



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 20 OF 2017

KENNETH MUTEMBEI t/a

MARKFIVE SUPPLIERS.....1ST APPELLANT

MERCY MUNARI t/a

MARKFIVE GARAGE.....2ND APPELLANT

VERSUS

GALAXY MERCHANTS LTD.....RESPONDENT

(Being an appeal from the Judgment delivered on 8th February, 2017 by Hon. Stella Abuya (Senior Principal Magistrate) Chief Magistrate's Court at Meru in CMCC No. 40 of 2014).

JUDGMENT

1. The Respondent who was the Plaintiff in the Lower Court sued the Appellants (Defendants) vide the amended plaint dated 16th March, 2014. The claim was for the sum of Ksh.1,539,703/= for goods allegedly supplied to the Appellants and not paid for.
2. The claim was denied through the statement of defence dated 11th March, 2014. In the alternative, it was pleaded that the Defendants are separate legal entities and ought to have been sued as the 1st and 2nd Defendant.
3. The trial magistrate entered judgment in favour of the Respondent as prayed plus interest and costs.
4. The Appellants were dissatisfied with the said judgment and appealed to this court on the following grounds:
 1. That the learned chief magistrate erred in law and in fact entertaining the respondents suit when she had no jurisdiction to hear the suit.
 2. That the learned chief magistrate erred in law and in fact in failing to hold that the appellants were separate entities, and they could not be sued together, the learned chief magistrate erred in law and in fact in failing to hold that the suit was incompetent and offended the express provisions of order rule 1 of the Civil Procedure Rules.

3. That the learned chief magistrate erred in law and in fact in that she misapprehended the evidence adduced and came to the wrong conclusion.

4. That the judgment of the learned chief magistrate is against the weight of the evidence and the law.

5. The parties opted to canvass the appeal by way of written submissions. I have considered the said submissions.

6. PW1 Vinit Arvind Salva a director of the Respondent Company testified on behalf of the company. His evidence was that the company supplied building materials to the Appellants who issued them with cheques for the payment of the 1,539,703/= but that the 18 cheques issued bounced. The dishonoured cheques were produced as exhibits. Letters by the Appellants who are husband and wife explaining the delay in payment were also produced as exhibits. It was PW1's further evidence that he paid Ksh.2,000/= bank penalties per each bounced cheque which came to a total of Ksh.36,000/=. PW1 maintained his evidence during cross-examination.

7. Kenneth Mutembei the 1st Appellant testified that he ordered for the goods and issued the Respondent with post-dated cheques. He blamed the delay in payment for the goods on delayed payments by Nyambene County council for a project he had carried out for the council. According to the 1st Appellant, the Respondent was malicious in that he banked all the post-dated cheques then proceeded to report the matter to the police even before the parties had carried out a reconciliation of the account. The 1st Appellant denied the delivery of goods amounting to Ksh.1,596,703/=.

8. The evidence from both sides reflect that the claim was for a debt of Ksh.1,539,703/=. The first ground of appeal therefore has no basis as any magistrate with the requisite pecuniary jurisdiction could entertain the same.

9. On whether the Appellants were separate entities, it is noteworthy that they are sued as "Kenneth Mutembei trading as Markfive Suppliers" and "Mercy Munari trading as Markfive Garage". These are business names. Some of the cheques were issued by the 1st Appellant trading as "Markfive Suppliers" and others issued by the 2nd Appellant trading as "Markfive Garage". The evidence by the 1st Appellant is that the 2nd Appellant is his wife. The letter dated 8th March, 2013 addressed to CFC Bank is signed by both the Appellants. The letter explains *inter alia* the problems that lead to the cheques being dishonoured. The said letter shows the two Appellants were working together on the Nyambene County Council Project and the cheques were for payment of the same goods. The trial magistrate therefore correctly held that the two Appellants were jointly and severally liable.

10. The Appellants issued the cheques that were dishonoured. They can now not be heard to argue whether the goods were ordered and supplied. That would beat any logic as to what the payment was for. It is also noteworthy that the 1st Appellant wrote letters explaining his financial situation to the Respondent. In the said letters the 1st Appellant admits owing the Respondent the money in question. The Respondent explained that the goods were collected from his shop and there were therefore no delivery notes. I am satisfied that the Respondent's case was proved on a balance of probabilities.

11. In the upshot I find no merits in the appeal and dismiss the same with costs.

B. THURANIRA JADEN

JUDGE

Dated, signed and delivered in Meru this 30th day of July, 2018

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