



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 18 OF 2017**

**PHILMARK SYSTEMS CO. LTD.....APPELLANT**

**VERSUS**

**ANDERMORE ENTERPRISES.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 322 of 2016 delivered by Hon. T.Obutu (PM) on 20th January, 2017)**

**JUDGMENT**

**1. ANDERMORE ENTERPRISES (hereinafter referred to as respondent) sued PHILMARK SYSTEMS CO. LTD (hereinafter referred to as appellant) in the lower court claiming Kshs. 6,248,724.00 on account of a balance outstanding for goods sold and supplied during the years 2015 and 2016 based on a mutually agreed computation and acknowledgement dated 29th March, 2016.**

**2. The defendant/respondent filed a statement of Defence and denied the claim on the basis that the supply of goods was from Andmore Timber Yard which it concedes owing Kshs. 2,226,750.00.**

**3. In a judgment delivered on 20th January, 2017, the trial court found that respondent had proved its case and entered judgment against the appellant for Kshs. 6,248,724.00 as prayed in the plaint.**

**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 5 grounds which I have summarized into 4 grounds that:-**

**1. The Learned trial Magistrate erred in law and in fact in ordering the appellant to pay sum of Kshs. 6,248,724/- plus interest from 29.3.16**

**2. The Learned trial Magistrate failed to evaluate evidence, consider the pleadings**

**3. The Learned trial Magistrate relied on documentary evidence which was never produced as exhibits**

**4. The Learned trial Magistrate ignored the principles applicable and relevant authorities cited by the appellant**

**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 it issued 14 supply orders Nos. 128; 130; 133; 134; 135; 136; 137; 139; 140; 141; 146; 147; 153 and 158 to Andermore Timber Yard, and not the respondent, for supply of specific items with specific values. Appellant concedes that Andermore Timber Yard supplied the goods ordered and issued the appellant with 14 invoices for the total sum of Kshs. 9,755,750/-. Appellant submits that it made 5 payments for the total sum of Kshs. 7,900,000/- directly to respondent's accounts at ABC Bank, Co-operative Bank and Chase Bank. Appellant denies owing the sum claimed but admits owing the respondent Kshs. 2,226,750.00 which it was prepared to pay.**

**7. Appellant faulted the trial court for relying on evidence that was not pleaded. In support thereof, it relied on the case of GALAXY**

***PAINTS COMPANY LIMITED V. FALCON GUARDS LIMITED COURT OF APPEAL CASE NUMBER 219 OF 1998***, the Court of Appeal stated that “*issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.*”

8. Appellant urged court to find that it was not pleaded that respondent and Andermore Timber Yard and were one and the same entity and that any evidence to that effect that did not flow from the pleadings ought to have been disregarded. In support of this proposition, appellant cited the Ugandan case of ***LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS*** [1986] UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in ***JONES Vs. NATIONAL COAL BOARD*** [1957]2 QB 55 that;

“**In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.**”

Appellant also relied on ***Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others*** [2014] eKLR which cited the decision of the Malawi Supreme Court of Appeal in ***MALAWI RAILWAYS LTD Vs. NYASULU*** [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] ***Current Legal problems***, at P174 whereof the author had stated;

“**As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....**

**In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.**”

9. In support of the proposition that parties are bound by their pleadings, appellant relied on Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd [2015] eKLR where the court referring to a decision of Nigerian Supreme Court our the Court of Appeal stated-“**In ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;**

‘**... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.**”

10. Appellant further submitted that it did not have any contract with the respondent and that the one between it and Andmore Timber Yard capable of being enforced by the respondent. In support thereof, it relied on ***Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi*** [1985] eKLR and ***Dunlop Pneumatic Tyre Co Ltd v Selfridge Ltd*** [1915] AC 847 where the court held that only a party to a contract can claim upon it.

#### **Respondent’s submissions**

11. Respondent submits that it owns the business known as Andermore Timber Yard which supplied goods in issue to the appellant. It is respondent’s case that the appellant owes it Kshs. 6,248, 724/-based on a mutually agreed computation and acknowledgement dated 29.3.16. Respondent urged court not to interfere with the trial court’s judgment on the ground that there was no evidence that the trial court acted on a misapprehension of the evidence, or demonstrably acted on wrong principles in reaching the findings he did. It relied on ***Selle v Associated Motor Boat Co. Ltd*** (1968) EA 123; ***Makube v. Nyamiro*** [1983] KLR 403 and ***Kiruga v Kiruga & Another*** [1988] KLR 348.

12. On the issue of agreements made by a representative of the appellant, respondent submits that the same are binding on the appellant and in support thereof relies on Section 35 of the Companies Act (2015) which provides that

(1) A contract may be made—

(a) by a company, in writing under its common seal; or

(b) on behalf of a company, by a person acting under its authority, express or implied.

(2) Any formalities required by law for a contract made by a natural person also apply; unless a contrary intention appears, to a contract made by or on behalf of a company.

13. Respondent further submitted that the documents on record speak for themselves and cannot be explained by oral evidence. (*See Section 97(1) of the Evidence Act*)

14. On the issue of interest, respondent submitted that exhibits produced in court show that interest was agreed upon and urged the court not to interfere with it because to do so would amount to re-writing the contract between the parties herein. In this regard, respondent relied on **Eslon Plastics Of (K) Limited v National Water Conservation And Pipeline Corporation [2014] eKLR**; **Gatobu M'Ibuutu Karatho v Christopher Muriithi Kubai [2014] eKLR** and **National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd and another (2002) EA 503**

#### **Analysis and Determination**

15. 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*; *Makube v. Nyamiro* [1983] KLR 403 and *Kiruga v Kiruga & Another* [1988] KLR 348.

16. It is trite that issues for determination in a suit generally flow from the pleadings unless the pleadings are amended in accordance with the Civil Procedure Rules. In order to determine the issues between the parties herein, one needs to look mainly at the plaint. A reading of the plaint demonstrates that Paragraph 3 is the foundation of respondent's claim and it states as follows:

**“The plaintiff's claim against the defendant is for recovery of Kshs. 6,248,724.00 being the amount due and owing to the plaintiff by defendant on account of a balance outstanding for goods sold and supplied by the plaintiff to the defendant during the years 2015 and based on a mutually agreed computation and acknowledgement dated 29th March, 2016.”**

17. Respondent does not dispute that the appellant receives from Andmore Timber Yard goods valued at Kshs. 9,755,750/- out of which of Kshs. 7,900,000/- has been paid leaving a balance of Kshs. 2,226,750.00. The sum of Kshs. 6,248,724.00 is from the evidence on record made up of interest. I am in agreement with the decisions in **Eslon Plastics Of (K) Limited v National Water Conservation And Pipeline Corporation [2014] eKLR**; **Gatobu M'Ibuutu Karatho v Christopher Muriithi Kubai [2014] eKLR** and **National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd and another (2002) EA 503** that a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. This does not however take away the duty of a party that alleges to prove. The respondent had a duty to prove how the sum due increased from Kshs. 2,226, 750.00 to Kshs. 6,248,724.00. The trial Court's finding that the parties had agreed at an interest at bank rates is not supported by the evidence on record. Further to the foregoing, respondent has not specifically demonstrated what bank rate was applied to attain the sum of Kshs. 6,248,724.00. Consequently; I am in agreement with the appellant that the sum that has been accurately proved to be due and owing is Kshs. 2,226, 750.00 and not Kshs. 6,248,724.00.

18. The next issue for determination is whether respondent can enforce the contract between appellant and Andmore Timber Yard. *Halsbury's Laws of England*, 3rd Edition, Volume 8 at paragraph 110 which was quoted extensively in ***Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR*** states as follows::

**“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”**

19. The 14 supply orders and invoices that form the basis of the respondent's claim are in the name of Andmore Timber Yard and not the respondent. From the foregoing authority, I find that the fact that respondent is in such near relationship to Andmore Timber Yard from whom the consideration proceeds does not entitle it to sue upon the contract between appellant and Andmore Timber Yard. Respondent is indeed a stranger to the said contract in issue and cannot claim upon it and on that basis this suit ought to have been dismissed.

20. I have considered the provisions of Order 30, rule 9 which provides that:

**“Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firmname.**

PW1 in his testimony stated that Andmore Timber Yard is a business name. Andmore Timber Yard which is the entity that had a contract with the appellant ought to have sued in its name instead of through a company whose directors are also its owners. And even as much as applicant has conceded owing Andmore Timber Yard Kshs. 2,226,750/- the doctrine of privity requires that only a party to a contract can sue. This court is therefore incapable of aiding a party that is not legally before it.

#### **Disposition**

21. In view of the foregoing finding, the Appeal is allowed. Andmore Timber Yard is at liberty to pursue the appellant if it so wishes. Each party shall bear its own costs

**DATED, DELIVERED AND SIGNED THIS 25th DAY OF May 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Appellant - N/A

Respondent - Mr. Bagada h/b for Mr. Onsongo