



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 117 OF 2008

BETWEEN

MINI BAKERIES (MSA) LTD.APPELLANT

AND

MOHAMED AHMED ABDUN &ALI AHMED DAHMAN...RESPONDENTS

(An appeal from the Judgment of Hon. H. Adika RM, delivered on 28th May, 2008 in Mombasa RMCC No. 151 of 2005).

JUDGMENT

1. The appellant, Mini Bakeries (Msa) Limited being aggrieved by the Judgment of Hon. H. Adika filed a memorandum of appeal on 27th June, 2008 against the respondents Mohammed Ahmed Abdun and Ali Ahmed Dahman hereinafter referred to as the 1st and 2nd respondents, respectively.
2. The memorandum of appeal raises the following grounds of appeal:-
 - (i) The Learned Magistrate erred in law and fact in finding that the agreement signed by the respondents honouring the debt owed to the appellant had been obtained under duress when the respondents had not pleaded the same and/or set up the particulars of duress in the defence;
 - (ii) The Learned Magistrate erred in law and fact in dismissing the plaintiff's case for want of proof of the claim while it was clear the defendants were indebted in that they had signed the agreement and the plaintiff had adduced evidence which was uncontroverted;
 - (iii) The Learned Magistrate erred in law and fact in dismissing the Plaintiff's claim for want of proof yet the plaintiff demonstrated to the court by way of evidence that the defendant had paid part of the amount Kshs. 401,860/= leaving a balance of Kshs. 331,880/=;
 - (iv) The Learned Magistrate erred in law and fact in finding that the plaintiff had not proved its case in stating how the amount was arrived at while the plaintiff in its evidence had produced cash flow that stated the same; and
 - (v) The Learned Magistrate erred in law and fact in failing to consider the evidence and

submissions made by the parties in writing the judgment delivered on 27th May, 2008.

The appellant prays that:-

(a) The appeal to be allowed;

(b) A retrial to be ordered;

(c) In the alternative, the Judgment of the Learned Magistrate be varied and Judgment be entered in favour of the appellant as prayed in the Resident Magistrate's Court Civil Case No. 151 of 2005, which sought Judgment against the 1st and 2nd defendants jointly and severally for Kshs.331,880/= plus costs and interest; and

(d) Costs of the appeal.

3. Counsel on record filed their written submissions which they highlighted.

DUTY OF THE FIRST APPELLATE COURT

4. The duty of the first appellate court is well articulated in the case of **Shah vs Mbogo** [1968] EA 93, where the Court of Appeal stated thus:-

“I think it is well settled that a court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

This court will therefore re-evaluate and analyze the evidence adduced in the lower court and arrive at its own independent decision bearing in mind that it has not had the opportunity of seeing the demeanour of the witnesses who testified.

5. PW1, Yunus Abdulrahman Baghan an employee of the appellant company adduced evidence that he knew the 1st respondent who used to work as the appellant's Branch Manager at Likoni. He produced the 1st respondent's letter of employment as plf. exh. 1. His evidence was to the effect that he conducted an audit on 15th July, 2004 and found a lot of discrepancies at the Likoni branch. He took the loading book from the 1st respondent and another audit was carried out by the appellant company. The audit revealed that there was more stock in the said book than there was in actual sense. He produced the appellant's cash flow chart as plt. exh. 2.

6. On checking the loading books, he found fictitious entries. The 1st respondent could not tell him which motor vehicles took the loaves (sic). The 1st respondent was sacked. When asked to go to the office he did not. The appellant reported the incident to Makupa Police Station and the 1st respondent was arrested but he was never taken to court. PW1 further testified that the 2nd respondent agreed to pay the outstanding amount together with the 1st respondent. They signed an agreement with the 2nd respondent. He stated that the 1st respondent was not in custody when the agreement was signed. The agreement dated 15th July, 2004 was produced as plt. exh. 3 and that dated 21st July, 2004 was produced in court as a plf. exh. 4 (after making reference to the Hon. Magistrate's handwritten proceedings for clarity). It was PW1's evidence that they withdrew the criminal case as they had an agreement to settle the amount. They wrote a letter to the Police on 22nd July, 2004 to that effect. The said letter was produced as plf. exh. 5.

7. He indicated that in accordance with the agreement, the 1st respondent paid Kshs. 70,000/= as the 1st installment whereas he was required to pay Kshs. 100,000/=. A receipt dated 18th August, 2004 in respect to the said payment was produced as plf. exh. 6. He indicated that the 1st appellant was dismissed

from work after he absented himself from duty. A letter to that effect was produced as plf. exh. 7. He added that they did not mislead the 2nd respondent to sign the agreement but he signed it of his own will. A demand letter addressed to the 1st respondent dated 25th November, 2004 was produced as plf. exh. 8. He stated that the amount due is Kshs. 331,860/= and requested for the same and interest at commercial rates.

8. On cross-examination, PW1 stated that they did not send a demand letter to the 2nd respondent. He reiterated that he reported to the Police on 18th July, 2004 and later on when he failed to report to work, even after he had signed the agreement. PW1 informed the court that the 1st respondent was arrested on 18th July, 2004 and was in custody till the 20th or 21st July, 2004. He further stated that the 2nd respondent signed the agreement in the presence of the 1st respondent. The theft occurred over a duration of 2 - 3 months.

9. The 1st respondent testified as DW1. He informed the court that he used to work for the appellant company in the year 2003, as the Branch Manager, Likoni. He was in charge of production and the sales people. He indicated that the Cashier is the one who received money but he never received any money. They would at times sell 2,800 loaves (of bread) per day or 1,000 loaves if business was low.

10. He explained that the person who was there (employed) before him did not hand over to him and yet a problem existed from before. The 1st respondent testified that he was told that if he was to be released, he had to sign the papers. He denied having stolen money or loaves of bread. He stated that he was given leave but before he could finish the same, he was issued with a termination letter. He stated that his leave was for 54 days from 19th July, 2004 to 20th September, 2004.

11. On cross-examination, the 1st respondent stated that he did not sign the agreement at the Police Station. He informed the court that after his arrest, he was removed from the cells the following day and taken to the office where he signed the agreement. He stated that he did not report to the Police that he was being harassed. His guarantor was his father.

12. The Hon. Magistrate considered the evidence tendered before him and found that the alleged false entries were not proved and the period when they were made was not indicated. The Hon. Magistrate held that the agreement in issue was signed under duress and that the 1st respondent signed it to avoid being taken to the cells. The court found the appellant had not proved its case on a balance of probabilities and proceeded to dismiss it, with costs.

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If the agreement dated 15th July, 2004 was signed under duress; and

(ii) If the 2nd respondent is liable to indemnify the 1st respondent from non-payment of the sum of Kshs. 331,860/=.

13. At the hearing of the appeal, Mr. Khatib for the respondents submitted that the agreement dated 15th July, 2004 was obtained and signed under duress. The 1st respondent in his defence stated that he was removed from the cells after his arrest and taken to the appellant's offices where he signed the agreement after he was told that he had to sign the papers in order to be released.

14. On the foregoing, I note from the evidence adduced by PW1 that on the 15th July, 2004 when the 1st respondent signed the agreement, he had not been arrested. He was arrested on 18th July, 2004 after he absconded duty. That was the evidence of PW1 and it was not controverted by the 1st respondent.

15. In his defence, the 1st respondent stated that when he took up the job, there was no handing over that was made to him by his predecessor. This then leaves the court to wonder how as a Branch Manager, he could have agreed to take up an appointment without any handing over and if indeed that was the position, he did not raise it up with his Supervisors from the outset or resign from his position soon after employment. His letter of appointment produced as plf. exh. 1 shows that he was employed on 1st June, 2003. The shortfall was detected on 15th July, 2004. The discovery in the discrepancies in the loading book was therefore made one year after the 1st respondent was employed by the appellant. From the foregoing, it is my finding that the 1st respondent's explanation as to the shortfall was not plausible.

16. Mr. Khatib argued that the cash flow chart produced as plf. exh. 2 does not show how the figure of Kshs. 401,860/= was arrived at. I note that the said Counsel represented the respondents in the lower court and was given an opportunity to cross-examine PW1 on any issue he wanted clarified. PW1 produced a cash flow chart to show stock in and stock out per day for the period that was audited. The costs of the items comprising the stock are also indicated therein. At this stage of appeal, the said amount cannot be said to be in issue more so in light of the agreement that the 1st respondent signed on 15th July, 2004. Out of the sum claimed, the 1st respondent paid Kshs. 70,000/= to the appellant on 18th August, 2004 showing that he acknowledged his culpability in the shortfall.

17. The 2nd respondent, signed an agreement on 21st July, 2004 where he accepted liability for the shortfall incurred by his son, the 1st respondent. He signed the said undertaking which was witnessed by his brother-in-law and some employees of the appellant company. He is therefore bound by the said agreement.

18. The burden of proof in civil cases is on a balance of probabilities. In so stating I am guided by the case of **D.T. Dobie & Co. Ltd. Vs Wanyonyi Wafula Chebukati** [2014] eKLR.

“The degree is well settled. It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think that it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case where a tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

19. It is my finding that by undertaking liability on behalf of the 1st respondent, the 2nd respondent became jointly and severally liable to pay the debt in issue with the 1st respondent. It is my considered finding that the Learned Magistrate erred when she dismissed the appellant's claim despite the evidence tendered in support of the appellant's case. The appellant discharged its burden of proof to the required standard.

20. The upshot of the foregoing is that the appeal is hereby allowed. I hereby set aside the Judgment entered in the lower court on 28th May, 2008 and enter Judgment for the appellant as against the 1st and 2nd respondents jointly and severally for the sum of Kshs. 331,880.00.

21. I award costs of the suit in the lower court and the appeal herein to the appellant. Interest at court rates is also awarded to the appellant.

DELIVERED, DATED and SIGNED at MOMBASA on this 23rd day of March, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Maosa holding brief for V.W. Maina for the appellant

No appearance for the respondents

Oliver Musundi - Court Assistant