberdare.

14. DW2 was Raj Shah. He admitted that the company entered into a contract with the appellant. But he testified that the appellant experienced financial difficulties; and, did not supply the seedlings. He claimed that the appellant sought an advance payment. It was declined. The respondent terminated the agreement on 14th April 2004 (defence exhibit 1).

15. DW2 testified that under the subsequent agreement, the respondent was to pay the supplier directly for the seedlings. He denied coercing the appellant to execute the 2nd agreement. He said the second agreement was executed during working hours and that his office door was open. Defence exhibits 5, 6,

and 7 confirmed payment by the respondent to Aberdare Technologies. He denied that the appellant delivered or planted any seedlings.

16. Upon cross examination, DW2 conceded that on 14th February 2004, he delivered 4 weeks' notice to terminate the contract. The letter was posted to the appellant. When she received the letter, she visited his offices. That is the day the 2nd contract was executed.

17. I will begin by making *two* general propositions on the law of *contract*: Parties are bound by commercial agreements; and, they must keep their part of the bargain. Secondly, it is *not* the true province of the courts to rewrite contracts for parties. See *Morris & Company Vs Kenya Commercial Bank* [2003] 2 E.A 605 and *National Bank of Kenya Limited Vs Pipeplastic Samkolit and another* [2001] KLR 112.

18. I would also add that parties are bound by their pleadings. Although the respondent's amended defence categorically *denied* the two contracts, the evidence of Raj Shah *acknowledged* the agreements. I would agree with the appellant that the evidence was *inconsistent* with the pleadings by the respondent.

19. I will now turn to the second agreement dated 19th February 2004. That agreement was between *Raj Shah* and the *appellant*. There is thus no *privity* of contract with *Ken-Knit Limited*. Raj Shah is *not* a party to these proceedings. To that extent, that agreement was a red herring. Its only relevance is providing a backdrop to the termination of the original agreement dated 12th February 2004.

20. I have carefully studied the original agreement. It was executed by the *appellant* and *respondent* on 12th February 2004. The appellant was to deliver the seedlings; dig up holes; water the seedlings; and, weed them for 6 months. The consideration was Kshs 13 per seedling. The respondent on the other hand was to identify the site; provide manure and water; and, furnish fencing materials and *jembes*. Under clause 2 (iv) (h), the company had *discretion* to pay an advance payment upon request. Otherwise, the payment of Kshs 13 was to be made after the seedlings were planted.

21. I thus readily find that there was a *valid offer* and *acceptance*. The parties intended to enter into *legally* binding relations. But there are some lingering questions: whether *consideration* passed; and, whether the respondent *frustrated* the contract.

22. It is instructive that the agreement provided no *timelines* for performance. The only reference to *time* was that the appellant was to take care of the seedlings for *six months*. I cannot then say that *time* to *supply* the seedlings or to *plant* them was of the *essence*. Clause 2 (ii) however provided for termination by *either* party giving *4 weeks' notice*. Defence exhibit 1 contains the termination letter by the respondent. It is dated 14th February 2004, barely *two days* after executing the agreement. Surprisingly, it called upon the appellant to call upon *Raj Shah* to *"enter into a new agreement"*.

23. I accept that the appellant had *financial* difficulties. But I find it *cunning* for Raj Shah to *hoodwink* the appellant to enter into a different agreement in his *personal* capacity. Furthermore, the termination notice had *not* expired by the time the appellant entered into the subsequent agreement. I am fortified by his own evidence: In his evidence in chief, Raj Shah (DW2) had stated as follows-

> *"I did not inform her that I was talking to Aberdare to deliver trees. The trees were delivered on 19th February 2004. They were loaded on 17th February 2004 and delivered on 18th or 19th February 2004. The trees were being delivered while we were signing the agreement….after we signed the 2nd agreement with Ann"*

24. I have also noted that the termination letter was not on the respondent company's note paper: it is in the name of *Raj Shah of P. O. Box 142 Eldoret*. I thus readily find that the termination of the agreement was in *breach* of the terms of the agreement. It also smirked of *bad faith*. It would have entitled the appellant to damages.

25. But the appellant failed to *prove* that she supplied 73,000 seedlings. She did *not* produce a *receipt* or call the supplier to the stand. There was *no* documentary evidence for *hire* of the lorry; or, for *payment* of the workers who dug up the holes. The respondent was emphatic that no deliveries were made by the appellant. I am thus *not* satisfied that the appellant proved on a balance of probability that she *performed* her part of the contract. Granted the paucity of evidence on *actual* loss, I concur with the learned trial magistrate that the appellant failed to prove the *special damages* of Kshs 310,000.

26. I am however satisfied that Raj Shah, who executed the original agreement on behalf of the respondent, deliberately *obstructed* the performance of the contract. I have already found that the purported termination was in *breach* of the contract. I have also found it was *mala fides*. Granted my findings in the preceding paragraph, I find that the appellant, at best, was only entitled to *nominal damages* for breach of contract. Paraphrased, I find that a *legal wrong* was committed without *actual financial loss.* I assess such nominal damages at Kshs 1,000 only. It also means that the *respondent* was *not* entitled to *costs* in the lower court.

27. The upshot is that the appeal partially succeeds. The judgment and decree of the lower court dated 29th June 2009 is hereby *set aside*. Instead, there shall be judgment *dismissing* the appellant's (plaintiff's) claim in the lower court for general and special damages. The order granting the *respondent* costs of the suit is also set aside. The appellant is hereby granted *nominal damages* for wrongful termination of contract in the sum of Kshs 1,000 only. Interest shall accrue at court rates from the date of this judgment.

28. Costs follow the event and are at the discretion of the court. In the *interests of justice*, I order that each party shall bear its *own* costs in the appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 16th day of January 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance by counsel for the appellant.

Mr. Kibii holding brief for Mr. Mukhabane for the respondent instructed by Nyairo & Company Advocates.

Mr. J. Kemboi, Court Clerk.