



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 200 OF 2012

SPECIALISED POWER SYSTEMS LTD.....APPELLANT

- V E R S U S -

PILOT TECHNICAL SERVICES LTD.....1ST RESPONDENT

CYPRIAN OJWANG OMOLLO.....2ND RESPONDENT

NANCY ATIENO.....3RD RESPONDENT

*(Being an appeal from the judgement /decree of the Chief Magistrate at Milimani Commercial Courts
Hon. T. W. C. Wamae (Mrs) delivered on 22nd March, 2012 in CMCC No. 3788 of 2010)*

JUDGEMENT

1. Specialised Power Systems Ltd, the appellant herein, filed an action against Pilot Technical Services Ltd, Cyprian Ojwang Omollo and Nancy Atieno, the 1st, 2nd and 3rd respondents respectively in the Chief Magistrate's Court, Milimani Commercial Courts, vide the plaint dated 14th June, 2010. In the aforesaid plaint the appellant sought for judgment in the sum of ksh.2,472,166/40 with 16% interest from 1.3.2008 and costs against the respondents jointly and severally. The respondents filed a joint statement of defence to deny the appellant's claim. At the trial, the appellant summoned a single witness to buttress its case while the respondents closed their defence without summoning witnesses. Hon. T.W.C. Wamae(Mrs) heard and dismissed the case. Being aggrieved the appellant preferred this appeal.

2. The appellant put forward the following grounds on appeal.

- 1. THAT the said learned magistrate erred in law and fact in dismissing the appellants suit.***
- 2. THAT the said learned magistrate erred in law and fact by not considering the appellant's sworn witness testimony.***
- 3. THAT the said learned magistrate erred in law and fact by not considering the various invoices produced as evidence by the appellant.***
- 4. THAT the said learned magistrate erred in law and fact by falling by not considering the various delivery notes produced as evidence by the appellant.***
- 5. THAT the said learned magistrate erred in law and fact by not considering that the second respondent negotiated and made various orders for various electrical products and control panels on behalf of the first and third respondents.***

6. THAT the said learned magistrate erred in law and fact by not considering that the second respondent sought and demanded to be supplied with the said electrical products and control panels knowing that the first respondent was not in a position to pay.

7. THAT the said learned magistrate erred in law and fact by not taking into account that the respondent's Agent Joseph Ajeko signed all the delivery notes.

8. THAT the said learned magistrate erred in law and fact by failing to take into account that all goods ordered for by the second respondents on behalf of the first and second respondents were taken possession of at the appellant's company premises.

9. THAT the said learned magistrate erred in law and fact in deliberately ignoring the delivery notes produced as evidence and dismissing the appellant's case on failure to produce a complimentary slip signed by the second respondent.

10. THAT the said learned magistrate erred in law and fact by not considering that the appellant's witness was categorical in his testimony that the respondents had ordered for the various electrical goods.

11. THAT the said learned magistrate erred in law and fact by falling to take into account that the respondents did not call any witness or evidence.

12. THAT the said learned magistrate erred in law and fact by not considering that the respondents did not call any evidence to prove that the only goods they ordered for amounted to ksh.45,627.95.

13. THAT the said learned magistrate erred in law and fact by finding that Ms. Irura Nguchuga Advocate was personally liable to the respondents for the costs of the suit.

14. THAT the said learned magistrate erred in law and fact by not considering the averments in the plaint and witness statement of the appellant averring that the appellant had appointed the firm of Irura Nguchuga and company Advocates to act for the in this matter.

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4. I have re-evaluated the case that was before the trial court. I have also taken into account the written submissions filed by both sides. The appellant summoned its General Manager, Kalpesh Patel (PW1) to testify in support of its case. PW1 stated that the 2nd and 3rd respondents are directors of the 1st respondent. He stated that the 2nd respondent made oral orders for the supply of goods and on complementary slips on various dates between the year 2007 and 2008. PW1 avers that the appellant supplied the 1st respondent with goods worth ksh.2,517,794/35 out of which the 1st respondent only paid ksh.45,627/95 leaving a balance of ksh.2,472,166/40. PW1 produced invoices and delivery notes indicating that all the goods ordered for were collected and signed for by one Joseph Aseko who represented himself as the agent of the defendants. In cross-examination, PW1 conceded that the 3rd respondent was not known to him and that he made no order for the supply of the goods. PW1 also conceded in cross-examination that the invoices and delivery notes were not stamped. The learned Chief Magistrate upon considering PW1's evidence, came to the conclusion that, since the respondents denied making any orders for the supply of the goods in question, the appellant was under duty to prove the said orders and the only way it could have done so was to produce the complementary slips issued by the 2nd defendant. The learned Chief Magistrate also held that the respondent failed to produce the complementary slips to link the said Joseph Aseko to the respondent thus failing to discharge its duty that the goods were collected with the authority of the respondents. There was also a challenge on the basis that the appellant failed to tender evidence showing that the firm of Irura Nguchuga & Co. Advocates was authorised by way of company of resolutions the 1st respondent to institute these proceedings. The

learned trial magistrate stated that she was satisfied that the failure by the appellant to prove that it had appointed the firm of Irura Nguchuga & Co. Advocates to act for it was fatal.

5. Though the appellant put forward a total of twelve (12) grounds of appeal, this court is of the view that the appeal may be determined by one main ground i.e as to whether or not the learned Chief Magistrate properly dismissed the appellant's suit. It is the submission of the appellant that there were sufficient evidence presented by the appellant to prove its case but the trial magistrate ignored the same. It was pointed out that the respondents did not present any shred of evidence to controvert the appellant's evidence. The respondents are of the view that the learned Chief Magistrate gave incisive and analytical consideration of the appellant's evidence hence it cannot be alleged that the trial magistrate never considered the appellant's evidence.

6. I have by way of re-evaluation shown the manner the learned Chief Magistrate dealt with the appellant's case. What emerges from the evidence tendered is that the parties herein had a long standing relationship that the appellant would accept verbal orders made by the respondents. This fact appears to have been admitted by the respondents in their defence that they had a contract with the appellant to supply them electrical products. They, however, aver that they paid for the supply. A careful examination of the evidence tendered by the appellant's witness will reveal that the invoices and delivery notes were not stamped by the respondents since the products were not delivered to the respondents but the respondents took possession of the goods at the appellant's office. PW1, further stated that it is only when the appellant would deliver goods to the client's office would the client stamp on the invoice and delivery notes. This piece of evidence was not captured by the learned Chief Magistrate in her judgment. It is apparent from the judgment of the learned Chief Magistrate that she formed the opinion that since the respondents had denied that they made any orders, the appellant was bound to prove the said orders and supply by producing the complimentary slips given to the 2nd respondent. With respect, the learned Chief Magistrate fell into error. The respondents did not summon witnesses to controvert the evidence presented by the appellant. The trial magistrate could not rely on a defence filed without evidence to shift the burden of proof to the appellant. A defence filed without support of evidence remains as a mere assertion. It is also apparent from the trial court's judgment that the learned Chief Magistrate ignored both the appellant's documentary and oral evidence.

7. In the circumstances of this case, I am convinced that this appeal should be allowed. I have purposely avoided to consider the grounds touching on the merits of the evidence because I think this is one of those rare cases which should be send back for retrial. Consequently, this appeal is allowed. The order dismissing the suit is set aside. The suit is remitted back to the trial court to be heard afresh before another magistrate of competent jurisdiction other than Hon. T.W.C. Wamae (Mrs). Costs of the appeal to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 23rd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent