



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 2 OF 2013

(Being an appeal arising from the judgement of the Honourable Resident Magistrate M.D. Ireri delivered on 19th day of December, 2012 in Eldoret CMCC No. 627 OF 2012)

THE CHAIRMAN B.O.G. }

GOSETA SECONDARY SCHOOL}APPELLANT

VERSUS

MARGARET BUSISA }

T/A JOMADI HOUSE OF DESIGN }.....RESPONDENT

J U D G E M E N T

1. The Plaintiff/Respondent instituted a case against the Defendant/Appellant vide a Plaint dated 12/7/2010 claiming payment for a sum of **Kshs 199,500/-**. The Plaintiff's claim was that the Defendant contracted her to supply school uniforms and games kits which she delivered but the Defendant failed to pay her **kshs 199,500/-** and paid only Kshs 40,000/-.
2. The claim was denied as per the statement of defence dated 30/9/2010. The Defendant denied having been supplied with any school uniforms and games kits or having paid the Plaintiff Kshs 40,000/- . The territorial jurisdiction of the trial court was denied. It was stated that the contract was entered into within the Local limits of Kitale court and not Eldoret court.
3. The plaintiff filed a reply to the defence denying all the averments made therein.
4. A preliminary objection was raised on the issue of territorial jurisdiction. The same was heard and a ruling delivered on 24/5/2011 dismissing the same.
5. The case proceeded to a full hearing. **Margaret Busisa (PW1)**, the only witness on the plaintiff's side described herself as a fashion designer trading as **JOMARI HOUSE OF DECIGN**. Her evidence is that the business deals in school uniforms and her business premises are situated in Eldoret. That following a call from the school headteacher **GOSETA SECONDARY SCHOOL** Mr Wasike asking for the supply of uniform, on 28th of January, 2005 and on the 11th of March, 2005 she delivered school uniforms and games kits to the school worth a total of **Kshs 239,500/-**. That the headteacher received the said supplies and referred her to the Bursar who signed and stamped the delivery notes. That the headteacher referred her to a teacher by the name Mrs Wandeto who she left the documentation with. That the said Mrs Wandeto later telephoned her and informed her of the deposit of Kshs 40,000/- in her (plaintiff's) account. The Plaintiff confirmed the said payment. However the rest of the payments were not forthcoming hence this

suit.

6. Three witnesses testified on the Defendant's side. **HARRISON WASIKE (DW1)** the headteacher of **GOSETA SECONDARY SCHOOL** and also the Secretary to the Board of Governors (Board) testified. His evidence was that the students buy their own uniforms. That the Board never contracted the Plaintiff to supply uniforms. That the procedure for supplies to the school is through the tender system. That the school expenditures are discussed at the Meetings of the full Board and no such expenditure for the supply of school uniforms was discussed or authorized by the Board. He produced the relevant Minutes of the school's full Board Meetings as exhibits. The headteacher denied having given an order for the supply of the uniforms. He denied that the stamp on the delivery notes produced by the plaintiff belonged to the school. He further stated that at the material time the school had an accounts clerk but had no Bursar and that the signatures on the delivery note were not familiar to him. DW1 further testified that the school never paid Kshs 40,000/- to the plaintiff.
7. **DW2 HERMAN MALAVI KHAHI** and **DW3 PATRICK SHIMUTWO SILIMOI** who were the various Chairmen of the Board during the period in question gave evidence that the students buy their own uniforms and that the board never tendered for any uniforms and games kits.
8. The trial court found the plaintiff's case proved on a balance of probabilities. Judgment was entered for the plaintiff for the sum of Kshs 199,500/- plus interests at court rates from the year 2005 till payment in full.
9. The Defendant was dissatisfied with the said judgment and appealed to this court on the following grounds:
 - “1. That the Learned Trial Magistrate misunderstood and misapplied the law on burden of proof, and he indeed shifted the burden of proof to the appellant, contrary to the law.**
 - 2. That the learned trial Magistrate erred in law and fact when he failed to appreciate that the Respondent had no *locus standi* to institute the suit.**
 - 3. That the learned trial Magistrate erred in law and facts and arrived at a judgment that is against the weight of the evidence on record.**
 - 4. That the learned Trial Magistrate erred in law and fact and misapplied the law by awarding interest at court rates from 2005 to the date of payment in full, yet that had not been prayed for in the plaint.**
 - 5. That the learned Trial Magistrate erred in law and fact when he failed to appreciate that the testimony of the plaintiff was full of material contradictions and which indeed discredited the plaintiff's case.**
 - 6. That the learned trial Magistrate erred in law and fact and failed to appreciate that there was no contract between the plaintiff and the defendant.**
 - 7. That the learned trial Magistrate erred in law and misapplied the provisions of Section 6 of the sale of goods Act.**
 - 8. That the learned Trial Magistrate erred in law and fact by entertaining a suit he did not have geographical jurisdiction to hear and determine.”**
10. The appeal was canvassed by way of written submissions which I have duly considered.
11. Ground No. 2 on the question of *locus standi* was abandoned. I will combine ground No. 1 on whether the Trial Magistrate shifted the burden of proof to the Appellant, ground No. 3 on

whether the judgment was against the weight of the evidence, ground No. 5 on whether there were material contradictions in the Plaintiff's evidence and ground No. 6 on whether there was a contract between the Plaintiff and the Defendant.

12. The Plaintiff's evidence is that the headteacher, Mr Wasike called her and asked her for the supply of the uniforms. During cross-examination by the Defendant's counsel, on page 84 of the record of appeal the plaintiff stated as follows “**Mr Wasike called me and placed a tender to supply the uniforms**”. Her further evidence was that she then proceeded to supply the uniforms and that the delivery note was stamped by the school Bursar. That Kshs 40,000/- was deposited in her account by a teacher, Mrs Wandeto who she had been referred to by the headteacher. The headteacher (DW1) denied having placed any order, the delivery and the school stamp said to be on the delivery note.

13. The Plaintiff produced as exhibits delivery notes and invoices which reflect as follows:

Delivery for 28/1/2005

- “ - 100 Trousers
- 100 Red T-shirts
- 100 Green T-shirts
- 100 L. Blue T-Shirts
- 100 N. Blue Shorts
- 130 L. Sleeved shirts”

Invoice for 28/1/2005

- “ -100 trousers - 500 - 50,000
- 100 Red T-shirts - 250 – 25,000
- 100 Green T-shirts – 250 – 25,000
- 100 L Blue T-shirts 250 – 25,000
- 100 N Blue shirts 250 – 25,000
- 130 L sleeved shirts 350 - 45,000”

The total is **Kshs 195,500/-**

Delivery for 11/3/2005

- “ -176 Blue Games Kit shorts”

Invoice for 11/3/2005

- “ - 176 N Blue shorts 250 – 44,000”

The total for the above comes to **Kshs 239,500** less the **Kshs 40,000/-** said to have been paid.

14. The plaintiff produced a delivery note dated 28/1/2015 which bears a rubber stamp with the name

of **GOSETA SCHOOL** on it. Although the Defendant has denied that the said stamp was from their school the Defendant did not adduce any evidence to prove that the said stamp was not from the school.

Section 112 of the Evidence Act Cap 80 Laws of Kenya provides as follows:

“In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

The school stamp and the school employees fell under the Defendants. The issue whether the school had a Bursar or an accounts clerk does not answer the question whether the school had a Bursar's stamp or not. The Defendant's contention that the supply of the uniforms was not sanctioned by the school Board failed to explain the presence of the school stamp on the invoice exhibited by the plaintiff.

15. I have found no contradictions in the plaintiff's evidence. Although the Defendant's counsel submitted that the plaintiff's evidence was contradictory in regard to whether the Plaintiff dealt with one Mrs Wandeto or not, a scrutiny of the plaintiff's evidence fails to reflect any such contradictions. On page No 89 wherein the plaintiff answered the questions relating to Mrs Wandeto, the plaintiff stated as follows:

***“ I was dealing with GOSETA SCHOOL. I have never dealt with Mrs Wandeto. I have never dealt with Mrs Wandeto in any business. I was paid Kshs 40,000/- by Goseta*”**

To my understanding, the words ***“ I have never dealt with Mrs Wandeto”*** in that context differentiates between the dealings with the school as opposed to dealing with Mrs Wandeto as a person.

16. On the ground whether the key ingredients of a contract were proved in this case, I am satisfied that the plaintiff's evidence as analysed above that there was an offer through the placement of the order, acceptance through receiving of the delivered uniforms and consideration in terms of the purchase price. There is no requirement for the said contract to be in writing. **Section 6 of the sale of Goods Act Cap 31** states as follows:

“A Contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.”

17. On the question of territorial jurisdiction, at the point the preliminary Objection was raised before the Lower Court, there was no evidence on record. The plaint reflects the plaintiff's place of business as ELDORET and the Defendants address of service as KITALE. The plaintiff stated the jurisdiction of the Court as ELDORET. The defendant gave its address as KITALE and averred that the alleged contract was entered into in Kitale within the jurisdiction of KITALE COURT. The issues raised before the trial court touched on disputed facts and were not pure points of law. As stated by the Court of Appeal at Nairobi in the case of **MUKISA BISCUIT CO. V. WEST END DISTRIBUTORS [1969] EA**

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

18. The trial court was therefore right in dismissing the preliminary objection at that stage. An evaluation of the evidence shows that at the conclusion of the case before the lower court, it was

abundantly clear that although the Defendant is based in Kitale, the plaintiff ran her business in **ELDORET**. The uniforms were also made in **ELDORET**. **Section 15 of the Civil Procedure** provides for the filing of suits where the Defendant resides or where the cause of action arose. Explanation (3) under the said provision of the Law states as follows:

“In suits arising out of contract, the cause arises within the meaning of this section at any of the following places, namely:-

- i. *The place where the contract was made;*
- ii. *The place where the contract was to be performed or the performance thereof completed;*
- iii. *The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.”*

In the case at hand, the contract was performed in ELDORET where the uniforms were made and completed in Kitale where the uniforms were delivered. My view is that the plaintiff could have sued either in ELDORET or in KITALE. It is not clear from the record why this appeal was filed in the High Court at KITALE when the suit originated from the Resident Magistrate's Court, Eldoret which falls within the supervisory jurisdiction of the High Court, Eldoret. All in all, no prejudice has been shown to have been suffered by any of the parties both in the Lower Court or in the High Court.

19. The issue of the date from which interest is applicable has been raised. **Section 26 Civil Procedure Act Cap 21 Laws of Kenya** provides as follows:

Section 26 (1) “ Where in and so far as a decree is for the payment of money, the court may, in the decree, Order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the suit to the date of the decree in addition to any interest at such rate as the court adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

The trial court therefore had the discretion to impose interest for the period prior to the filing of the suit.

The cause of action herein arose in January 2005. The Trial Court therefore properly exercised its discretion in awarding the plaintiff interest from the year 2005. As stated by the Court of Appeal in the case of **APPOLLO INSURANCE CO. LTD V EA DEV BANK & ANOTHER (2016) Eklr.**

“On the issue of 18% interest, this court has often times stated that the award of interest and the rate thereof is at the discretion of the trial court. (See Yousuf Abdulla Gulamhusein -v- The French Somaliland Shipping Co. Ltd 1959 EA 25). Courts have discretion to determine whether interest is to be awarded, the period of interest and the rate of interest. In B.P. Exploration Co. (Libya) v Hunt (No.2) [1979] 1 WLR 783, [1982] 1 All ER 925, it was stated that the fundamental and overarching purpose of judicial discretion on the award and rate of interest is to compensate the claimant for not having the sums owed from the date the loss is suffered and to enable the claimant to be compensated fairly in the circumstances of the case. In Mohammed s/o Mohamedi -v- Athmani Shamte (1960) EA 1062, it was held that the court may or may not at its discretion award the contractual rate of interest between the date of institution of the suit and judgment, and whether it does so or not depends upon whether the rate is reasonable”.

20. With the foregoing, I find no merits in the appeal and dismiss the same with costs.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitale on this 19th day of May 2016.

B. THURANIRA JADEN

JUDGE