



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 125 OF 2012

JOHN NDEREBE KAHUTHIA.....APPELLANT

t/a KIRURUMO FILLING STATION

VERSUS

JARIBU FARMERS CO-OPERATIVE SOCIETY LTD.....RESPONDENT

(An appeal arising from the Judgment of V.K. Kiptoon Honourable Resident Magistrate Delivered On 22ND June 2012 in Nyahururu S.P.M.C.C. No. 2000 of 2011)

JUDGMENT

1. The appeal before the court arises from the judgment of the trial court delivered on the 22nd June 2012, whereof the appellant's suit was dismissed with costs on grounds that there was no contract between the appellant and the respondent. The claim was for a sum of Kshs.83,471/50, being arrears of unpaid supply of fuel by the appellant to the Respondent under an alleged contract of service entered into by a letter dated 1st April 2009 by the respondent and the appellant.

2. The Respondent in its defence denied existence of the alleged contract with the appellant which position was ratified by the trial court in its judgment.

The appellant preferred four grounds of appeal that:

1. The learned trial magistrate erred in law and fact in holding that there was no contract between the appellant and the Respondent in spite of overwhelming evidence on record to the contrary.

2. The learned Magistrate erred in law and fact in holding that the suit contract was between the appellant and NEW KCC LTD.

3. The learned magistrate erred in law and fact in holding that in the absence of a written contract between the appellant and the respondent no legal obligations would accrue or become enforceable against the Respondent.

4. The Learned trial Magistrate delivered a judgment which was clearly against the weight of evidence.

3. The appellant relies entirely on an introductory letter dated 1st April 2009 by NEW KCC LTD to the appellant as the basis of the contract. The letter was produced as an exhibit. It reads in part:

“Please issue fuel worth 3,500/= daily to Jaribu Farmers Co-operative Society. They have been contracted by NKCC to transport milk for Passenga Scheme and Siranga Scheme. Payments will be made monthly by themselves on payment of their milk transport dues.

Yours faithfully

For New KCC LTD

The letter was addressed to the proprietor, Kirurumo Petrol Station. Pursuant to the said letter, the appellant supplied fuel to the Respondent on diverse dates and made part part payments for the full supply of Kshs.21,528/50 leaving a balance of Kshs.83,471/50 subject of the trial court suit and this appeal.

4. The Appellant testified before the trial court that he was introduced to the Respondent through NEW KCC Nyahururu branch, that Jaribu Farmers were to make payments for the supply of fuel. It was his testimony that upon supply he would issue invoices to Jaribu Farmers who paid but as at 30th April 2009, they had an unpaid balance of Kshs.83,471/50. He sent numerous demand letters to Jaribu Farmer were supposed to make the payments. It was his evidence that Jaribu Farmers owned him the mount in issue and not New KCC as he did not supply fuel to it.

On re-examination, the appellant stated that the part payment of Kshs.21,528/50 was paid by NEW KCC on behalf of the Respondent, and that there was no contract between himself and NEW KCC.

The Respondent did not call any evidence. To that extent the appellants evidence was controverted and unchallenged.

5. Upon the above evidence and submissions by counsel, the trial court made findings that there was no valid contract between the appellant and the respondent on the basis that there was no offer extended to the Respondent by the appellant, nor was there acceptance of the offer and consideration to create a valid legal relationship. It was his conclusion that the contract was between the Appellant and NEW KCC as it was the one that negotiated the contract and not the respondent and therefore there was no privity of contract between the appellant and the Respondent.

6. This court being the first appellate court is enjoined to re-consider and re-evaluate the evidence tendered and make its own findings and conclusions – See **Selle & Another -vs- Associated Motor Boat Co. Ltd & Another & Others (1968) EA 123.**

The appellant submits that the letter dated 1st April 2009 had no contractual effect as it was merely an introductory letter introducing the Respondent to the Appellant and upon which the appellant acted to supply fuel to the Respondent. It only informed the respondent of its contract with NEW KCC to transport fuel. It was his submission that there is no requirement that a contract be in writing citing **Section 5 of the Sale of Goods Act, Chapter 31 Laws of Kenya** and also **Section 3(1) of the Act.** He submitted that the trial Magistrate erred in his finding that there was no contract between the appellant and the Respondent.

The Respondent submitted that a contract cannot confer rights and obligation upon a stranger. It was his submission that the supply contract was between the appellant and New KCC who is a stranger in these proceedings citing the case **Michuki -vs- Waita (2003) e KLR,** that the issue of payment for the fuel supplies was conditional upon New KCC performing its part of the bargain, after all the negotiations on the mode of transport, payment and price of fuel were all negotiated with New KCC including the part payment and by New KCC.

7. I have considered the evidence tendered before the trial court. The appellant stated on oath that he supplied fuel to the respondent and it is the respondent who was obligated to pay for the fuel, that he had no debt whatsoever with New KCC as what New KCC did was only to introduce him to the respondents. Referring to the letter dated 1st April 2009, it indicated that payments would be met by the Respondent.

8. It is trite that a contract for sell of goods may be in writing or oral for a money consideration – See **Section 3(1) Sale of Goods Act**. It may be implied by the conduct of parties or by word of mouth or may be in writing as provided under **Section 5 of the Act**.

The court poses to ask:

Did the letter dated 1st April 2009 written by New KCC Ltd to the appellant constitute a contract between the Appellant and the Respondent?

In **Jiwaji & Others -vs- Jiwaji & Another (1968) EA 547** it was stated that:

“--- where there is no ambiguity in an agreement it must be construed according to the clear words actually used by the parties, and it would be wrong to adopt a different construction or to imply a term to contrary effect. --- I think I am not entitled to put into the instrument something which I did not find there in order.”

9. In interrogating the letter of 1st April 2009, in its natural and true meaning, from which the intention of the parties can be deduced, it is clear to me that:

(1) the appellant was introduced and requested if he could supply fuel to the Respondent who had been contracted by New KCC to offer transport services on its behalf.

(2) That for information, the Respondent had been contracted by New KCC to transport services (an added advantage)

(3) Payments for the fuel supply would be paid by the Respondent, and not New KCC.

In my considered view, the said letter was a request. The appellant had an option to agree to the request or to refuse to act on the same. It opted to act on the same, upon basis that the Respondent would pay the fuel charges.

10. In my opinion, the contract could only be made between the supplier and the consumer, the supplier being the appellant and the consumer being the Respondent. I subscribe to the courts holding in **Michuki -vs- Waita** (supra) that:

“A contract cannot confer rights or impose obligations arising out of it on any person except parties to it.”

It is evident that the appellant supplied fuel to the respondent and invoiced it for payment. Payments were partly made on its behalf by the third party, New KCC. When there were arrears, the appellant addressed demand letters to the Respondent. Initial demand was made to New KCC, perhaps because it was the link between the two contracting parties, and that it too was to pay the respondent for its services. New KCC could not be called upon to pay the debt as no services were rendered to it that would have been contrary to the principles of a contract.

11. Upon the above evaluation, the court makes a finding that there was no contract between the Appellant and New KCC but between itself and the respondent. I agree with the appellant that the trial magistrate had no legal obligation or otherwise to pay the debt for goods not supplied to it.

12. It is true the terms of the fuel supply including charges are negotiated and agreed upon by the respondent and New KCC which is not a party to this suit. The appellant was categorical that it was the Respondent that it supplied fuel to and so it was the same that ought to pay. Invoices were issued to the Respondent, not to New KCC. If the suit had been filed against New KCC the obvious defence would have been that the appellant did not supply it with any goods. It did not issue any invoices to it.

13. In terms of **Section 3(1) Sale of Goods Act**, the appellant did supply the respondent with goods for

valuable consideration, evidenced by the invoices. There is no dispute on this. The part payment of the price may have been paid by New KCC or any other party on behalf of the respondent. I find nothing unusual in this. It cannot create a valid contract known in law.

Citing **Jiwaji & Jiwaji** case above, I find no ambiguity in the letter the basis of the contract. The words used are clear. The court will not adopt a different construction contrary to the intentions of the parties, that the appellant would supply fuel to the respondent, and the respondent would pay for the same. I do not accept the respondent's submission that the contract for the supply of goods was between the appellant and the New KCC. If that was the intention of the parties it would have been stated expressly that payments for the supply of goods to the Appellant would be met by New KCC.

14. For those reasons, the appeal is found to be meritorious. The trial court's judgment is set aside and substituted with a judgment in favour of the Appellant against the Respondent in the sum of Kshs.83,471/50 with costs.

The sum of Kshs.83,471/50 being a liquidated claim shall attract interest at 12% per annum from the date of filing of the primary suit. The costs of the primary suit and in this appeal shall be borne by the Respondent.

Dated, signed and delivered in the open court this 22nd day of September 2016.

JANET MULWA

JUDGE