



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 23 OF 2008

STEPHEN LOYATUM..... (APPELLANT)

VERSUS

MOHAMED ALI T/A

SUNDOWN AMALGAMATED CO. LTD.....RESPONDENT

J U D G M E N T

This appeal arises from the decision and judgment of the Chief Magistrate in Kitale CMCC No. 315 of 1998, in which the appellant **Stephen Loyatum**, was sued by the respondent **Mohamed Ali t/a Sundown Amalgamated Co. Ltd**, for the sum of Kshs. 290,831/= being the amount due and owing in respect of goods sold and supplied to the appellant (defendant) and cash money advanced to him.

It was averred in the plaint dated the 2nd June, 1998, that the appellant attempted to off-set part of the aforementioned debt by drawing a cheque No.000002 for Kshs.100,000/= in favour of the respondent (plaintiff) which on presentation at the bank was returned unpaid with remarks “refer to drawer”. That, despite demand having been made and notice of intention to sue being given, the appellant neglected and/or refused to pay the amount. The respondent therefore prayed for judgment against the appellant in the said amount together with interest and costs of the suit.

The appellant filed a statement of defence dated 15th June, 1998 in which he denied being indebted to the respondent as alleged and averred that indeed he ordered for the goods from the respondent but the same were fully paid for. He also denied having borrowed any money from the respondent and having drawn any cheque. He averred that if such cheque was drawn, it was not meant to offset part of the alleged debt. That between 1996 and 1997, the respondent supplied him with goods on a running account and on diverse dates he deposited various amounts of money with the respondent from which deposits the respondent was to draw the price of the goods supplied and at the same time he (appellant) made various direct payments for the goods.

The appellant further averred that he asked for a full and true statement of account but the respondent gave piecemeal information and in some instances totally concealed the particulars and/or details of the monies received by himself (respondent). The appellant therefore prayed for the taking of accounts between himself and the respondent and that any established over-payments be refunded with interest at commercial rates to him (appellant). In the alternative, the appellant prayed for the dismissal of the plaintiff/respondent's claim with costs.

After considering the pleadings by both sides and the evidence adduced in support thereof, the learned trial magistrate in her judgment dated 7th August, 2008 found for the respondent and entered judgment in his favour for the sum of Kshs.211,831/= plus costs and interest. In so doing, the learned trial magistrate rendered as follows;-

“After considering the entire evidence, the court I satisfied that on a balance of probabilities, the plaintiff has proved that the defendant owes him the amount claimed in the sum of Kshs.290,831/=. It is also the court's finding that the plaintiff has on his part not accounted for Kshs.79,000/= paid him by the defendant and his claim will be granted less that amount, giving a total of Shs.21,831/=.”

Being dissatisfied with the judgment, the appellant preferred the present appeal on the basis of the grounds in the memorandum of appeal dated 26th August, 2008 filed herein by the firm of **Messers Samba & Co. Advocates.**

Learned Counsel, **Mr Samba**, appeared for the appellant and argued the appeal by way of written submissions filed herein on the 7th June, 2013. The respondent was represented by learned counsel, **M/S Nyakibia**, who opposed the appeal and accordingly filed written submission on 12th June, 2013. Both counsels cited various authorities in support of their respective submissions.

Having considered the rival submissions, the duty of this court is to re-visit the evidence presented before the trial court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the plaintiff/respondent's case was based on the evidence adduced by the plaintiff, Mohamed Ahmed Ali (PW1), who stated that he was a hardware dealer trading under the name Sundown Amalgamated Co. and that he knew the defendant as his customer to whom he supplied building materials in the years 1996 and 1997 for his house at Siyoi Kapenguria. He (plaintiff) produced a letter dated 25th October, 1996 confirming his appointment as a supplier by the defendant (P.Ex.1). He said that payments were made on supply and that orders were placed by the defendant's workers or the defendant himself on phone from France but that some orders were not paid for. He produced several orders (P. Ex.2 to 19) and indicated that some were settled and some were not. He also indicated that some of the orders were partly paid. He contended that the orders which remained unsettled amounted to Kshs.290,000/=. He produced additional documents (P. Ex 20 – 38) indicating the cash transactions effected in the defendant's cash account. He contended that the amount actually owed to him by the defendant was Kshs.290,831/=. That, they confirmed the amount by taking accounts and in an attempt to settle part of the amount the defendant drew out a cheque (P. Ex. 39) which was dishonoured on presentation to the bank.

In denying the claim, the appellant/defendant, **Stephen Loyatum (DW1)**, testified that between 1996 and 1998, he served as the Kenya ambassador to France and that he came to know the plaintiff in early 1990's or late 1980's. He knew the plaintiff as a person running a hardware shop in Kapenguria which happened to be his (defendant's) home. In 1996, he conceived a project to construct a house and in the process picked on the plaintiff to supply the construction materials. The value of the materials came to Kshs.227,000/= which he (defendant) paid in advance and which was fully acknowledged by the plaintiff in the appropriate bill of quantities. He (defendant) said that he did not make orders beyond what was in the bill of quantities and that the orders presented by the plaintiff in court. (i.e P. Ex. 2 to 19) did not emanate from him or his agents and were forgeries. He contended that he made payments by cheque and that he did not authorize any cash payment by the plaintiff to any person. He said that he held a discussion with the plaintiff and insisted that he had been defrauded when he was questioning the claim made against him by the plaintiff. Due to the misunderstanding, he requested his bankers to provide to him all the cheques and these amounted to Kshs.907,000/=. He produced two cheques (D. Ex. 4 and 5) to show that he paid Kshs.217,000/=. He also produced other cheques (D. Ex. 6 – 8, 11 – 12) showing additional payments made by himself and contended that the agreement with the plaintiff was for the supply of construction materials only. He maintained that he was not indebted to the

plaintiff as alleged and demanded to be refunded any amount over and above what was paid to the plaintiff by himself. He admitted that he gave instruction to the bank not to honour the cheque for Kshs.100,000/= (P. Ex. 39(a)) until accounts were taken.

All the foregoing evidence was carefully considered by the learned trial magistrate after which she concluded that the plaintiff was owed a sum of Kshs.211,831/= by the defendant for the supply of construction materials.

On its own consideration of the evidence, this court notes that it was an undisputed fact that the plaintiff was contracted by the defendant to supply construction/building materials. To that effect, the defendant used his official letter head dated 25th October, 1996 (P. Ex 1) to give necessary instructions to the plaintiff and to effect an initial payment of Kshs.210,000/= by cheque. It was notable that the estimated total value of the materials to be supplied by the plaintiff was not indicated in the instructions and due to that omission the current dispute arose with regard to the amount of money due from the defendant for the materials supplied. Whereas the plaintiff contended that he was owed Kshs.290,831/= by the defendant, the defendant contended that he was not indebted to the plaintiff in that consent as the materials supplied to him were fully paid for.

It is shown in the plaint that the figure Kshs.290,831/= was made up of the value of goods supplied to the defendant and cash money advanced to the defendant by the plaintiff. The amounts were not separated and particularized such that it became impossible to say what was owed by him as cash money advanced to him by the plaintiff. It was therefore erroneous for the learned trial magistrate to opine that just because the defendant did not deny in his defence that hand cash was given to him then all expenses incurred by the plaintiff were part and parcel of the sale work such that the plaintiff need not have specified each item in the plaint.

Matters of payment must be specifically pleaded (See Order 2 Rule 4 (1) of the Civil Procedure Rules 2010) and if such are not specified a party cannot purport to give evidence to establish an unpleaded fact. It was therefore incumbent upon the plaintiff/respondent to specify the amount he was claiming from the defendant for the supply of goods and the amount he was claiming for cash advancements made to the defendant. His failure to do so meant that his claim against the defendant/appellant could not stand. Hence, the merits of grounds (2) and (3) of the appeal.

In adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings, the burden of proof being on the plaintiff and the degree of proof being on a balance of probabilities (see, **Wareham t/a F. Wareham & 2 others Vs. Kenya Post Office Savings Bank**).

In the case of **Hassan V. Vuni (1964) EACA 201**, the court dealt with a specific claim for specific value of goods which was not particularized and noted that the failure to particularize did not prejudice the appellant. However, in the present case the appellant was prejudiced for the reason that the respondent's claim was not for the value of the goods only but also encompassed a completely different item i.e advancement of cash money. This was a defect which could not be cured by supply of particulars outside pleadings or by providing evidence in the trial. It was difficult to tell what the claimed amount was actually for. The case of **Odd Jobs Vs. Hubia (1970) EA 476** would not apply herein.

The fact that the appellant issued a cheque which was dishonoured by the bank did not make the potential any better as it was not known whether the payment was for goods supplied or for money advanced. For all the foregoing reasons, this court is of the opinion that the case against the appellant was not established for an award of judgment in favour of the respondent by the trial court. Consequently, this appeal is allowed to the extent that the judgment of the trial court is hereby set aside and substituted with a judgment dismissing the respondent's claim with costs.

The appellant shall have the costs of this appeal.

Ordered accordingly.

J. R. KARANJA,

JUDGE

(Delivered and signed this 25th day of February, 2014).