



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 295 OF 2013**

**DIGITAL IMAGING SYSEMS LTD .....APPELLANT**

**V E R S U S**

**VAIZZER LIMITED .....RESPONDENT**

*(Being an appeal against the judgment of Hon. Obulutsa (Ag. CM) delivered on 2<sup>nd</sup> May 2013 in Nairobi Milimani CMCC No. 2092 of 2009)*

**JUDGEMENT**

1. Vaizzer Ltd the Respondent herein, filed an action before the Chief Magistrate's Court, Milimani, vide the amended plaint dated 21<sup>st</sup> April 2009. In the aforesaid plaint, the Respondent sought for judgment against Digital Imaging Systems Ltd the Appellant herein, as follows:

- i. An order directing or compelling the defendant to return and deliver to the plaintiff the Mutoh Valuejet 1204 wide format printer machine complete with accessories and RIP software in working condition.*
- ii. A permanent injunction to restrain the defendant by itself its servants or agents or otherwise howsoever from repossessing, removing, selling, disposing of or any other way interfering with the plaintiff's possession of the Mutoh Valuejet 1204 wide format printer machine complete with accessories and RIP software.*
- iii. In the alternative the sum of ksh.710,000/= being deposit on the purchase price for the Mutoh Valuejet 1204 wide format printer machine computer with accessories and RIP software.*
- iv. Damages for wrongful and unlawful repossession, loss of business, loss of goodwill and loss of business opportunities.*
- v. The sum of kshs.230,000/= incurred in purchasing a networking the 2 computers and preparing a dust proof room/premises wherein the machine was installed.*
- vi. Costs of and incidental to this suit.*
- vii. Interest on (3) and (4) above at court rates.*
- viii. Any other relief that this honourable court may deem fit to grant.*

2. When served with the pleadings, the Appellant filed an amended defence and a counter-claim. The

Respondent called two witnesses while the Appellant summoned one witness to testify in support of their cases. The case was heard by Hon. C. Obulutsa, learned acting Chief Magistrate, who eventually entered judgment in favour of the Respondent as follows:

***i. Refund of kshs.710,000/= paid in deposit.***

***ii. Claim of kshs.230,000/= dismissed.***

***iii. General damages for unlawful repossession and loss of business opportunities granted at kshs.400,000/=.***

***iv. Counterclaim dismissed.***

***v. Plaintiff to have costs of the suit and counterclaim and interest at court rates.***

3. Being aggrieved, the Appellant preferred this appeal. On appeal the Appellant put forward the following grounds:

***1. The learned magistrate erred in awarding the plaintiff the sum of kshs.1,110,000/= with interest from date of decree , which sum was part of a purchase price and loss of business by the plaintiff without finding that the cheque issued by the Respondent had been returned unpaid contrary to the terms of the contract.***

***2. The learned trial magistrate erred in basing his decision on the evidence of Auctioneers rules without find that the Respondent was already at fault and could not benefit from its mistake.***

***3. The learned trial magistrate erred in law and fact in finding the Appellant liable despite there was a valid agreement between the parties, which agreement had been violated by the Respondent entitling the Appellant to cancel the contract.***

***4. The learned trial magistrate erred in law and fact in holding the Appellant liable when the Respondent had not proved her case against the Appellant.***

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. It is the case of the Respondent that it entered into a contract to buy a printing machine from the Appellant at a price of ksh.1,420,000. The Respondent paid the initial deposit of ksh.710,000/= before the delivery of the aforesaid machine. The balance was to be settled by monthly instalments and the Respondent issued postdated cheques. It is the submission of the Respondent that the Appellant delivered and installed the machine but the same had defects which were not addressed by the Appellant despite having been notified. The Respondent stated that it was prompted to countermand the post dated cheques when it realized that the Appellant was not keen in addressing the defects it pointed out. When the cheque was returned unpaid, the Appellant instructed Whitestone Auctioneers to repossess the machine which was eventually sold. The Respondent stated that it instructed its advocates to demand for a refund of the deposit paid but the Appellant failed to do so prompting the Respondent to file the suit which gave rise to this appeal.

5. The Appellant's case on the other hand is that it entered into an agreement with the Respondent to purchase a printing machine. It is said that the Appellant requested to be paid 50% before delivering the machine. It is the assertion of the Appellant that the equipment was shipped for the Respondent. It is also argued that even before the machine could be installed the Respondent realized it did not have the balance of the outstanding sum. The Appellant further stated that it signed a lien agreement over the machine and the Appellant was issued with posted cheques by the Respondent and on the strength of the lien agreement and the post dated cheques they installed the machine printing. When the post dated cheques were returned unpaid and attempts to contact the Respondent bore no fruits forcing it to institute the action giving rise to this appeal.

6. On the first ground of appeal, it is argued that the trial magistrate erred when he awarded the Respondent kshs.1,110,000/= with interest from the date of the decree, which sum was part of the purchase price and loss of business by the Respondent without establishing that the cheque issued by the Respondent had been dishonoured contrary to the terms of the contract. The Appellant is of the view that the Respondent breached the lien agreement and was not entitled to the orders granted. The Respondent on the other hand is of the view that the learned magistrate's findings were based on the evidence on record and that the learned magistrate did not err in awarding the Respondent the sum of ksh.1.110,000/= with interest. The Respondent further stated that the sale agreement dated 25.9.2008 indicated that the Appellant would supply the machine on or before 28.1.2009 but the same was supplied on 26.2.2009 about two months after the initial deposit was made. The Respondent further pointed out that after the delivery and installation of the machine, the same experienced technical defects which were orally and in writing brought to the attention of the Appellant but the Appellant ignored the Respondent's plea. The Respondent further pointed out that the Appellant had promised to provide experts to train the Respondent's staff on how to operate the machine but it failed to do so. The Respondent also stated that the machine it was supplied was rejecting prints the Respondent wanted and that the machine was not adhering to commands given.

7. The Respondent stated that it stopped payment of the balance when it realized that the Appellant was not addressing the technical problems the machine it supplied to the Respondent was experiencing.

8. Having considered the rival submissions and having re-evaluated the case that was before the trial court, there is no dispute that the trial magistrate awarded the Respondent ksh.710,000/= as a refund of the deposit and ksh.400,000/= being general damages for unlawful repossession and loss of business opportunities. The parties do not dispute that the Appellant initiated measures to have the machine to be repossessed from the Respondent when the cheques issued by the Respondent were dishonoured upon presentation. The repossession was also carried out pursuant to the lien agreement executed by the parties. In my understanding, I am convinced that the lien agreement was meant to secure the payment of the balance of the purchase price due to the Appellant. Though the Appellant is of the strong view that the Respondent breached the terms of the lien agreement, I do not think that is the case here. In his judgment, the learned acting Chief Magistrate expressly stated that the Respondent paid the required deposit. He also pointed out that the Appellant begun to breach the contract by supplying the machine late by a month and also failed to train the Respondent's staff. The learned Chief Magistrate further pointed out that the machine supplied had defects which the Appellant failed to address despite having been notified by the Respondent. With respect, I agree with the submissions of the Respondent that the Appellant has failed to demonstrate how the trial Chief Magistrate wrongly exercised his discretion in favour of the Respondent. It is apparent that the Appellant had failed to address the concerns raised by the Respondent over the defects the machine supplied had. The Appellant did not train the Respondent's staff on how to operate the machine. The Appellant also supplied the machine one month after the period agreed upon. The learned Chief Magistrate cannot therefore be faulted.

9. In the second ground of appeal, it is the Appellant's submission that the trial magistrate should not have based his decision on the evidence of the Auctioneers' Rules without finding that the Respondent was already at fault and could not benefit from its mistakes. The Appellant argued that since the machine was under a lien agreement, the Appellant was under no obligation to give notice and that the Respondent is bound by the terms of the lien agreement hence Rule 12 of the Auctioneers Rules 1997 were not applicable in the circumstances. The Respondent is of the view that it did not breach any of the terms of the agreement for the sale of the machine and therefore there is no justifiable reason to repossess and remove the machine from the Respondent's possession. I have carefully considered the evidence presented before the trial court and it is clear to me that the Auctioneer did not prepare and issue a proclamation indicating the value and the condition of the machine repossessed. The Auctioneer did not also give the Respondent the notice of 7 days to redeem the machine thus denying the Respondent the right of redemption.

10. With respect, I agree with the submission of the Respondent that the repossession and removal of the machine by the Appellant was wrongful, irregular and in flagrant breach of the law and therefore the learned Chief Magistrate did not err in basing his decision on the evidence and the Auctioneers Rules.

11. Both the Appellant and the Respondent agreed grounds 3 and 4 of the appeal together. It is the argument of the Appellant that the learned Chief Magistrate erred when he held that the Appellant was liable when there was evidence that the Respondent had violated the agreement whose result entitled the Appellant to cancel and or avoid the agreement. The Appellant further submitted that there was a valid lien agreement between the parties which the court did not consider in its judgment yet the Respondent was bound by the terms of the lien. The Appellant further argued that whether the machine was working or not was not a reason not to pay the balance of the purchase price of the machine. The Respondent on the other hand argued that it never breached any of the terms of the sale agreement. The Respondent is of the opinion that the Appellant is the party who blatantly breached the terms of the sale agreement. In my humble appreciation of the evidence tendered before the trial court and the submissions presented before this court, I do not find any fault in the manner the learned acting Chief Magistrate determined the issue touching on the breach of the agreement. There is no doubt in my mind that the Appellant breached the terms of the agreement. I have already stated hereinabove that the Appellant had a false start when it supplied the machine two months late. It also failed to train the Respondent's staff and further failed to address the technical problems the machine had yet the machine had a warranty. In the circumstances, the Respondent was entitled countermand its cheques.

In the end, I find the appeal to be without merit. It is dismissed 12. in its entirety with costs to the Respondent.

Dated, Signed and Delivered in open court this 16<sup>th</sup> day of June, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent