



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 150 OF 2010

MESHACK NDEGWA.....APPELLANT

VERSUS

EDWARD KARANJA.....RESPONDENT

(Being an Appeal from the Judgment and decree of the learned Mr. E.N.Gichangi, Resident Magistrate's Court, Nanyuki in the SPM Civil Case No.129 of 2008 at Nanyuki delivered on 26th day August, 2010)

JUDGMENT

This Judgment is the outcome of the appeal by **Meshack Ndegwa** (Appellant), against the Judgment of Hon. E.N.Gichangi, learned Resident Magistrate, Nanyuki delivered on 28th August, 2010 vide Nanyuki R.M.C.C.C no.129 of 2008. In the aforesaid judgment, the learned Resident Magistrate awarded **Edward Karanja**, (Respondent) Kshs.186,000, costs plus interests. Being aggrieved, the appellant preferred this appeal and put forward the following grounds in his Memorandum of Appeal:

1. **That the learned Resident Magistrate erred in law and fact in ignoring the Principal of Law that he who alleges must proof thus occasioning miscarriage of justice.**
2. **That the learned Resident Magistrate erred in law and fact in ruling that there existed a contractual relationship between the plaintiff and the defendant despite lack of any contract in writing and insisting on enforcing an alleged oral contract thus occasioning a miscarriage of justice.**
3. **That the learned Resident Magistrate erred in law and fact in holding that the goods in question were delivered to the appellant despite there being no delivery note issued to the appellant and signed by the Appellant hence occasioning a miscarriage of justice.**
4. **That the learned Resident Magistrate erred in law and in fact in holding that PW2 was an employee and agent of the appellant despite there being lack of proof of any relationship between the appellant and PW2 hence occasioning miscarriage of justice**
5. **That the learned Resident Magistrate erred in law and fact in holding that the appellant was the person undertaking the tenders in question despite there being no evidence in support of this hence occasioning a miscarriage of justice.**
6. **That the learned Resident Magistrate erred in law and fact in introducing evidence alien to the case in the judgment thus occasioning a miscarriage of justice.**
7. **The learned Resident Magistrate erred in law and fact in not noting that the signatory to the delivery notes in question was not called in support of the Respondent's case hence occasioning a miscarriage of justice.**
8. **That the learned Resident Magistrate erred in law and fact in not noting that evidence orders for supplies in question was not tabled hence occasioning a miscarriage of justice.**
9. **That the learned Resident Magistrate erred in law and in fact in holding that the appellant had partially paid the debt in question yet no evidence of such payment was tabled by the**

- respondent thus occasioning a miscarriage of justice.**
- 10. The learned Resident Magistrate erred in law and fact in holding that the appellant ought to have enjoined third parties to the suit yet he did not consider whether any legal relationship existed between the appellant and the purported third parties with regard to the suit in question thus occasioning a miscarriage of justice.**
- 11. The learned Resident Magistrate erred in law and fact in not considering the defence of the appellant hence occasioning a miscarriage of justice.**

When the appeal came up for hearing, learned counsels appearing herein, recorded a consent order to have the appeal disposed of by written submissions. Let me set out in brief the background of this appeal. The Respondent herein filed an action before the trial court in which he sought for payment of Kshs.186,000 and with cost plus interest. The appellant filed a defence to deny the Respondent's claim. The learned Resident Magistrate in the end gave the Respondent judgment as prayed. This decision prompted the appellant to file this appeal.

I have already enumerated the grounds put forward on appeal. The first ground argued is to the effect that the trial Magistrate failed to apply the principle that he who alleges must prove. It is stated that the Respondent's claim is on account of supply building materials. The delivery notes produced in court were never addressed to the appellant but were either addressed to Mt. Kenya Hospital or Ministry of Agriculture. The Appellant argued that the delivery notes' origin is unknown and not addressed to him and neither receipt of the delivery notes were acknowledged. The Respondent urged this court to reject the submission because he issued the delivery notes in the name of the construction sites but he issued the appellant with invoices to seek for payment. The appellant is said to have made past payment. I find the appellant's submission not convincing. There is clear evidence that the building materials supplied to the appellant were received by the appellant's foreman and receipt acknowledged by the appellant's colleague Peter Ndirangu. If the appellant's submission that the building materials were supplied to a third party i.e Erickson and Mwangi contractors, then he should have caused them to be enjoined as a third party to suit. I find no merit on that ground.

The appellant further argued that the Respondent did not tender evidence to prove the existence of a contract. The appellant claimed there was no order in writing or acknowledgment of deliveries, therefore no contractual relationship proved. This submission is related to the first ground which I dealt with substantively herein-above. There is cogent evidence on record that the Respondent presented evidence which shows he supplied good to the Appellant. The appellant ordered those goods either verbally or by phone calls and were consequently supplied and received. This is a common practice in such transactions hence there was an offer and acceptance thus completing the process of the contract.

The third important point argued on appeal is that the trial Magistrate erred when he concluded that PW2 was an employee and agent of the Appellant. He argued that there is no evidence to show that PW2 was duly authorised to receive deliveries and sign for them. The evidence of PW2 is to the effect that the delivery notes were signed by Peter Ndirangu who was not called as a witness. I have re-evaluated the evidence of PW2 and it is clear that he pinpointed the delivery notes he personally signed and those signed by Peter Ndirangu. PW2 said he worked with Peter Ndirangu hence he was able to identify his signature. It is also clear from the evidence of PW2 that he knows both the Appellant and the Respondent. PW2 confirmed he was employed as a foreman for of the appellant. He was not given a letter of appointment. After a critical examination of PW2's evidence, I am convinced he was a honest, consistent and reliable witness hence I have no reason to doubt the veracity of his evidence. Nothing turns out on this ground.

In the end, I see no merit in the appeal. It is dismissed in its entirety with costs to the Respondent.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of

Mrs. Kahiaga h/b for Mr. Wanjohi for Appellant

N/A for Mr. Gichohi for Respondent but with Notice