



Editorial Summary

1. *Civil Appeal*

2. *Subject of Sun ordinate case:*

COMMERCIAL LAW

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2.1 *Contract*

2.2 *Appellant original plaintiff*

M/s Sona Information Technologies Ltd

enter into agreement on

31st March 2005

to sell:

- i) Stock*
- ii) Asset*
- iii) Fittings*

for a sum of Ksh.1,000,000/- to

to:

Asher Akal Onyango

T/a Elegance Uniform Centre

2.3 *Payment agreement*

- i) Ksh. 300,000/- deposit on execution.*

ii) Ksh. 700,000/- two equal instalments
of which last instalment be paid on
30th May 2005.

2.4 Respondent pays Ksh. 300,000/- and given
immediate vacant possession.

2.5 Respondent unable to pay two equal
instalments.

2.6 Two cheques returned to appellant,
“return to drawer.”

2.7 Request by respondent to review instalment
payments:
Two Ksh. 175,000/-
Sum Ksh. 50,000/-
by post dated cheques

2.8 As a result

i) Rent arrears accrues at
Ksh. 80,000/-

ii) Bank charges of Ksh. 7000/-

2.9 Total claim Ksh. 787,000/-

2.10 Appellant files suit for refund of claim
5th July 2005

2.11 Respondent files defence 8th August 2005

- i) *Landlord levys distress*
- ii) *Frustration of contract.*

2.12 *Application chamber summons 18th August 2005*
To strike out defence and judgment be
Entered in favour of appellant original plaintiff.

2.13 *Respondent represented by:*

- i) *M/s Makacha & Co Advocates*
(20th July 2005)
changes advocates
- ii) *M/s Dola Magani & Co Advocates*
(23rd December 2005)
changes advocates
- iii) *M/s Gathii & Co Advocates*
(5th December 2006)

2.14 *Application heard with appellant's advocate*
M/s Oyatta & Co Advocate
interparte
The respondent unable to make payments

2.15 *Respondent states there is frustration of*
the contract.

2.16 *Ruling by trial magistrate that:-*

- i) *Respondent owed money.*
- ii) *... a clear case for summary judgment*

for sum of Ksh. 700,000/-

- iii) *No proof of Ksh. 7000/- nor Ksh. 80,000/-
as bank charges and rent arrears
respectively.*

2.17 *Appellant changes advocates to
M/s N.O. Sumba & Co Advocates.
21st July 2006.*

2.18 *Respondent application leave of
23rd December 2005 dismissed.*

2.20 *Consent of parties
30th January 2006
Judgment petition to liquidate*

- i) *Ksh. 100,000/- be paid 5th May 2006*
- ii) *Ksh. 10,000/- to be paid 30th March 2006*
- iii) *Ksh. 10,000/- to be paid 30th April 2006*
- iv) *Ksh. 100,000/- ... 30th May 2006*
- v) *Balance to be paid equal instalment
of Ksh. 88571/-
with effect 30th June 2006
in default execution to issue.*

2.21 *Further consent 9th August 2006
Respondent pay Ksh. 178,000/- and a balance
of monthly instalment of Ksh. 100,000/- per month.*

2.22 *Respondent defaults in payment.*

2.23 *New advocate by respondent*

2.24 *What is outstanding Ksh. 421,220/-*

2.25 *On 14th December 2006*

Application 14th November 2006

to set aside and or review orders of

25th October 2005

i) *Leave to amend the defence that*

Ksh. 547,000/- already paid be returned.

2.26 *Application opposed advocate with no*

practising certificate commissioned affidavit.

2.27 *Application 14th November 2006 allowed*

summary judgment of 25th October 2005

set aside on 21st November 2006.

3. *Appeal filed 18th January 2007.*

a) *There was no new evidence.*

b) *Delay is inordinate*

c) *Order was to appeal not review*

summary judgment.

- d) *Application 14th November 2006 to review summary judgment was irregular.*
- e) *Affidavit of respondent commissioned by an unqualified person.*
- f) *Respondent had recorded serial consents.*
- g) *Appellant's liability up to sale transaction 31st march 2005.*
- h) *Transfer of execution passed to the respondent.*
- i) *Defence raised, no triable issue.*
- j) *Ruling be set aside.*

4. *In reply:*

- 4.1 *An order is the same as a decree. No Need to attach same to the application.*
- 4.2 *Contract was illegal.*
- 4.3 *Sale agreement executed was invalid.*
- 4.4 *There was no goods passed to the respondent.*

5. *Held:*

- 5.1 *Appeal allowed.*
- 5.2 *Summary judgment orders reinstated.*

6. *Case Law:*

- a) *Giella – Vs – Cassman Brown & Co Ltd*

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7. *Advocates* :

- i) *N.O. Sumba instructed by M/s N.O. Sumba
& Co Advocates for appellant/ original plaintiff*
- ii) *H Okumu instructed by Ochanda ONgori & Co Advocates for
respondent/defendant*

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 32 of 2007

SONA INFORMATION

TECHNOLOGIES LTD APPELLANT/ ORIGINAL PLAINTIFF

VERSUS

ASHER AKAL ONYANGO T/A

ELEGANCE UNIFORM CENTRE RESPONDENT/ORIGINAL DEFENDANT

*(Being an appeal arising from the Ruling of Hon. T.W.C. Wamae delivered on 21st December 2006 in
Case No. 7155 of 2005 dated at Milimani Commercial Courts)*

J U D G M E N T

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I. **INTRODUCTION**

1. In the subordinate courts, a suit was filed by M/s Sona Information Technologies Ltd, the original plaintiffs (herein referred to as the appellants,) to enforce a sale agreement that they had entered into with the said respondent original defendant Asher Akal Onyango t/a Elegance Uniform Centre (herein referred

to as the respondent).

2. It was the agreement in this commercial matter that a sum of Ksh. 1 million would be paid for stock assets and fittings for the respondent.

3. The agreement for payments to be deposited upon execution of the agreement. Thereafter Ksh. 700,000/- was to be paid in two equal instalments of which the last instalment would have been paid by the 30th May 2005.

4. Unfortunately, the respondent paid only Ksh. 300,000/- whereas he was given vacant possession, he failed to pay the two equal instalments.

5. The respondent then changed his advocate being:

M/s Makecha & Co Advocates

(20th July 2005)

Changed to:

M/s Dola Magan & Co Advocates

(23rd December 2005)

Changed to

M/s Gathii & Co Advocates

(5th December 2006)

6. What transpires is that the respondent entered into several consents with the appellant to make payments.

7. The appellant filed application for serving judgment application. This was granted by the Hon. Trial Magistrate but for only Ksh. 700,000/-. The balance of proof of Ksh. 7000/- being bank interest and Ksh. 80,000/- being rent areas was rejected by that court on grounds that it has never been established. (25th October 2005).

8. The appellant changed advocates to M/s Sumba & Co Advocates.

9. The respondent as stated earlier entered into series of consents of how he would repay the sum of moneys. This was on 30th January 2006 and

9th August 2006.

10. Despite this the respondent defaulted again in payment. He engaged the services of a new advocate who then filed application dated

14th November 2006. This application prayed for the setting aside and or review orders of 25th October 2005 that granted the summary judgment that was being executed.

11. The respondent also prayed for leave, if the judgment was set aside to be able to amend the defence to include a claim of Ksh. 547,000/- as refund to him.

12. The appellant opposed this application. The proper course would have been to file appeal against the summary judgment. This was never done. It was also prudent to note that the affidavit in support of the application was commissioned by an advocate who had no practice certificate.

13. The Hon. Magistrate was convinced her order for summary judgment should never have been issued. It transpired that the appellant was aware all along that the said file had already an attached to. The appellant argued the respondent ought to have done due diligence on this matter.

14. Being convinced nonetheless, the trial magistrate set aside her orders by way of a review.

15. The appellant was aggrieved and filed appeal raising the above issues stating that the appellant's summary judgment should never have been set aside.

16. The appellant's liability to the premises was limited to the

31st March 2005. Once the transfer passed to the respondent then he was liable for any dues.

17. In reply to this argument, the respondent stated that whereas the review application was filed without the order or decree required to be so filed to the application, this was not fatal as the order was included. The sale agreement that was executed was null. There was no good that passed through to the respondent. In short the contract was illegal.

II OPINION

18. For there to be a review, one of the conditions was that not only must there be new and important matter or evidence, but that an applicant must exercise due diligence which when discovered was not within his or her knowledge and such knowledge could not be provided by him.

19. In this appeal, the appellant argued that there was no due diligence that had been exercised by the respondent. The appellant prayed that the review application orders be set aside.

20. Order 45 rule 1 goes further to state that the orders or decree passed that required to be served must have been done without unreasonable delay.

21. The issues brought up such as there being no decree order attached to the application.

22. The issue of the advocate having no practicing certificate to commission an affidavit brought out serious issues.

23. The respondent herein brought an application for review against the Hon. Magistrate orders that had been on the record for over a year or more. That execution had contract.

24. I believe that the submissions put to this court and authorities that have been submitted support the fact that the learned Hon. Magistrate erred in setting aside her orders for review.

25. This appeal be and is hereby allowed. The orders of the Hon. Magistrate is set aside and is substituted with the orders that the application for review be and is hereby dismissed.

26. There will be costs to the appellant/original plaintiff to be paid by the respondent in this appeal. There will be costs in the subordinate court case to be paid to the original plaintiff/appellant by the respondent.

DATED THIS 23RD DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

i) *N.O. Sumba instructed by M/s N.O. Sumba
& Co Advocates for appellant/ original plaintiff*

ii) *H Okumu instructed by Ochanda Ongori & Co Advocates for
respondent/defendant*