



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 168 OF 2016

TIMWOOD PRODUCTS LIMITEDAPPELLANT

- V E R S U S -

KARACHIWALLA (NAIROBI) LIMITED..... RESPONDENT

(Being an appeal from the judgement of Hon. M. Chesang (Mrs.) Resident Magistrate delivered on 5.11.2015 in Nairobi Chief Magistrate's Court, in Milimani CMCC No. 3522 of 2014)

JUDGEMENT

1) On 5.11.2015, Hon. M. Chesang learned Senior Resident Magistrate, entered judgement in favour of Karachiwalla (Nairobi) Ltd, the respondent and against Timwood Products Ltd, the appellant herein, in the sum of Ksh.504,600 with costs and interest. Being aggrieved the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds:

1. THAT the learned magistrate erred in law and fact in not giving reasons for reaching a finding that the respondent had proved its case to the required standards and was entitled to judgment as prayed in the plaint.

2. THAT the learned magistrate erred in law and fact in finding judgment in favour of the respondent who had not proved his case as pleaded.

3. THAT the learned magistrate erred in law and fact in finding judgment against the appellant on account of the value of goods that were not supplied to it. There was no evidence that the goods that formed the basis of the respondent's claim were supplied to the appellant or received by it as alleged in the plaint or at all.

4. THAT the learned magistrate erred in law and fact in finding judgment against the appellant for goods collected by a third party when there was no agreement, memorandum or note in writing and signed by it or at all promising to answer to the debts of the 3rd party that was supplied the goods.

5. THAT the learned magistrate erred in law and fact in denying the appellant its constitutional right to fair hearing which is also against the rules of natural justice.

6. THAT the learned magistrate erred in law and fact in awarding the respondent interest at 12% p.a from 22nd June 2011 on the claimed about of 504,600/= for a suit filed on 19th October 2014 without giving reasons based on evidence or the law or any justification for that date and

resulting period. This yielded unjustified interest in favour of the respondent and unjust enrichment at the expense of the appellant.

3) When the appeal came up for hearing, learned counsels appearing in this matter 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 written submissions filed herein. The evidence recorded indicate that the respondent's claim was for money in respect of goods supplied to the appellants. The record shows that the primary suit came up for hearing on 6th August 2015. On the aforesaid date the respondent presented evidence and closed its case. Upon the closure of the respondent's case, the appellant through its advocate applied for an adjournment on account of the fact that the appellant's advocate had travelled to India for medical treatment. That application was rejected on the basis that no good reason was advanced to back up the application for adjournment. The trial court noted that the defendant (appellant) was absent from court. The trial magistrate proceeded to invite learned counsels to file written submissions. The record does not show that the defence case was formally closed. In a brief half a page judgment, the learned trial magistrate proceeded to enter judgment in favour of the respondent.

4) On appeal, one of the main grounds raised is that the judgment did not comply with the requirements of Order 21 rule 4 of the Civil Procedure Rules.

5) The appellant filed its submissions but the respondent did not deem it fit to do so. I have carefully considered the appellant's submissions and I am persuaded that the trial court's judgment does not comply with the provisions of Order 21 rule 4 of the Civil Procedure Rules. It is apparent that the aforesaid judgment does not contain the concise statement of the case nor the points for determination. The learned trial magistrate totally failed to analyse the evidence to show how the respondent proved the case to the required standards in civil cases.

6) The second main ground is to the effect that the appellant was unfairly denied a right of hearing. I have already stated that the appellant was denied an adjournment on the basis that the reason advanced to support the application for adjournment was not plausible. It is clear from the record that the appellant's advocate was taken ill and had to seek for medical treatment in India. The trial magistrate agreed with the objection raised by the respondent's advocate that the explanation given by the appellant was not a good reason. In fact, the trial magistrate went ahead to query the way the appellant was not present in court to testify. The trial magistrate also noted that the date was taken by consent and that the appellant's advocate had sufficient time to call the appellant but failed to do so. The trial magistrate also noted that the appellant was ably represented by M/s Mr. Kamunde. Having considered the material placed before this court, I am convinced that the trial magistrate unfairly denied the appellant an adjournment. There was no dispute that Mr. Kamunde was out of the country to seek medical treatment. In my view that was a good reason which should have earned the appellant an adjournment. The fact that the hearing date was fixed by consent did not matter in the circumstances.

7) On the basis of the above grounds, I find the appeal to be meritorious. Consequently, the appeal is allowed. The judgment and decree 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. M. Chesang.

8) In the circumstances of this appeal a fair order on costs is to order which I here do that each party bears its own costs.

Dated, Signed and Delivered in open court this 17th day of November, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent