



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO 16 OF 2013

(Appeal from the Decree passed on 07.11.2012 in Kangema PMCC 199 of 2008 – A Too, SRM)

SAFARICOM LIMITED.....APPELLANT

VERSUS

JITEGEMEE SOCIETY LTD

(Suing through Duncan Gikandi,

Ann Wahito and Ruth Maina).....RESPONDENT

J U D G M E N T

1. The Appellant herein was the defendant in the court below while the Respondent was the plaintiff. The Respondent’s claim was in contract. The parties had entered into an M-Pesa agency contract. The contract was terminated by the Appellant without notice to the Respondent on grounds that the Respondent had conspired with an employee of the Appellant to defraud the Appellant.

2. In their plaint the Respondent contended that the Appellant disconnected its M-Pesa and sim replacement services occasioning it loss of business and profits. The Respondent then wrote to the Appellant and registered a dispute; it also invited the Appellant to suggest an arbitrator to hear the dispute in terms of the arbitration clause in their agreement. The Appellant declined and stated that the contract was due for termination.

3. The Respondent then filed suit. It claimed refund of money deposited with the Appellant; loss of expected earnings; general damages for breach of contract; costs of the suit and interest.

4. In its judgment, the trial court found that the Respondent had proved its case on a balance of probabilities and awarded the following -

Refund of deposits.....KShs 400,000/00

Loss of expected earnings.....340,000/00

Total.....KShs 740,000/00

The court also awarded costs of the suit and interest at court rates.

5. Aggrieved by that judgment the Appellant appealed to this court and put forth the following grounds, *inter alia* (appropriately rephrased) -

i. That the trial court misinterpreted clauses 10.1 and 10.2 of the agency agreement.

ii. That the court erred in making a contradictory finding that only KShs 200,000/00 was standing in credit yet proceeded to make an award for KShs 400,000/00 without justification.

iii. That the court erred in making an award for loss of expected earnings in the absence of proof of the same.

6. The appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 28/05/2014 while those of the Respondent were filed on 03/06/2014. Counsels highlighted their submissions on 08/07/2015.

7. When the court retired to consider its judgment however, it was discovered that the huge record before it did not include the original lower court record. Furthermore, the record of appeal had numerous documents (receipts, invoices, etc.) that were not legible at all. Eventually the original lower court record was availed, but it contained the same numerous illegible documents. Even after a very long period of time the counsels for the parties were unable to provide legible copies. The court therefore had to contend with the defective record of appeal in preparing this judgment rather than strike out the appeal on account of the defective record of appeal! That is why this judgment has taken so long to prepare.

8. I have considered the submissions of the parties both written and oral, including the authorities cited. I have also read through the trial court's proceedings so as to evaluate the evidence placed before it and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I did not hear and see the witnesses, and I have given due allowance for that fact. I am also guided by the principle that an appellate court will not readily depart from a trial court's findings of fact, except where its assessment or apprehension of those facts is clearly wrong, or not supported by the evidence placed before the court, or where the court acted on wrong principle in arriving at those findings.

9. In its submissions dated 16/05/2014, the Appellant submitted that the trial magistrate failed to appreciate the facts and evidence placed before her, particularly the M-Pesa agent agreement between the parties. It was further submitted that DW2 (Edward Muchiri) had testified that a certain employee of the Appellant had been charged together with the 1st Respondent with the offense of stealing from the Appellant; and further, that from the Appellant's investigations, it had been found that the Respondent had been found to have benefitted from fraudulent payments; and that the trial court ignored evidence and held that there was no proof that the Respondent had knowledge of the fraudulent transactions. The Appellant therefore submitted that the trial court failed to take account of the fact that the Respondent had written to the Appellant seeking calculations of any overpayment to them and undertook to refund such overpayments. To the Appellant this amounted to admission of liability.

10. On interpretation of clauses 10.1 and 10.2 of the agency agreement, the Appellant submitted that the provisions were binding upon the parties and therefore there was no need for any notice of termination of the contract as claimed by the Respondent. Those clauses read -

“10.1 Safaricom retains the right to temporarily or permanently disconnect the agent SIM from its network at any time if it determines in its sole discretion that the connection may be being (sic) used for purposes other than M-PESA services, or that the agent is not complying with the terms of this agreement and the terms of the M-PESA manual.

10.2 To the fullest extent permitted by law, Safaricom will not be liable for any costs, loss, liability or damage whether direct, special or consequential, howsoever and whensoever arising from any suspension or termination of this agreement.”

The Appellant submitted that the Respondent cannot then purport to avoid the provisions of the above clauses as contracts are binding on parties.

11. On the exemption clause 12.4 of the agency agreement - **“Except as provided herein, Safaricom’s liability shall not, whether in contract, tort or otherwise exceed in aggregate for any breaches the sum kshs. 100,000/00....”**

the Appellant submitted that since the law is clear that parties are bound by their contracts, the trial court should have been guided by that principle. The Appellant also submitted that the trial court failed to give any reasons for its findings and made generalized statements that did not conclusively solve the issues between the parties.

12. On loss of expected earnings, the Appellant submitted that it was of a special damage claim that should have been strictly proved. The Respondent claimed KShs 340,000/00 which it never proved. As for the award of KShs 400,000/00 refund, the Appellant submitted that the trial court failed to take into account the fact that it amounted to unjust enrichment to the Respondent as the deposits were non-refundable under the agency agreement.

13. On its part, the Respondent submitted that the trial court considered all the evidence placed before it before reaching arriving at its conclusions regarding the same; that the court noted that the omissions and commissions giving rise to the discrepancy in the commissions payable to the Respondent were carried out by the Appellant’s employee, and that the Respondent was not privy to the Appellant’s administrative issues; that the Respondent never acknowledged receiving any overpayments; and that the Appellant was trying to unfairly make the Respondent bear the costs of its internal administrative weaknesses as it relied on evidence of their employee- who allegedly forged documents and stole from them. It was further submitted that there was no evidence tendered in court which proved that the Respondent was involved in any fraudulent activities, and that allegations in that regard were mere attempts by the Appellant to absolve itself from any claim or liability.

14. The Respondent further submitted that the trial court correctly interpreted the provisions of the agency agreement; the Respondent was thus entitled to the reliefs granted, and that the trial court correctly found that the Respondent earned on average a sum of KShs 2,000/00 per day. The award of KShs 340,000/00 for loss of expected earnings from the date of breach of contract to the date of filing suit was there lawful and just.

15. The Respondent further submitted that the Appellant was not in court with clean hands as it had declined arbitration as provided for in the agency agreement; further, the Appellant never claimed the alleged overpayment from the Respondent either through any demand letter or by way of a counter-claim.

16. Did the trial court misinterpret clauses 10.1 and 10.2 of the agency agreement? Faced with a similar clause in *Laiser Communications Limited & 5 Others –vs- Safaricom Limited [2016]* the *Court of Appeal* had this to say -

“In light of this clause limiting liability of the respondent to only KShs 100,000/00, we are of the considered view that enforcing the arbitral clauses would seriously impede the applicants’ right to access justice. The cause of action as set out by the appellants involves large sums of money. If that clause is enforced, and the respondent is successful, it would be prejudicial. An arbitral clause that is oppressive or repugnant to justice is one that disadvantages one side. It is clear that the respondent herein would have the upper hand; it would amount to undue influence and an unfair bargaining power on the respondent’s part. The arbitration clauses would therefore lead to an injustice.”

This interpretation is similar to the one given by the trial court in the present case. The court thus did not err.

17. Regarding the award of KShs 400,000/00, it will be noted that the Respondent’s claim was for refund of money deposited which was said to be KShs 300,000/00. There was also evidence that at the time of disconnection of the lines, the Respondent had a float of KShs 200,000/00 and a deposit of KShs 100,000/00 (paid on 20/12/2010 in advance for SIM swaps) which had not been delivered at the time of

switching off of its lines and termination of contract. ***(Luckily, the receipt for this transaction is among the few legible ones on the record of appeal at page 24).***

18. The trial court awarded a refund of the deposited money amounting to KShs 400,000/00 comprising of the KShs 300,000/00 deposit and KShs 100,000/00 deposit. I have perused the trial court record and note that both the Appellant and the Respondent referred to the KShs 300,000/00 as ***M-Pesa float***. Clause 5 of the agency agreement provided -

“The M-PESA float shall at all times during the agreement period be the PROPERTY OF THE AGENT and shall vary in accordance with the transaction effected by the agent as specified in the M-PESA agents’ manual. Any E-money outstanding in the M-PESA float SHALL BE EXCHANGED FOR AN EQUIVALENT AMOUNT OF MONEY from the M-PESA account on expiry or termination of the agreement.”

20. The evidence showed that the Respondent had deposited a sum of KShs 300,000/00 at the commencement of the agency agreement. At the time of disconnection of the lines and termination of contact the float was down to KShs 200,000/00 in e-money, and cash of KShs 50,000/00. The deposit therefore that was available in the Respondent’s e-account was KShs 200,000/00 which was to be refunded to the Respondent upon termination. The payment in advance of KShs 100,000/00 was also to be refunded as the Appellant had not delivered the SIM swaps. The trial court should thus have awarded a refund of KShs 300,000/00 and not KShs 400,000/00.

21. Finally, loss of earnings is a special damage claim that must be specifically pleaded and strictly proved. The Respondent did not strictly prove its earnings at KShs 2,000/00 per day, and this claim should not have been awarded.

22. In conclusion, I will partially allow this appeal by setting aside the judgment of the lower court and substituting therefor the following -

(a) There shall be judgment for the plaintiff in the sum of KShs 300,000/00 plus costs and interest at court rates from the time of filing suit until payment in full.

(b) The claim for loss of earnings is dismissed.

(c) The parties shall bear their own costs of the appeal.

Those will be the orders of the court.

DATED AND SIGNED AT MURANG’A THIS 30TH DAY OF MARCH 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 31ST DAY OF MARCH 2017