REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 245 of 2010

KENINDIA ASSURANCE COMPANY LIMITED …..…….. APPELLANT

VERSUS

RANGI MBILI AUTO SPARES ……..……..…… RESPONDENT

(Appeal arising from the judgment and decree of Mr. M.N. Gicheru, CM, in Kisii CM's

CMCC NO.225 of 2007 dated and delivered on the 26th October, 2010)

JUDGMENT

THE PLEADINGS

1. The Respondent in this appeal was the plaintiff in the court below. It had initially filed the suit in the High Court being HCCC NO.187 of 2001, vide a plaint dated 29th November 2001. Later on with the consent of the parties entered into on 23rd May 2007, the suit was transferred to the Chief Magistrate's court at Kisii, being CMCC NO.225 of 2007.

2. From the above stated plaint, the following paragraphs bring out the respondent's claim against the appellant:-

"3.Vide an agreement made between the plaintiff and the defendant, on or about 13.11.1998, the defendant offered and the plaintiff accepted to carry out repairs on a motor vehicle registration number KAD 327 J Isuzu.

4. In pursuance of the said agreement, the plaintiff duly carried out the repairs as specified at a mutually agreed consideration of Kshs.694,804/=.

5. That upon the plaintiff's own and express request and/or instructions the defendant duly paid a sum of Kshs.200,000 out of the said consideration to Messers Kisii Maternity and Nursing Home in order to settle a debt then due from the plaintiff to the said Nursing Home.

6. That in breach of the agreement, the defendant has refused, failed and/or neglected to pay to the plaintiff the sum of Kshs.494,804/= being the balance of the consideration or any amount thereof and still persist (sic) in such refusal, failure and/or neglect."

3. The Respondent therefore prayed for judgment against the appellant (as defendant) for:-

a) Kshs.494,804.00

b) Costs of this suit.

c) Interest on (a) and (b) above at court rates

4. The appellant/respondent replied to the Respondent's claim first by filing a written statement of defence dated 11th December 2001 through the firm of Olago-Aluoch & Company Advocates. On the 17th March 2003, the appellant filed an amended Written Statement of defence and counterclaim in the sum of Kshs.549,929/= being the amount allegedly owed by the plaintiff to the defendant in respect of unpaid premiums. Yet again on 2nd May 2003, the appellant filed a Further Amended Written Statement of defence and Counterclaim. In this Further amended Written Statement of defence and Counterclaim, the amount of unpaid insurance premiums was amended upwards to Kshs.1329705/=.

5. The salient points of the appellant's defence vide the Further amended Written Statement of defence are discernible from the following paragraphs:-

"2. The defendants deny the rest of the paragraphs of the plaint and join issue with the plaintiff thereto.

3. Without prejudice to the generality of the foregoing, the defendants state that the plaint is bad in law and offends the rules of pleadings generally and the provisions of the Civil Procedure Act for failure to disclose a cause of action or the nature and extent of damages suffered.

4. Further the defendants shall raise a Preliminary Objection to the suit for the deliberate concealment of material facts relating to the alleged cause of action in order to avoid payment of all requisite and applicable court filing fees.

5. The defendants states (sic) that any liability to the plaintiff was satisfied wholly by part payment to Kisii Maternity & Nursing Hospital for 200,000/= debit for compulsory excess of 200,000/=; Credit Note No.1106 for 228,247/= owing from the plaintiff; Credit Note No.1109 owing by Ishumad Hardware. Payment of Kshs.121044 by Defendant to plaintiff vide cheque No.001995.

6. It appears from the record of the lower court on 4th December 2008 and 16th February 2009 that the appellant's counter claim of Kshs.1,329,705/= was struck out for failure on the part of the appellant to pay the requisite court fees for the same amounting to Kshs.64165/=.

7. The respondent filed a Reply to the appellant's amended written statement of Defence and Defence to counter claim. The Respondent averred that the appellant's liability to it was never satisfied in the manner alleged by the appellant and further that apart from the admitted payment to Kisii Maternity and Nursing Hospital, the appellant had no authority, permission or consent of the Respondent under the contract between the parties and/or any legal excise whatsoever to make payments to third parties as alleged in paragraph 5 of amended written Statement of Defence. The respondent also denied that the appellant ever paid to the Respondent the sum of Kshs.121,044/=. The respondent further averred that if any payments over and above the sum of Kshs.200,000/= paid to Kisii Maternity and Nursing Hospital were ever made, an allegation that was denied by the Respondent, then such payments were misplaced, erroneous, fictitious and in breach of the contract between the respondent and the appellant. The respondent therefore urged the court to dismiss the appellant's amended Written Statement of Defence and counterclaim and to enter judgment for the Respondent as prayed in the plaint.

THE RESPONDENT'S CASE

8. At the hearing of the case before the trial court, the Respondent's case was anchored in the testimony given by Akbar Kassam Khan who testified as PW1. He testified that he was the owner and director of Rangi Mbili Auto Spares Limited which specialized in repair of motor vehicles and sale of spare parts. He stated that their portfolio for motor vehicle repairs was for all insurance companies. He recounted how sometime in November 1998, the appellant herein took a truck, Registration Number KAD 327 J for

repairs, with instructions to repair all the damaged parts of the truck. The Request Form for the repair work was produced as **PMF1-1**. PW1 stated that the damaged truck belonged to Dr. Manduku, the Chairman of Kisii Maternity and Nursing Home.

9. He stated further that the repairs were done as requested at the total repair cost of Kshs.694804.40/= as communicated to Dr. Manduku vide a letter dated 25th May 1999. PW1 also stated that according to the repair instructions received, they were to put a new engine, which was to be brought by Dr. Manduku, and for that arrangement, the bill was reduced by Kshs.200,000/= as per **P. EMF1-3**. PW1 further stated that apart from the sum of Kshs.200,000/= the balance of Kshs 494804/= was yet to be paid, although he also stated that the appellant attempted to pay to the Respondent the sum of Kshs.121,044/= after an invoice was sent to the appellant. PW1 however added that they refused to take the sum of Kshs.121,044/= by returning the cheque to the appellant.

10. PW1 was cross examined at great length by counsel for the appellant and during the cross examination the following information came out of the mouth of the witness. The damaged parts of the truck which were to be repaired were" front bumper at Kshs.9000/=, grill at a cost of Kshs.6000/=; 2 fog lights at a cost of Kshs.5500/=; one right hand head light at a cost of Kshs.300/=; R/H indicator light at a cost of Kshs.2100/=; R/H and L/H spring hanger at a cost of Kshs.10,000/=; reconditioned engine at Kshs.400,000/= (initially this was Kshs.300,000/=); one R/H ring at a cost of Kshs.3,000/=. The outer mirror at a cost of Kshs.790/=; R/H outer mirror handle for Kshs.1200/=; Reflector strip for Kshs.600/=; Reflector for Kshs.400/=; Painting work for Kshs.1800/= and miscellaneous costs of Kshs.9000/=; body repair at a cost of Kshs.3900/=, costs of labour at Kshs.20,000/= plus VAT of Kshs.17214.40. PW1 confirmed that the items indicated above constituted the whole of the repair work.

11. During the cross examination, PW1 confirmed that the engine, at the estimated cost of Kshs.400,000/= was not replaced; and that he would not be billing for the cost of the said engine. He also stated that he was not in a position to say how he had arrived at the figure of Kshs.694804.40 which formed the basis of the respondent's claim against the appellant and the fact that the invoices marked MF1-1 and MF1-4 were different and did not add up.

12. PW1 further stated during the cross examination that the appellant was to be invoiced only in respect of repairs actually undertaken, and referring to **PMF1-1**, he stated that the total amount for the repairs was Kshs.441300/= and that the said document does not make mention of the cost of the engine. He also said he returned cheque No.01001995 for Kshs.121,044/= to the appellant's offices in Kisii. He also confirmed that a business known as Ismail Hardware was owned by his brother who was also a director of the respondent company. He denied that he had lodged a fake claim.

13. In re-examination, PW1 stated that there was no disagreement whatsoever between the respondent and the appellant over the sum of Kshs.694804.40 and further that there was no problem over the sum of Kshs.200,000/= paid to Kisii Maternity and Nursing Hospital.

THE APPELLANT'S CASE

14. The appellant did not call any witnesses, despite having been given an opportunity to do so.

THE SUBMISSIONS

15. Both parties filed written submissions before the trial court.

THE JUDGMENT

16. After carefully considering all the evidence that was adduced in the case as well as the submissions filed by learned counsel for the parties, the trial court (Hon. M.N. Gicheru, CM), entered judgment for the respondent as prayed in the plaint.

THE APPEAL

17. The appellant was aggrieved by the whole of the decision of the learned trial magistrate as a consequence of which this appeal was filed. The appellant's complaints as per the Memorandum of Appeal dated 23rd November 2010, and filed on the same date are:-

1. The learned trial magistrate erred in fact and in law when he held that the respondent had proved that the appellant was indebted to him as had been prayed for in the plaint.

2. The learned trial magistrate erred in fact and in law when he failed to take into account the fact that the appellant had paid to the respondent the sum of Kshs.121,044/= vide cheque number 001995 and which payment the respondent had acknowledged out of the contract sum.

3. The learned trial magistrate erred in fact and in law when having found that the cost of providing a new engine could not be claimed by the respondent as the respondent did not provide it, he went ahead and found for the respondent in the suit, on a claim that included the set of the said engine.

4. The learned trial magistrate erred in fact and in law when he failed to appreciate the nature, importance and effect of the survey report which was produced in evidence by the respondent as plaintiff exhibit 1, which document constituted the contract between the parties.

5. The learned trial magistrate erred in fact and in law when he failed to appreciate that the survey report clearly indicated the extent of damage to the vehicle, what was to be repaired and replaced by the respondent and the cost of suit repair or replacement.(sic)

6. The learned trial magistrate in the premises erred in law and in fact when he awarded judgment against the appellant in favour of the respondent on the basis of an invoice no. A73037 dated 28th May 1999, exhibit 4 which had no relevance at all to the repair works which the respondent had undertaken on instructions of the appellant.

7. The learned trial magistrate in the premises erred in fact and in law when he ignored the respondent's contradictory and unsatisfactory testimony given during cross examination.

8. The learned trial magistrate erred in fact and in law when he failed to hold and apply the principle that he who alleges must prove and in failing to hold that the respondent had not proved that he was owed the sum claimed in the plaint as alleged or at all.

18. By consent of the parties herein, this appeal proceeded by way of written submissions; which were duly filed on 23rd February 2012 and 12th March 2012 by the appellant and respondent respectively.

THE APEPLLANT'S SUBMISSIONS

19. Through counsel M/s Okong'o Wandago & Company Advocates, the appellant contends that a close look at the entire evidence shows that the Respondent did not prove its case against the appellant on a balance of probabilities. It is contended further that the major item of the amount claimed was Kshs.400,000/= being the cost of an engine that was never installed and that therefore the respondent had no basis for claiming the sum of Kshs.494804/40 after payment of Kshs.200,000/= and Kshs.121044/= both of which amounts were allegedly acknowledged by the respondent.

20. It is also contended that the respondent's claim being a material damage claim was in the realm of special damages and therefore the respondent needed to plead that damage specifically and specially prove the same. Reliance was placed on the case of **Sabuni –vs- Kenya Commercial Bank [2002] 1 KLR**? where it was held inter alia, that:-

i) when the tort complained of has resulted in damage to the chattel, the plaintiff is entitled to either the costs of the repair thereof or any consequential loss which is not too remote, subject to the plaintiff's duty to mitigate the loss.

ii) Both type of loss are in the nature of special damages and the law is now settled beyond paradventure that such damages must be pleaded with particularity and strictly proved at the trial by evidence.

21. Counsel specifically referred to page 371 of the **Sabuni judgment** where the court observed as follows on the issue of special damages:-

"Finally, although it may be cold comfort to the plaintiff I desire to state that I am not holding that the plaintiff did not suffer any consequential loss for non-user of his motor vehicle (the evidence is abundant that he did) what I am holding is that he has not proved the exact quantum of such loss to the degree of proof required of special damages. In the result, I must reject his claim for loss of income."

22. Counsel for the appellant argue that from PW1's evidence, it is clear that the respondent never exhibited any agreement dated 13th November 1998 as pleaded at paragraph 3 of the plaint and that in view of **Order 2 rule 6** of the **CPR, 2010,** a party is bound by its pleadings. Counsel urged this court to allow the appeal and to substitute the judgment of the trial court with an order dismissing the respondent's claim with costs.

THE RESPONDENT'S SUBMISSIONS

23. These were filed by the firm of M/S Khan & Associates Advocates on the 12th March 2012. It is contended that the respondent's claim against the appellant is a liquidated claim arising out of a contract which contract is admitted by the appellant in its pleadings especially at paragraph 5 of the written statement of defence and through the exhibits produced on behalf of the appellant. It is also contended that the respondent's claim does not arise from a tort; that the same arises out of a repairs contract which repairs were carried out to the satisfaction of the appellant as stated in "**Ex. AK 2"** being a letter dated 25th May 1999 written by Dr. H. Manduku, the chairman of Hema Hospital. The said letter was addressed to the appellant's Kisii Branch Manager and the subject matter thereof is **"REPAIR OF VEHICLE KAD 327J"** and reads thus at paragraphs 1 and 2:-

"This is to certify that the above mentioned vehicle has been repaired by Rangi Mbili Motors as per your specification and to our satisfaction.

Kindly organize payment to Rangi Mbili Motor Spares."

24. On the basis of the above, respondent's counsel submits that grounds 3,4 and 5 of the appeal are misguided and should be struck out.

25. Regarding ground 2 of the appeal, counsel submits that the same is frivolous and without merit for the simple reason that the cheque for Kshs.121,044/= though received by the Respondent was returned to the appellant as the Respondent did not agree with some of the terms imposed by the appellant. Counsel points to a letter dated 1st December 1999 from the appellant's Kisii Branch Manager to the respondent herein. The first paragraph of that letter reads:-

"We acknowledge receipt of your letter dated 30.11.99 on the above together with the returned cheque for Kshs.121044.00."

26. In the same letter, the author talks about the sum of Kshs.200,000/= charged on the repairs amount and the two credit notes passed against the same amount. Counsel argues that if indeed the said sum of Kshs.121044/= was paid to the Respondent, then there is no reason why the appellant did not adduce evidence to confirm such a position with production of its bank statement.

27. The other point taken up on behalf of the respondent in opposing the appeal is that there was no agreement between the parties to make any deductions as those the appellant purported to do vide credit

notes 1106 for Kshs.145513 and 1109 for Kshs.28247.00. Reliance was placed on **Civil Appeal NO.330 of 2001 - Kenindia Assurance Co. Ltd. –vs- Alpha Knits Ltd** where Kwach, J. as he then was, held that:-

"It is illegal, unfathomable and preposterous to make such wild deductions just because the two different companies had a director in common. Such deductions have to be done with written and express consent of the plaintiff."

28. Further, counsel contends that even if it were to be accepted that the deductions were legitimate (which is denied by the respondent), payments to Thabiti Brokers on whose behalf the appellant purported to issue the Credit notes, was not confirmed by any documentary evidence.

29. On whether or not an agreement can only be discerned if it is in writing, counsel submits that an agreement can be either verbal or written and it can be proved by correspondences and memoranda or notes. In this regard, counsel relies on the Court of Appeal decision **Manji –vs- U.S.I.U. & another [1976] KLR 185**, in contending that the contract in the instant case, though unwritten was fully acknowledged by the appellant. Counsel has distinguished the **Sabuni case** (above) and argues that the same is irrelevant to the issues at hand since that case concerned a material damage claim requiring strict proof which is not the position in the instant case. The claim in this case, submits counsel, is for repair charges, which claim is not denied, but the appellant has only tried to reduce the actual amount of money to be paid out to the Respondent through credit notes against the sum claimed.

30. Finally, counsel submits that as at the time of hearing of the case in the lower court, the appellant did not have a valid defence on the record since it failed to pay the further court fees of Kshs.64165/= and subsequently the Further amended Defence was struck out on 16th February 2009 pursuant to the court's earlier order of 14th December 2008 by which order the trial court said:-

"Court. Having heard defendant counsel and the plaintiff's counsel, it is clear that the defendant has not paid Kshs.64165/= which it ought to have paid when it filed its counter claim. In the circumstances, I do hereby order the defendant to pay the same within 30 days from today failure of which the counter claim shall stand struck out with costs to the plaintiff. Case adjourned today's costs to the plaintiff as well as CAF of Kshs.400/= the latter to be paid forthwith by consent hearing on 16/2/2009."

31. When the case came up on 16th February 2009, Mr. Ogweno counsel for the respondent pointed out to the court that the further court fees which was ordered to be paid within 30 days on 4th December 2008 was yet to be paid. Mr. Ogweno prayed that the counter claim be deemed as dismissed. In reply to Mr. Ogweno's submissions, Mr. Okongo, appearing on behalf of the appellant stated **"It was to be struck out"** and so it was in accordance with the court order of 4th December 2008. In making the submissions touching on the struck out Further amended Written Statement of Defence, counsel relies on the case of **Mutuku & 3 others –vs- United Insurance Co. Ltd. – Nairobi HCCC No.1994 of 2002** where the court persuasively held that **"where a pleading is amended, then is struck out for whatever reason, the party affected simply has no valid pleadings left on record**." Counsel urged this court to make such a finding in respect of the appellant's defence, and to proceed to dismiss the appeal with costs to the respondent.

THE DUTY OF THIS COURT

32. Since this matter is before me on a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. It has to be remembered however, that in reconsidering and evaluating the evidence afresh, this court has no opportunity of seeing and hearing the witness who gave evidence before the trial court. It also has to be remembered that it is usually a big thing for an appellate court to overturn the findings of a trial court unless it is abundantly clear that the conclusions reached by the trial court are not supported by evidence or that the trial court applied the wrong principle in reaching its conclusions. Generally see **Selle & another –vs- Associated**

Motor Boat Co. Ltd. & another [1968] EA 123 and **Peters –vs- Sunday Post Ltd. & another [1958] EA 424**. There is thus need for caution and an exhaustive evaluation of all the evidence on record before deciding whether or not to support the findings of the trial court.

FINDINGS AND CONCLUSIONS

33. I have now carefully reconsidered and evaluated the evidence afresh as clearly set out in the preceding pages of this judgment. I have also carefully considered and weighed the judgment of the trial court. I have also read through the pleadings and the submissions by counsel both before the trial court and before me. From all the above, the issues that arise for determination are:-

1) Was the respondent's claim a material damage claim or was it a claim for repair work undertaken by the respondent on the instructions of the appellant?

2) Was the sum of Kshs.121044/= paid to and acknowledged by the respondent?

3) Did the appellant have the authority to issue credit notes against the respondent's claim?

4) Did the respondent prove its claim against the appellant on a balance of probabilities?

5) Who is to bear the cost of this appeal?

34. With regard to the first issue, the evidence is clear that the respondent's claim against the appellant related to repair charges which were incurred by the respondent for work undertaken on the instructions of the appellant. There was therefore a misapprehension of the law on the part of the appellant in thinking that the respondent's claim was a material damage claim which required to be specially proved by evidence. In any event, during his testimony, PW1 gave details of the work undertaken on the subject motor vehicle as per the invoice dated 28th May 1999 for Kshs.694804.40 out of which Kshs.200,000/= was settled by consensus. It therefore follows that the respondent's claim against the appellant does not arise from a tort though the genesis of it was a tort, but as I have said earlier it is a liquidated claim for work undertaken. This fact is admitted by the appellant vide its letter dated 20th November 1999 to the respondent. The appellant acknowledged the invoice amount as being Kshs.694,804/= from which it deducted Kshs.200,000/= and two credit notes 1106 and 1109 for Kshs.145513.00 and Kshs.228247.00 respectively. It was on the basis of the said acknowledgment and deductions that the appellant came up with the amount payable as Kshs.121,044.00.

35. The answer to the second issue is clear, and that is that the sum of Kshs.121,044.00 was never paid to the respondent. Though a cheque number 001995 for the said sum was dispatched to the respondent the respondent returned the cheque to the appellant vide its letter dated 30th November 1999 and duly acknowledged by the appellant vide its letter dated 1st December 1999. The appellant did not produce any other evidence to show that the said cheque was ever returned to the respondent and paid into the respondent's account. It was the duty of the appellant to prove the allegation that the sum of Kshs.121044/= was indeed paid to the respondent.

36. On the third issue, and bearing in mind the authorities cited to me by counsel for the respondent, I have reached the conclusion that the appellant had no authority or color of right whatsoever in purporting to make the deductions from the amount due and owing to the respondent. The case in point is **Kenindia Assurance Co. Ltd. –vs- Alpha Knits Ltd** (supra). I say nothing more on this issue.

37. Taking all the above findings into account, I am satisfied that the respondent proved its claim against the appellant on a balance of probabilities. The claim was admitted by the appellant through the appellant's letter dated 26th November 1999. The appellant was bound by that pleading. The fact that the appellant had no authority to make the deductions it purported to make, the respondent's claim as prayedin the plaint remained intact.

38. The upshot of what I have said above is that the trial court had no option but to enter judgment for the respondent as prayed in the plaint. This being the case, I see no reason to interfere with the judgment of the learned trial court. In my humble view, the findings and conclusions of the trial court were well grounded.

39. The appeal is therefore dismissed in its entirety with costs to the respondent.

40. It is so ordered.

Dated and delivered at Kisii this 31st day of January, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of

Mr. Odhiambo Kanyangi (present) for Appellant

Mr. Kaburi for Ogweno (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.