



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 220 OF 2006

DELMONTE KENYA LIMITED.....PLAINTIFF

VERSUS

EVANS MBURU MUTHEMBA.....1ST DEFENDANT

ROBERT NDARU GICHONI.....2ND DEFENDANT

J U D G M E N T

1. Delmonte (K) Ltd, the Plaintiff herein filed this action by way of the plaint dated 7th March, 2006 and amended on 27th November, 2009 against Evans Mburu Muthemba and Robert Ndaru Gichoni, the 1st and 2nd Defendants respectively, whereof it sought for payment of Ksh.5,500,000/- together with costs and interest. The Defendants each filed a defence to deny the Plaintiff's claim.
2. When the suit came up for substantive hearing, the Plaintiff and the Defendants tendered the evidence of a single witness. Willis Alala Oyudo (PW 1) testified in support of the Plaintiff's case.
3. PW 1 told this court that he is the Head of Finance and accounting for the Plaintiff and was therefore, authorized to testify in support of the Plaintiff's case.
4. PW 1 further told this court that in December, 2004, Evans Mburu Muthemba (DW 1) was the Treasury Manager for Delmonte while he was the Senior Accountant in charge of General Accounts. PW 1 stated that the 1st Defendant (DW 1) role included cash management, foreign exchange negotiations, negotiating bank loan facilities and overdraft. PW 1 further stated that DW 1, was also responsible for the cash office, cash received, cash disbursed, bank depots and messegerial services of Robert Ndaru Gachoni (DW 2), the 2nd Defendant and the clerk responsible for banking.
5. The Plaintiff further stated that in December, 2004, the 2nd defendant (DW2) was responsible for banking and was answerable to DW 1. PW 1 also pointed out that the 2nd Defendant's role included ensuring monies released to him for banking were deposited in the bank accounts in Commercial Bank of Africa and Kenya Commercial Bank. PW 1 further stated that DW 1 and DW 2 were terminated from employment as a result of the loss of USD.68,000 on 29th December, 2004.
6. The Plaintiff also told this court the 2nd Defendant (DW 2) was arrested and arraigned before the Chief Magistrate's Court, Thika to face a charge of theft by servant but was eventually acquitted of the Criminal Offence on account of the prosecution's failure to prove the case against the 2nd Defendant beyond reasonable doubt.

7. The Plaintiff also stated that the 1st Defendant opted to resign before his employment with the Plaintiff was terminated for the reason that he failed to follow the company policy with regard to money handling of bulk cash for banking and for violating the requirement of the money Insurance Policy which required escort warranty for moneys above Ksh.500,000/- to be guarded and escorted by recognized Security Firm and the Kenya Police in an armoured vehicle.
8. PW 1 said that the 1st Defendant is guilty of the particulars of negligence stated in the plaint leading to the loss of the aforesaid monies. PW 1 also stated that he was aware that the 2nd Defendant was supposed to be on anti-convulsion drugs on the day the monies were lost i.e. on 29th December, 2004.
9. PW 1 was of the submission that the 2nd Defendant is guilty of the particulars of negligence as set out in the amended plaint. He pointed out that the 2nd Defendant knew about his condition and that had he been taking drugs as required he would not have suffered an epileptic seizure.
10. It was also pointed out by PW 1 that on 29th December, 2004, the 2nd Defendant had gone for a resupply of his medication before the due date indicating that he may have lost the previous prescription and was therefore, not taking his drugs.
11. The Plaintiff alluded that the 2nd Defendant was gravely careless to walk on foot from Barclays Plaza to Wabera Street and Past Post Bank House, a place generally known to be unsafe.
12. PW 1 accused the 1st Defendant for not bothering on how monies would get to the Bank yet that was his responsibility and that may be the reason why he opted to resign instead of waiting to be terminated.
13. The 1st Defendant (DW 1) testified in support of his case. DW 1 told this court that he was not negligent while performing his duties. DW 1 further stated that he was persuaded by the Plaintiff to leave the Plaintiff's employment by resigning. DW 1 also said that he was paid all his dues upon resigning and he therefore, has no claim against the Plaintiff.
14. DW 1 further said that the monies in question were received when he was not in the office. He stated that the monies were receipted and that he expected the cashier to inform the Finance Manager who would then determine how much money would be banked and how much would be retained.
15. DW 1 admitted having received money on 28th December, 2004. He, however, stated that it was the responsibility of the cashier to organize for security and banking.
16. DW 1 further admitted that the cashiers were under his supervision and that he was present in the office on 29th December, 2004. DW 1 also stated that he was aware that the 2nd Defendant (DW 2) was given USD 68,000/- to bank and that he was aware too of the Insurance Policy in respect of money over Ksh.500,000/-.
17. DW 1 also admitted that the 2nd Defendant was not given security escort while going to the bank and that he was aware DW 2 had occasional epileptic seizures.
18. Robert Ndaru Gichoni the 2nd Defendant (DW 2) testified in support of his defence. DW 2 denied being negligent while performing his duties. He stated that he was initially employed as a store attendant but was later reassigned clerical and messengerial duties.
19. DW 2 stated also that his duties included banking foreign cash.
20. DW 2 further stated that he was charged with the offence of stealing by servant but he was eventually acquitted for lack of evidence.
21. DW 2 stated that on 29th December, 2004 he was given the company car to take him to the bank to

bank USD 68,000/- among other duties.

22. The 2nd Defendant also stated that he dropped a cheque with Barclays Bank for the Plaintiff's employees payroll after which he went on foot to Commercial Bank of Africa in Wabera Street to deposit the USD 68,000/- which amount was in a bag.

23. DW 2 said that he developed an epileptic seizure before reaching Commercial Bank of Africa and in the process he lost the bag containing USD 68,000/- when he lost conscience.

24. At the close of evidence, learned counsels appearing in this matter were invited to file and exchange submissions. I have considered the rival submissions as well as the evidence. One main issue commends itself for the determination of this court that is whether or not the Defendants were negligent in performing their duties assigned by the Plaintiff

25. I have already outlined the evidence tendered by both sides over the issue and I do not need to regurgitate the same at this stage. The question is whether or not Evans Mburu Muthemba, the 1st Defendant was negligent in performing his role as the Manager in Charge of the Plaintiff's Treasury.

26. It is not in dispute that the 1st Defendant was the Manager in charge of the Plaintiff's Treasury at the time the monies in question were lost. The roles of the 1st Defendant were clearly explained by PW 1.

27. DW 1 admitted that he was aware of the Plaintiff's Money Insurance Policy and its provision with regard to banking of cash above Ksh.500,000/-.

28. DW 1 was required to enforce those guidelines as spelt out in the policy. I am satisfied that the Plaintiff through the evidence of PW 1 established that the 1st Defendant failed to enforce the provisions of the Escort Warranty provided in the Plaintiff's money Insurance Policy and as a consequence US 68,000/- was lost on 29th December, 2004.

29. DW 1 also failed to give clear instructions to the 2nd Defendant to first bank the cash at hand since he had not provided security escort as required. I find the 1st Defendant vicariously liable for the acts or omissions of the 2nd Defendant.

30. The next question is whether the 2nd Defendant was negligent in carrying his duties assigned by the Plaintiff. It is not in dispute that the 2nd Defendant performed clerical and messengerial duties. It is also not in dispute that the 2nd Defendant was prone to epileptic seizures which condition was well known to the Plaintiff and the 1st Defendant.

31. It is apparent from the evidence of PW 1 that the Plaintiff had provided adequate medication for the 2nd Defendant's condition to enable him manage it and carry out his duties.

32. The 2nd Defendant opted to first deposit a cheque with Barclays Bank instead of giving priority to deposit the USD.68,000/- in Commercial Bank of Africa. The 2nd Defendant decided to go through city market to reach Commercial Bank of Africa at Wabera Street. That street is known to be unsafe and the 2nd Defendant knew or ought to have known that fact.

33. The defences put forward by the Defendants are found to be lacking in merits. I am convinced that the 2nd Defendant in the circumstances, acted recklessly and carelessly hence he is found liable for negligence.

34. In the end, I am satisfied that the Plaintiff has proved its claim against both the Defendants on a balance of probabilities. Consequently, judgment is entered in favour of the Plaintiff and against the 1st and 2nd Defendants jointly and severally as follows: -

i) A sum of Ksh.5,500,000/-

ii) Costs of the suit.

iii) Interest on (i) at court's rate from the date of judgment until full payment.

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 Plaintiff***

..... ***for the 1st defendant***

..... ***for the 2nd defendant***