REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 70 OF 2008

FARWAYS SAFARI CENTRE LIMITED …….APPELLANT

-V E R S U S-

GENERAL TYRES SALES LIMITED ……....……...… RESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate, Hon. Mr. T. Nzioki, SRM delivered on 27th day of March 2008 in SRMCC No. 1318 of 2004)

JUDGMENT

1. This is an appeal against the lower Court judgment whereby that Court gave judgment in favour of the General Tyre Sales Limited (**Respondent**)

2. Respondent by its claim before that Court prayed for judgment against Farways Safari Centre Limited, the Appellant for Kshs. 250,000/- which amount was represented by 4 cheques issued by Appellant in favour of Respondent.
3. Appellant by its defence pleaded that it was not liable to pay the amount of those cheques because-

- **the Respondent had failed to deliver the tyres and or tubes the account of which those cheques were issued;**

- **that those cheques were issued for the Respondent to hold them and only to bank them if full delivery of tyres and or tubes in full consideration of each cheque and upon raising an invoice for each delivery and upon Appellant's confirmation of satisfactory delivery.**

That Respondent failed to deliver the said tyres and tubes within reasonable time and on that premises the consideration of those cheques had totally failed. Further that Appellant had given Respondent a cheque dated 20th June 2003 for the sum of Kshs. 50,000/- being a replacement of cheque No. 112742 which cheque was issued in October 21003. That Appellant had severally requested Respondent not present the cheques to the bank for payment to await replacement because the cheques were due to be dishonoured by Appellant's banker. That Respondent presented the cheques for payment in disregard of Appellant's request.

4. This is the first Appellate Court and accordingly the duties of this Court are as set out in the case **JAMES ODERA T/A A. J ODERA & ASSOCIATES –Vs- JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013]eKLR** viz-

"This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority –Vs- Kuston (Kenya) Limited (2009)2EA 212 wherein the Court of Appeal held inter alia that-

> **'On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in**

mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.'"

RESPONDENT'S EVIDENCE

5. PW1, Manish Laladher Naran Dindya, Respondent's Company Administrator stated that the Respondent claim was represented by four cheques issued by Appellant as follows-

PARTICULARS

CHEQUE NO.	DATE	VALUE	DRAWN UPON	DATE PRESENTED FOR PAYMENT
866824	20.7.03	50,000.00	First American Bank	18.9.03
866825	20.8.03	50,000.00	First American Bank	18.9.03
866828	20.9.03	100,000.00	First American Bank	4.2.04
866823	20.6.03	50,000.00	First American Bank	18.9.03
TOTAL		250,000.00		

These cheques were represented by cash sales 4594 and 4595 to which one of them was attached various delivery notes. Those delivery notes were for tyres, tubes and batteries supplied by Respondent to Appellant. That on those cheques being banked at Respondent's bank, Giro Bank

they were dishonoured. Indeed each of those cheques are stamped unpaid with a code next to the stamp of Number 63. It is only the cheque dated 20.9.2003 for Kshs. 100,000.00 which has the remarks "refer to drawer."

6. PW2 Hamza Essek Hassan was Respondent's employee in its accounts department. This witness reiterated the evidence of PW1 and stated that it was not reasonable for Appellant to make payment, as it had alleged, to the Respondent before goods were delivered. He also denied, just as PW1 had, that Respondent had replaced a dishonoured cheque.

APPELLANT'S CASE

7. Contrary to the defence referred to above in this judgment Appellant's witness in evidence went on a tangent and failed to support that defence.

8. DW1 Salim Pirbhai Valjijiva, Appellant's Operations Manager stated in evidence that Appellant was dealing with Respondent on credit terms. That they had a running account with Respondent. In his explanation of Appellant's reason for issuing those cheques he stated-

> **"Our Managing Director, Mr. Moordin Tejpar who was also the Chairman of my community Ismaelic Community was put under pressure by the General Tyres Sales Limited through Mr. Minar to pay the Kshs. 250,000. I spoke to Mr. Minar. The Kshs. 250,000/- was not proper. The post dated cheques were issued pending the reconciliation of the accounts. I was to reconcile the accounts with Mr. Masud, the General Manager of General Tyres Sales Limited. I had meetings with Mr. Masud but he never came up with a reconciliation of our account. I wrote letters to Mr. Masud after I had issued the cheques. The first cheque we issued is Exh No. 5. I wrote to Mr. Masud on 19th June, 2003. I told Mr. Masud not to bank the cheque."**

The witness referred to a statement by Respondent dated 31st March 2004 showing Appellant's debt to be Kshs. 49,710/-. He denied that this debt was owed because Respondent was supposed to give Appellant credit for goods returned to Respondent.

9. DW2 Abdul Hakim, Appellant's banker of Southern Credit Moi Avenue Branch stated that Appellant in the year 2003 Appellants were running an account at that bank. DW2 produced bank statements for that account which showed that Appellant had substantial credit balance of not less than Kshs. 1.5 million.

COURT'S ANALYSIS

10. Appellant has some 11 grounds of appeal. I intend to deal with them globally.

11. Firstly it is important to state that as provided under Section 73(1) of the Bill of Exchange Cap 27 cheques are defined as a Bill of Exchange. That Section provides-

> **"73(1) A cheque is a bill of exchange drawn on a banker payable on demand.**
>
> **(2) Except as otherwise provide in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."**
>
> **Section 3(1) of that Act defines the Bill of Exchange as follows-**
>
> **"3(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to**

pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer."

Section 10(1)(1) and (b) of that Act provide that a bill of exchange is payable on demand. That Section also provides as follows-

"10(1) A bill is payable on demand-

a. **which is expressed to be payable on demand, or at sight, or on presentation; or**
b. **in which no time for payment is expressed."**

In the case **NJOKA TANNERS LTD & ANOTHER –Vs- PAUL KIGIA (2011)eKLR** the Court in a discussion of a cheque being a bill of exchange stated thus-

"I am aware that the appellants stated that the cheques were security for debt owed to the Respondent and that they were issued postdated. The 2nd appellant however by virtue of drawing those cheques in law was acknowledging indebtedness to the Respondent. That was well stated in the case Paresh Bhimsi Bhatia vs. Mrs. Nita Javesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (Unreported) at page 8 where the Court of Appeal stated thus-

'A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonor be duly taken. In Hassanha Issa & Co. vs. Jeraj Produce Store [1967]EA 55, the president of the predecessor of this court when dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is in pari material with our Section 30(2) of the Bills of Exchange Act, Act 27 said in part at page 500: 'in case inasmuch as the suit was upon a cheque and in as much as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.' The other members of the court agreed with that exposition of the law. The appellant's suit is substantially based on the four cheques. The issuance of the cheques is pleaded. The cheque numbers, the date and the amount of each cheque are pleaded. The fact of dishonor is pleaded. It is admitted that the cheques were given. It is also admitted that by the time the cheques were given, the 3rd Respondent owed the appellant the money shown in the respective cheques. In the circumstances, the onus was on the respondents to show circumstances which he is disentitle the appellant to summary judgment such as fraud, duress or illegality."

12.As stated before Appellant failed, by its witness evidence to support

the defence on record. In the case **HAYWARD –Vs- PULLINGER (1950)ALLER** the Court stated that the function of pleadings is to make it clear to the opponent what case he is to meet.

13.The Court of Appeal in discussion that issue, that parties are bound

by their pleadings in the case **INDEPENDENT ELECTORAL AND BOUNDARIES**

COMMISSION & ANOTHER –Vs- STEPHEN MUTINDA MULE & 3 OTHERS [2014]eKLR referred to a case of Malawi which has persuasive effect as follows-

> **"… the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD –Vs- NYASULU [1998] MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated-**
>
> **'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings … for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows that case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; or a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice …**
>
> **In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."**

14. The learned trial Magistrate also noted the Appellant's departure from its pleadings by stating-

> **"Contrary to the pleadings on the defence, DW1 Salim said that the four cheques Exhibit No. 3, 4, 5 and 6 were issued by the Managing Director, Mr. Nordin Tejpar 'under pressure' from General Tyre Sales Limited pending the reconciliation of accounts. This is a departure from the pleadings on the defence. No particulars of duress were alleged against the Plaintiff on the defence when the cheques were issued. Mr. Salim also stated that he wrote correspondence to one Mr. Minar to stop payment of the cheques since the Defendant was changing its bankers a fact that was also not pleaded in the defence as a reason for the cheques to be dishonoured. DW1 also introduced in his evidence the claim for returned or faulty goods which is a new matter not pleaded or counter-claimed in the Defence."**

15. In view of the above observation Appellant's defence remained unsubstantiated and accordingly its defence to the Respondent's claim must fail.

16. Even though Appellant's witness evidence did not substantiate the defence I will refer to some inconsistencies that were not explained by Appellant.

17. Firstly Appellant by evidence of DW1 stated that it replaced a

cheque when it issued on 20th June 2003 number 866823 with another number 112742 of similar amount. In the letter forwarding the alleged replaced cheque Appellant requested for return of cheque No. 866823. It seem, if that allegation is to be believed the Appellant did not get that cheque returned and did not complain of such failure to return.

18. Secondly Appellant pleaded in its defence that Respondent failed to

deliver goods represented by the payments of those cheques. I make a finding that the burden of proof to prove that issue lay with Appellant. Appellant failed to discharge that burden.

19. Appellant sought to explain that Respondent's Statement that is

Defence Exhibit No. 3 was not due because Appellant had returned the goods to Respondent. That explanation is unbelievable because the goods allegedly were returned to Respondent between the year 2001 and 2002 and it is not believable that those would be related to a statement dated 1st March 2004, which statement did not reflect a balance carried forward.

20. The fact that Appellant had credit balance in another Bank does not

assist Appellant since it is not unusual for companies to have more than one bank account, even in different banks.

21. On the whole I wholly agree with the finding of the Learned Trial

Magistrate. The Learned Magistrate who had the opportunity to

observe the witnesses who testified before him stated in his judgment thus-

> **"I do not believe the evidence of DW1 Salim which I find to be inconsistent and contradicting the defence on record. To the contrary I find that the Plaintiff's witnesses PW1 and PW2 were telling the truth that the cheques Exhibit No. 3,4,5 and 6 were issued on account of the goods supplied to the Defendant as were particularly proved by the cash sales cheques Exhibit No. 1 and 2 and the attached delivery notes. I further find that the cheque Exhibit No. 5 was not replaced by the cheque D-Exh No. 18. The cheque D-Exh No. 18 was for a completely different transaction which was a credit sale."**

22. The Respondent had to prove its case on a balance of probability. I

have taken account of the submissions of Appellant in respect of Respondent's lack of Notice as required under Section 49 of Cap 27. However my understanding of the provisions of Section 50(1) (c) (iii) is that such Notice, as in this case, is dispensed with "**where the drawer is the person to whom the bill is presented for payment."**

23. Respondent did in my view meet the required burden of proof. It

proved its case on a balance of probability. The learned author Alan Taylor in the book '**Principles of Evidence**' – Second Edition considered the burden of proof in Civil cases and wrote-

"Denning J in Miller v Minister of Pensions (above) also explained the operation of the Civil standard of proof:

> **That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities**

are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

24.Respondent met that burden and I therefore uphold the lower Court's judgment.

25.The Respondent did not oppose the present appeal and will therefore not be entitled to costs.

CONCLUSION

26.In the end this appeal is hereby dismissed with no orders as to costs.

DATED and DELIVERED at MOMBASA this 27TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE