



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 85 OF 2013

NEW KENYA CO-OPERATIVE CREAMERIES LTD.....APPELLANT

- V E R S U S -

JOHNSON THEURI MWANGI.....RESPONDENT

(Being an appeal against the judgement delivered on 30th January 2013 by Hon. Nditika in Nairobi CMCC no. 2143 of 2004)

JUDGEMENT

1) Johnson Theuri Mwangi, the respondent herein, filed an action against New Kenya Cooperative Creameries Ltd, the appellant herein, claiming for payment of ksh.211,138 as unpaid dues for milk deliveries by the respondent to the Kenya Creameries Cooperative Ltd (K.C.C.). The appellant filed a defence denying the respondent's claim alleging *inter alia* that it had no privity of contract with the respondent. Hon. Nditika learned Senior Principal Magistrate heard the suit and in the end he gave judgment in favour of the respondent.

2) The appellant was aggrieved hence he preferred this appeal and put forward the following grounds.:

1. THAT the learned magistrate erred in both law and fact by failing to appreciate that the respondent had supplied milk to Kenya Co-operative Creameries Ltd which was wound up pursuant to a court order and that the respondent ought have therefore lodged its claim against the liquidator of Kenya Co-operative Creameries Ltd and not otherwise.

2. THAT the learned magistrate erred in law and fact in failing to appreciate the fact there was no nexus between Kenya co-operative Creameries Ltd and the appellant as the appellant had purchased the assets it did after it was incorporated in 2003 from Kenya Co-operative Creameries (2000) Ltd and not Kenya Co-operative Creameries Ltd.

3. THAT the learned magistrate erred in law and fact by holding that the appellant had purchased any trading stock including the milk allegedly delivered to Kenya Co-operative Creameries Ltd by the respondent against the weight of evidence on record, which clearly showed that there was no nexus between Kenya Co-operative Creameries Ltd and the appellant therein.

4. THAT the learned magistrate erred in both law and fact by entering judgment against the appellant against the weight of the evidence adduced including the fact that the alleged contract of supply was between the respondent and Kenya Co-operative Creameries Ltd (KCC Ltd) which had no nexus nor succeeded by the appellant company.

5. THAT the learned magistrate erred in both law and fact in failing to appreciate the identity and legal distinction between Kenya Co-operative Creameries Ltd, Kenya Co-operative Creameries (2000) Ltd and New Kenya Co-operative Creameries Ltd and thereby arrived at a wrong decision.

3) When the appeal came up for hearing this court directed the parties to file and exchange written submissions. At the time of writing this judgement, the appellant was the only party which had filed its submissions.

4) I have re-evaluated the case that was before the trial court. I have further taken into account the appellant's submissions. The aforementioned grounds of appeal are so interrelated that they should be determined together. The main issue which commends itself for determination is whether the appellant is liable to settle the liabilities of K.C.C Ltd. It is the submission of the appellant that KCC Ltd was wound up pursuant the High Court order made on 30.1.2003, vide H.C. Winding Up Cause No. 1 of 2002 and published in Gazette no. 1756 on 4.3.2003.

5) It is said that an official receiver was appointed as a liquidator and that all would be creditors were advised to prove their claims before the liquidator for payment and the respondent should have taken advantage by lodging his claim.

6) The appellant further pointed out that all the assets of KCC Ltd were sold off by Kenya Commercial Bank Ltd on the power of debentures

it held over the assets of KCC Ltd vide the agreement dated 12th April 2001.

7) It is also the submission of the appellant that KCC Ltd was wound up and all its creditors' claims against it ought to have been raised with the liquidator of KCC Ltd and the appellant having been incorporated on 24th June 2003 is a separate legal personality distinct from KCC Ltd.

8) The appellant further argued that no liabilities were transferred to the appellant because the same were dealt with by the official receiver duly appointed by the court in Winding Up Cause no. 1 of 2002.

9) The record shows that the respondent presented evidence showing that he supplied milk to KCC Ltd and was issued with delivery notes by KCC Ltd for ksh.211,138 between the month of September 1999 and January 2000. In his judgment Hon. Nditika stated that though the appellant did not produce the original documents, the sale agreement shows that the appellant bought all stocks including milk of the old entity.

10) The learned Senior Principal Magistrate also noted that the winding up proceedings were not produced and further appreciated the fact that the appellant and KCC Ltd were two distinct companies. He further noted that the appellant and KCC Ltd executed an agreement therefore the appellant could not be liable for the debts of KCC Ltd.

11) It is apparent from the record that the learned Senior Principal Magistrate noted that the original documents and the winding up causes were not presented to court. A careful perusal of the defence shows that the appellant had clearly indicated that the winding up cause number in respect of KCC Ltd. The appellant also presented copies of the sale agreement and gazette notices.

12) With respect, I agree with the appellant's submission that the appellant did not succeed KCC Ltd. The truth of the matter is that KCC Ltd was wound up and all its creditors were invited to present their claims to the liquidator.

13) I am also satisfied that the agreement executed by the government and K.C.C 2000 Ltd and K.C.C. Holdings did not transfer the liabilities of KCC Ltd to the appellant.

14) I am convinced further that there was no privity of contract between the appellant and the respondent therefore the learned Senior Principal Magistrate erred by holding the appellant liable for the debts or liabilities of KCC Ltd.

15) In the end, the appeal is found to be meritorious. It is allowed.

Consequently, the judgment given in favour of the respondent (plaintiff) is set aside and is substituted with an order dismissing the suit with costs to the appellant. The appellant to have costs of this appeal.

Dated, Signed and Delivered in open court this 19th day of October, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents