



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO.19 OF 2016

SWAN CENTRE LIMITED.....APPELLANT

VERSUS

GULAB BROTHERS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 116 of 2013

delivered by Hon. J.T. Obutu (PM) on 15th March, 2016)

JUDGMENT

1. **GULAB BROTHERS LIMITED** (*hereinafter referred to as respondent*) sued **SWAN CENTRE LIMITED** (*hereinafter referred to as appellant*) in the lower court claiming Kshs. 1,318,217/- being premiums paid on behalf of the appellant from 31.12.07 in respect of various policies held by the appellant.
2. The defendant/appellant filed a statement of Defence and denied the claim.
3. In a judgment delivered on **1st March, 2017**, the trial court found the appellant 100% liable and awarded damages in the sum of Kshs. 1,318,217/- with interest from 31st December, 2007.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 28.6.17 filed the Memorandum of Appeal dated 29.3.17 which sets out 9 grounds of appeal that may be summarized into the following 6 grounds that:-

- 1) **The Learned trial Magistrate erred in law and in fact in failing to appreciate that there was no contract between the appellant and the respondent capable of being enforced for want of consideration**
- 2) **The Learned trial Magistrate erred in law and in fact in failing to appreciate that the plaintiff was an agent of KENINDIA ASSURANCE COMPANY LIMITED and could not double as an agent of the appellant**
- 3) **The Learned trial Magistrate erred in law and in fact in failing to find that the appellant did not instruct the respondent to pay on behalf of the appellant**
- 4) **The Learned trial Magistrate erred in law and in fact in finding that the respondent had paid money on behalf of the appellant where there was no evidence of payment**
- 5) **The Learned trial Magistrate erred in law and in fact in refusing to find that respondent's claim on invoices dated 17.8.06 for Kshs. 835,744/-; 17.8.06 for Kshs. 20,000/-; 17/8/06 for Kshs. 100,450/-; 20.9.06 for Kshs. 26,810/- totaling Kshs. 983,094/- was time-barred**
- 6) **The Learned trial Magistrate erred in law and in fact in failing to consider the defence**

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

6. Appellant holds the view that there was no evidence that it gave a consideration for the contract alleged by the respondent. It was submitted for the appellant that in the absence of receipts from KENINDIA ASSURANCE COMPANY, endorsement on invoices was no evidence of payment. Appellant also submitted that there was no resolution by the appellant indicating that appellant agreed to take up the contract from Swan Millers Ltd and that the contract could therefore not be enforced against it. Appellant additionally submitted that the cause of action arose on 6.1.06 and was therefore time-barred. Appellant relied on the following authorities.

1. *The Law of Contract by Sir Guenther Treitel, 11th Edition at page 67*
2. *Omondi v Natioan Bank of Kenya & Others 92001)eKLR*
3. *Agricultural Finance Corporation v Lengetia Limited (KLR) 765*
4. *Section 3(1) and (2) of the Law of Contract*
5. *Section (4)(1) of the Limitation of Actions Act*
6. *Sachania&Anor v HirjiPitamber (1958)EA at page 503*
7. *Order 2 rule 9 of the Civil Procedure Rules*

Respondent's submissions

7. It was submitted for the respondent that letters from appellant's managing director demonstrated for insurance services which the appellant has not denied utilizing and that appellant is estopped from stating otherwise. Respondent urged the court to find KENINDIA had confirmed that the services were paid for and that the utilization of the services amounted to consideration for the contract. Respondent holds that the suit was not time-barred since appellant had a running account and premiums were paid up to 16.5.07. Respondent likewise submitted that DW1 had conceded that after the appellant company was registered assets and liabilities of Swan Millers Ltd were transferred to it and that appellant was therefore liable to pay for the services rendered by respondent.

Analysis and Determination

8. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123.**

9. The court record shows that by a letter by H.K.Shah dated 6.1.06, managing director of Swan Millers Ltd, KENINDIA ASSURANCE COMPANY LIMITED and the respondent were notified of transfer of ownership of Swan Millers Ltd to the appellant company. By the same letter, KENINDIA ASSURANCE COMPANY LIMITED was instructed to transfer insurance policies in the name of Swan Millers Ltd to the appellant. Another letter by H.K.Shah dated 19.6.06 instructed the respondent to renew all policies of the appellant as previously held by Swan Millers Ltd. Letters from KENINDIA ASSURANCE COMPANY LIMITED dated 17.4.07 and 16.5.07 confirmed that all premiums on account of the appellant had been paid in full. A letter dated 18.5.07 by Michael Nyachae, a director of the appellant, instructed KENINDIA ASSURANCE COMPANY LIMITED to deal directly with the company and not through the respondent.

10. I have carefully analyzed the evidence on record. It has not been denied that ownership of Swan Millers Ltd was transferred to the appellant company. The transfer was notified to respondent and KENINDIA ASSURANCE COMPANY LIMITED was instructed to transfer insurance policies in the name of Swan Millers Ltd to the appellant.

11. There is no doubt the policies issued to the appellant were fully paid by the respondent. It was confirmed that Mr. Shah had authority to act for Swan Millers Ltd and his instructions to the respondent are therefore binding on the appellant which acquired assets and liabilities of Swan Millers Ltd.

12. A letter dated 18.5.07 by Michael Nyachae, a director of the appellant, instructing KENINDIA ASSURANCE COMPANY LIMITED to deal directly with the company and not through the respondent proves that respondent transacted insurance business with KENINDIA ASSURANCE COMPANY LIMITED on behalf of the appellant. Appellant is therefore estopped from asserting otherwise.

13. Policy schedules attached to the invoices issued to the respondent show that the insurance policies issued to the appellant ran up to July 2007. This suit was filed on 28.3.13 and was therefore filed within the 6 year period for a claim under contract.

14. The totality of the evidence demonstrates that there was a contract for insurance services between the parties herein. Appellant gave an offer to the respondent to renew its insurance policies and in consideration thereof respondent paid for the said policies in full. Appellant cannot after enjoying the services provided by the respondent run away from its responsibility of paying for the same.

Disposition

15. In view of the foregoing finding, this court finds that the decision of the trial court was well deliberated and declines the invitation to sanction appellants attempt to escape from its responsibility to pay for services offered to it by the respondent. *The Appeal is thus disallowed*

with costs to the respondent.

DATED, DELIVERED AND SIGNED THIS 19th DAY OF April 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Carolynne and Aura

Appellant - Mr. Bagada Holding Brief for Njoga

Respondent - Mr. Emukule