



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 215 OF 2010

ATEET JETHA. APPELLANT

VERSUS

OLERAI LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate Hon. S N Riechi (Mr) delivered on 17th May, 2010 in Milimani CMCC No. 4262 of 2007)

J U D G M E N T

1. Olerai Ltd, the Respondent herein filed an action against Ateet D. Jetha, the Appellant herein, vide the Complaint dated 28th May, 2007. In the aforesaid complaint the Respondent sought for payment of Ksh.1,500,000/- in respect of the value of maize consignment supplied to the Appellant in the year 2004.

2. The Appellant filed a defence to deny the Respondent's claim. The suit was heard and determined in favour of the Respondent. Being Aggrieved, the Appellant preferred this appeal and put forward the following grounds: -

- i. The learned magistrate erred in law and fact in finding judgment against the Defendant for acts of a Limited Liability Company.**
- ii. The learned magistrate erred in law and fact in finding judgment against the defendant when there was clearly no privity of contract between the Plaintiff and Defendant.**
- iii. The learned magistrate erred in law and fact in finding judgment against the defendant on account of the value of a consignment of dry maize that was not supplied to him in his personal capacity but to a third party.**
- iv. That the learned magistrate erred in law and fact in finding judgment against the defendant for acts of a third party when there was no agreement, memorandum or note in writing and signed by him or at all promising to answer to the debts of the 3rd party that was supplied the consignment of dry maize by the plaintiff.**
- v. That the learned magistrate erred in law and fact in basing his judgment on the plaintiff oral evidence that varied the contents of the written contract which is against the parole evidence rule.**
- vi. That the learned magistrate erred in fact in basing his judgment upon a cheque that the plaintiff had inserted the date and name of the payee without approval and against the instructions of the defendant.**
- vii. That the learned magistrate erred in fact in basing his judgment upon a cheque meant for goods other than the consignment that is the subject of this claim.**

3. When the appeal came up for hearing learned counsels appearing in the matter recorded a consent order to have the same determined by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the Appellant's written submissions. At the time of writing this judgment the Respondent had not filed its submissions.

4. Though the Appellant put forward a total of seven (7) grounds, those may be determined in two broad grounds vizly.

- a. First, that the trial magistrate erred when he rendered a judgment against the Appellant for acts or omissions of a limited liability and where there was no privity of contract between the Appellant and the Respondent.**

b. Secondly, that there was no privity of contract between the Appellant and the Respondent.

5. On the first ground of appeal, the Appellant is of the submission that Maizena Millers Ltd, which was supplied with the maize consignment was and is, a distinct legal entity from the Appellant, therefore, the Appellant could not be held liable for the liabilities of the aforesaid company.
6. It is important to re-examine the evidence and arguments presented before the trial court over the first issue. Hugo Wood (PW 1), told the trial court that in the month of September, 2004 he delivered maize to Maizena Millers Ltd and was partly paid, leaving a balance of Ksh.1,599,175/- unpaid.
7. It said that Appellant issued the Respondent with a signed but an undated cheque for Ksh.1,500,000/-. The Respondent held the cheque for two years after which he dated it and had it banked. The aforesaid cheque was returned unpaid for lack of funds.
8. Ateet Jetha (DW 1) told the trial court that he was the Operations Manager for Maizena Millers Ltd, a firm owned by his father and family. He expressly stated that Maizena Millers Ltd had a business relationship with the Respondent where the Respondent would supply maize to the Appellant at the request of Maizena Millers Ltd. DW 1 stated that he later left the employment of the company and established his own firm by the name Excel Milling Ltd. DWI averred that he spoke to PW 1 to supply his firm maize and went ahead to issue a cheque for Ksh.1,500,000/- but the maize was not supplied and that is why he did not pay.
9. In his judgment, the trial Chief Magistrate did not believe the Appellant's assertion that he had issued the cheque to the Respondent for payment for a consignment of maize to be supplied to his company known as Excel Millers.
10. The trial Chief Magistrate also rejected the assertion by the Appellant that he would not have issued a personal cheque for payment for maize supplied to Maizena Millers Ltd. The learned Chief Magistrate eventually found the case in favour of the Respondent by finding the Appellant truly indebted to the Respondent.
11. The evidence tendered before the trial court shows that the Appellant was sued as an individual for the supply of dry maize delivered to Maizena Millers Ltd.
12. PW 1 presented documentary evidence showing that the Respondent had raised an invoice addressed to Maizena Millers Ltd for Ksh.1,599,175/-.
13. It is clear in my mind that the learned Chief Magistrate did not appreciate the fact that though the Appellant presented his personal cheque to the Respondent that in itself did not change the legal status of the Appellant. The Respondent had supplied maize to a Limited Liability Company known as Maizena Millers Ltd which is a totally distinct and separate legal entity from the Appellant. The Appellant was not and could not be expected to be held liable for the acts and omissions of a limited liability company in his personal capacity. With respect, I agree with the Appellant's submissions that the learned trial Chief Magistrate erred.
14. The second ground is closely related to the first ground which is to the effect that there was no privity of contract between the Appellant and the Respondent. I have carefully re-evaluated the evidence presented by both sides before the trial court and it is apparent that the Respondent had a contract with Maizena Millers Ltd to supply dry maize consignment. There was no evidence of any contract between the existing between the Appellant and the Respondent. It is, therefore, clear that there was no privity of contract between the Appellant and Respondent to find the Appellant liable for the debt owed to the Respondent.
15. In the end, this appeal is found to be meritorious. It is allowed. Consequently, the order entering judgment in favour of the Respondent is set aside and is substituted with an order striking out and dismissing the suit with costs to the Appellant. Costs of this appeal is awarded to the Appellant.

Dated, signed and delivered at Nairobi this 16th day of August, 2018.

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J K SERGON

JUDGE

In the presence of

..... **for the Appellant**

..... **for the Respondents**