



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 7 OF 2016

CHAMKEN BOOKSHOP LIMITED....APPELLANT

-VERSUS-

BOARD OF MANAGEMENT DEDAN

KIMATHI HIGH SCHOOL.....RESPONDENT

(An appeal against the judgment of the Hon. John Aringo delivered

on the 22nd January 2016 in Civil Case no. 25 of 2014)

Between

CHAMKEN BOOKSHOP LIMITED

-VERSUS-

BOARD OF MANAGEMENT DEDAN KIMATHI HIGH SCHOOL

JUDGMENT

The only issue for determination before me is whether the respondent owes the applicant the sum of Ksh 41, 600 for the supply of '4 RISO INK CZ 100' and '2 RISO CZ 100 MASTER INK'. It is the appellant's averment, which was contended by the respondent, that it supplied the said items among others between the months of June 2010 and June 2012. Indeed, the amended plaint filed on the 19th August 2014 sought judgment against the respondent for the sum of Ksh 455, 130.

The Magistrate upon hearing the suit, found as a fact that the sum of Ksh 41, 600 had not been proved and gave judgment for the appellant against the respondent for the sum of ksh413, 530.

The appellant, in its memorandum of appeal attacks this finding on the following grounds;

1. that the learned trial magistrate erred in law in fact in failing to appreciate that the defendant had wholly and unequivocally admitted that the plaintiffs claim
2. that the learned trial magistrate erred in fact and in law in failing to appreciate that the defendant had not only admitted to receiving the 9 items cited as '2 Rizo ink CZ 100 and 7 Master Rizo CZ 100 invoiced at Kenya shillings 42,600 but had actually produced evidence in court of the receipt of the same, hence there was no basis of rejection of the claim.
3. The learned trial magistrate erred in fact law in failing to find that the plaintiffs entire claim had been substantiated to the required standard

Its prayer is that the appeal be allowed and the judgement of the learned trial magistrate be set aside and substituted with an order allowing the plaintiffs claim in its entirety.

The parties agreed to dispose of the appeal by way of written submissions. The appeal was opposed. The appellant was represented by Mr. Nderi, the respondent by Mr. P. Gisemba, State Litigation Counsel.

It is the appellant's contention that the respondent had admitted the entire claim, but later on changed its mind and went on to complain that the said items had not been supplied.

That the respondent, had through various correspondences admitted the claim, that there was a delivery note signed by the respondent showing receipt of the items, that there was admission by the respondent's witness of receiving items; on the 25th May 2010 4 tubes of Rizo ink and on 11th November 2011 5 tubes of Rizo 100. On the applicable principles on admission, it relied on the case of **Winfred Nyawira Maina vs Peterson Onyiego Gichana HCC 576 of 2012 [2013] eKLR**

On its part the respondent submits that the court found that the plaintiff had failed to discharge the evidentiary burden that it had supplied the items as per the invoice. Secondly that the claim that the goods were supplied on the 25th May 2010 was a material contradiction to paragraph 3 of the amended plaint where the plaintiff averred that the cause of action arose between June 2010 and June 2012.

As the 1st appellate court, I am required to reevaluate the evidence and arrive at my own conclusions.

What is the evidence before me?

- There is the invoice dated 19th January 2011 no. 33537 showing supply of 9 pieces of RISO ink CZ 100 and 7 pieces of Master RISO CZ 100 There is a delivery note dated 11th January 2011 indicating the delivery of 5 tubes each of Rizo CZ 100 and Muster CZ 100.
- There is the Invoice no. 33444 dated 22nd October 2010 showing that among items being charged for are 6 pieces each of RISO CZ 100 and Master RISO CZ 100. It is accompanied by the delivery note dated 22nd September 2010

PW1 Charles Mwaniki Kariuki testified that he was the founder and MD of the plaintiff. They had a long relationship with the defendant school. By June 2011, the defendant owed the plaintiff Ksh 550,011, and by the end of 2011 the debt had reached 597, 350.

A demand letter was sent to the school and by a letter dated 12th January 2011, the Principal acknowledged the debt and asked for time to pay, and proceeded to pay the sum of Ksh 142, 220 on 6th June 2013, leaving the balance of 455, 130. on 2th February 2014, the school wrote disputing the Ksh 41, 600, saying that the same were invoiced but not supplied.

DW1 Francis Koira Ndirangu was the school principal at the material time and had taken over on the 18th January 2011 from the previous principal inheriting inter alia the school liabilities. He said his letter of 12th November 2011 acknowledged the debt for purpose of continuing to do business, and he only discovered the anomaly of the two items later and raised the dispute. He testified that though the items were in the school ledger, though they were invoiced, there was no evidence of delivery unlike all the others. More particularly they were alleged to have been delivered in the 2nd term of the previous year 2010 and were being invoiced in the 3rd term 2011, yet the delivery for that term clearly indicated specific number of the two items.

He explained that this was a serious discrepancy that compelled him to raise the dispute.

In his testimony **DW2 David Wachira Maina** the store Keeper testified that on 26th May 2010, the school received 4 tubes of Rizo Ink and 2 tubes of Rizo Master and he signed for the two deliveries. However, these were not in the delivery notes produced in court by the plaintiff. Neither was there a corresponding delivery note from the defendant.

In reviewing the evidence on record I found some disconcerting anomalies. None of the invoices produced as evidence referred to any specific delivery note. I noted that the delivery notes were serialized. However, the invoices are drawn in such a manner that they have five columns: S/NO, ITEM DESCRIPTION, QTY, PRICE, AMOUNT. Hence at a glance one cannot tell when these items were supplied and against which delivery note. It is difficult for the plaintiff to argue that the disputed items were supplied in May 2010, and then include them in an invoice for November 2011, yet that same invoice is accompanied by a 'current' delivery note.

I think the Principal's concern was genuine in that here is a record showing that upon supply of items the invoice is raised the following month. How then do you explain items from the previous year just popping up in an invoice?

Did the letter of 12th February 2011 amount to an admission of the claim?

The trial magistrate relied on section 24 of the Evidence Act which states:

*Effect of admissions **Admissions are not conclusive proof of the matters admitted**, but they may operate as estoppels under the provisions hereinafter contained. (emphasis added)*

Section 61 of the Evidence Act provides: Facts admitted in civil proceedings

No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions. (emphasis

added)

A perusal of the judgment reveals that the trial magistrate took cognizant of the fact that there was no admission in the pleadings by the defendant respondent. He posed the question: ***“So, can the letter of 12/11/2012, PEX 2 from the defendant to the plaintiff be deemed as an unequivocal admission of the claim as submitted by counsel for the plaintiff? ...the statement of defence it itself does not seem to evince any admission, but rather a joinder of issues...Order 2 rule 11 says that an admission must be specific in the pleadings.*** He formed the opinion in response to the question: ***“This court is of the view that the letter of 12/11/2012 on its own does not constitute an admission”.***

Upon joinder of issues it was upon the plaintiff to prove its claim. Having lost a n application for summary judgment on the alleged admission, the appellant was warned so to speak that the court was of the view that the disputed sum was a triable issue that would now require specific evidence to be proved. The trial magistrate did not err by requiring proof and finding none.

It is also noteworthy the issue of estoppel was neither pleaded nor evidence led to prove the same. There were no submissions on the issue except reiteration of the alleged acknowledgement/ admission by the defendant that they had received the goods, through various correspondence and the evidence of the store keeper.

I have pointed out herein above the fact that the storekeeper’s testimony is unreliable as it is not supported by any corresponding delivery note, and the billing for goods allegedly delivered on a different year, without corresponding delivery notes and contrary to the apparent standard practice between the two parties. The trial court noted that the plaintiff took a lot for granted assuming that matters were self-evident while they were not. That ultimately the burden of proof lay with him.

Hence upon reevaluating and re assessing the evidence in the lower court’s record, and the judgment of trial magistrate, I agree with the trial magistrate that: there was no admission of the claim as envisaged by law, the claim for Ksh 41, 600 for the alleged delivery of the 4 tubes of Rizo Ink and 2 tubes of Rizo Master was not proved.

I find no reason to disturb the trial magistrate’s judgment.

The appeal is dismissed with costs to the respondent.

Dated delivered and signed at Nyeri this 28th May 2018

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Atelu

Counsel for Appellant; Ms. Wanjira holding brief for Mr. Nderi

Counsel Respondent; Mr. Gisemba for respondent