



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL 177 OF 2003

C.G. PUNJANI (MSA).....APPELLANT

VERSUS

MOHAMMED A. TAIB.....RESPONDENT

JUDGMENT

The Respondent herein **MOHAMED A. TAIB** filed a suit in Court vide a plaint dated 18th June 1999, against the appellant **C.G. PUNJANI (MOMBASA) LIMITED**, seeking for inter alia, prayers that judgment be entered for the plaintiff in the sum of Kshs. 229,678.50 plus interest thereon at court rates, cost thereof and incidental to the suit.

The suit was registered as SRMCC. No.1999. The appellant filed a defence thereto denying liability. The suit was heard by the Learned Trial Magistrate Mr.F. Kadima (as he then was) and judgment delivered on 25th September 2003. The judgment was in favour of the Plaintiff/Respondent. The trial Magistrate concluded that;

“the plaintiff has proved his claim on the balance of probability and I in the result enter judgment for the plaintiff against the defendant in the sum of Kshs. 229,678.50 as prayed in the plaint together with costs and interest of suit.”

Being aggrieved with the judgment, the defendant/appellant has filed this appeal. He filed a memorandum of appeal dated 23rd October 2003 and raised five grounds of appeal as follows.

That the Learned Magistrate erred in law in

- Coming to a finding that the Respondent had proved its claim on a balance of probability.
- Failing to consider the evidence tendered by the appellant.
- In entering judgment for the Respondent in the sum of Kshs. 229,678.50
- In his evaluation of the evidence and coming to the wrong decision.

· Inordinate delay in delivering the judgment which was not explained.

At the hearing of the appeal, the parties agreed to dispose of the appeal by way of written submission. The submissions were subsequently tendered by the firm of Khatib and Co. on behalf of the appellant and the firm of Taib A Taib on behalf of the respondent. In a nutshell the Appellant submitted that the respondent did not prove his case on a balance of probability as there were many glaring discrepancies in the evidence. Especially exhibits No. 10, 11 and 12 which were admitted had a lot of contradictions. That, the respondent's witness was not credible. That the Learned Magistrate failed to consider the evidence given by the appellant. That DW1 produced a receipt dated 4th June 1996 to prove an amount of Kshs. 370,000 was paid in full and as a final settlement of the Respondent's claim. But the respondent did not appear in person to rebut that evidence. That the judgment entered herein was in error because although P.Exh. 5 shows a payment of Kshs. 1,122,776.50, the statement issued shows a sum of Kshs. 500,000 as paid on 29th March 1996 and that the payment of Kshs. 370,000/- was made when the figures were reconciled. That since the respondent was not called to testify, the evidence of PW1 was hearsay. That the Learned Magistrate erred by wrongly evaluating the evidence and thus arriving at the wrong conclusion. The Appellant also laments that inordinate delay in delivery of the judgment caused him injustice and prejudice.

In reply and in opposition to the appeal, the respondent submitted that PW1, the Chief Accountant of the plaintiff company testified and gave details of the goods delivered to the appellant and the invoices raised. That the respondent has given a breakdown of the invoices and the delivery. That, the witness again gave details of the total claim as per the invoices as Kshs. 1,977,250 less a payment of Kshs. 1,222,775.50 and credit notes of Kshs. 624,795.0 thus the balance of Kshs. 229,678.50 claimed the respondent was not clear as to whether he paid the invoice by cash or through cheque system. That when the appellant supplied particulars of payment on request, it was clear, all payment were made in cash. That the defendant/appellant allegation that no receipts were issued on payment made was not true and far fetched. That, DW2 the co-director of the appellants company admitted thereafter the payment of Kshs. 370,000 and further payment was made as part of the said "**final settlement sums**". The respondent submitted that the evidence adduced by DW1 and DW2, did not make sense. It was not clear and contradictory. As regards the issue of delay in delivery judgment, the Respondent told the court that, the appellant never wrote to the court to complain over the same, and in any case no prejudice was suffered by the appellant. That, the court do expunge that ground of appeal.

I shall now deal with the issues raised. As a first appellate court, I am expected to reconsider the evidence adduced afresh and draw my own independent conclusion. I have therefore re-evaluated the evidence adduced by the parties. I have also considered the submissions for and against appeal herein. I find that, there is no dispute that the parties herein had a long standing business relationship. The same was conducted on the basis of a running account. All seem to have gone on well, until the parties disagreed on the statement of accounts, and more specifically the amount of money owing to the plaintiff by the defendant (if any). It seems, due to the disagreement the parties "**seems**" (as alleged by the defendant/appellant) entered into a negotiation to reconcile the account. Again according to the Appellant, the issue was settled, whereupon it was agreed the defendant/appellant was to pay a sum of Kshs. 370,000/- in final, and full settlement of the plaintiff's claim. That allegation of "**settlement**" is disputed by the plaintiff. Be it as it were, that is part of the issues in dispute herein. I have as aforesaid reconsidered the evidence adduced. To me, this was a simple and straight forward matter that required simply the co-operation and sincerity of the parties. I call it simple because all it required is for each party to honestly submit their accounting documents to the other for consideration and necessary action. If the parties disagreed, nothing would have been easier then engage a professional accountant to, reconcile the disputed documents and/or payment. They could still engage two different accountants, engaged by each party, to resolve the issues. That would have saved the parties a lot of time, money and litigation, fatigue, had they engaged in negotiation process (Arbitration Dispute Resolution) However, the parties seem to have been quite unco-operative or unwilling to concede. I say so because I have gone through the record of appeal and come across several correspondence evidencing the same. To recap some of them, the parties wrote to each other requesting for particulars. In reference is a request dated 12th August 1999 from the respondent's counsel and another dated 16th August, 1999 from the appellant's counsel. The

reply received from the appellant's dated 16th August 1999 did not go down well with the respondent, who responded by filing an application and Chamber Summons dated 20th September 1999 that the defendant be compelled to apply the particulars or the defence be struck out. In response the appellant/defendant's counsel wrote another letter dated 7th September 1999, insisting the particulars supplied were inadequate, arguing that the pleading filed were very general. Again, the defendant filed an application and chamber summons that the plaintiff/respondent be ordered to supply particulars of para 3 of the plaint dated 18th June 1999 or the plaint be ordered struck out for want of particulars. It is therefore clear that the parties herein were not prepared to co-operate and choose to simply be difficult. Be it as it, some particulars were supplied and the case proceeded. I have analysed the issue on the conduct of the parties because, it has a relevance to the evidence adduced at the trial and the final decision in the matter. I have gone through the documents each party produced at the trial. The plaintiff produced invoices, delivery notes and a statement of account. They detail out the goods delivered, the invoices sent out, the credit notes issued and the payments received. The same are as tabulated as follows:

Invoices as per dates

1. Invoice No. 1152 12.9.1995
2. Invoice No. 506 13.11.1995
3. Invoice No. 689 13.12.1995

Statement of Account

1. Kshs. 792.750DR 12.9.1995
2. Kshs. 386.250DR 13.11.1995
3. Kshs. 789.250DR 13.12.1995

Thus the total payment received is stated Was Kshs.1,122.776.50 plus the credit notes of Kshs. 624.795, that was against a debit balance of Kshs. 1977.250. That leaves the balance of Kshs. 229,678.50, the subject of the claim. These details are found in the plaintiff exhibit No. 11. I, however note as per the P.Exh. 12 a balance was brought forward on 31.08.98 of Kshs. 260.278.50. Subsequently payments were received as follows:-

1. 18,500 30.12.1998
2. 4,600 30.12.1998
3. 7,500 30.12.1998

Leaving a balance of Kshs. 229,678.50 as claimed However it seems to me that, although the parties were in along running commercial transaction, what was produced in Court was isolated transaction running from the year 1995 to 1998. Be that as it were, the plaintiff having rested its case, as aforesaid, the defendant produced only one document, the defence Exh. No. 1 a statement of account. I note from that statement that it relates to the period 31.08.1995 to 29.03.96, whereas the statement of the plaintiff runs from the period of 30th July, 1995 to 30th December 1998. Thus, the accounts cannot tally. I have however critically analysed the accounts and apparently despite the parties disagreeing on the negotiation that gave rise to a sum of Kshs. 370,000/-. That figure is clearly reflected in the statement issued by the plaintiff/respondent. That statement indicates that on 4th June 1996 document CA No. 2386 there was a credit entry of Kshs. 370,000/- in favour of the appellant. That figure is not reflected in the appellants statement because the statement, ends on 09/03/1996 with a credit entry of Kshs. 500,000/-. Thus I have arrived at the conclusion that the negotiation took place and a subsequent payment was received. Although the defendant indicates that it was to be a full and final settlement of plaintiffs claim, the statement of accounts indicate after that payment the outstanding debit balance was 898.573.50. That I believe is the case, because even if one deducts Kshs 370,000 from the last figure of Kshs 1,268,573.50 indicated by the defendant's statement of account, the balance will still be Kshs. 898.573.50. After the 4th June 1996, the accounts seem to have continued running and on the 2nd September 1996, the defendant

was given a credit of Kshs. 624,795.00 for goods returned. That credit was set off against the outstanding debt of the Kshs. 898,573.50 and the balance remaining was Kshs. 273,778.50. Again the defendant made a credit payment of Kshs. 13,500 on 27th February 1997 and that reduced the Dr. balance to Kshs. 260,278.50. After that three credits were received as follows

1. Kshs. 18,500 30.12.1998
2. Kshs. 4,600 30.12.1998
3. Kshs. 7,500 30.12.1995

Those credits reduced the outstanding debit amount from Kshs 260,278.50 to Kshs. 229,678.50 and that is the subject of the claimed herein.

I am therefore convinced that the plaintiff has adequately explained the amount claimed and supported it well; on a balance of probability. In fact, the defendant statement shows write ups of an amount of Kshs. 900,376 but the defendant did not explain how these figure was arrived at and the said write up are not by an endorsement by the plaintiff. An outstanding debit of Kshs. 1,268,573.50 cannot have just been reduced to Kshs. 368,197.50 and rounded up to Kshs. 370,000/- casually. Be it as it were, the evidence adduced by the defence witnesses was not clear, as stated by the trial magistrate. I, therefore, uphold the finding of the learned magistrate. I dismiss the appeal. I order that the judgment entered herein be and hereby stands, unless otherwise set aside by a Court of higher jurisdiction. The costs of the appeal to the appellant.

Orders accordingly.

Dated, delivered and signed in open court on the 27th June 2012 at Mombasa.

G.L.NZIOKA
JUDGE
27.6.2012

In the presence of:

Miss. Njuguna holding brief for Mr. Taib for the respondent.

Miss. Mwajuma for the appellant.

G.L.NZIOKA
JUDGE
27.6.2012

Miss. Njuguna – I pray the court to give clear direction on the issue of interest.

Court – As a result of the judgment herein judgment is entered in favour of the plaintiff/respondent as against the appellant/defendant as ordered by the trial court. The decretal sum of Kshs. 229,678.50 plus interest (at court rates, and costs). The costs of the appeal also ordered.

G.NZIOKA
JUDGE
27.6.2012

Miss. Mwaijuma- We seek for proceedings for the purposes and 45 days of stays.

Miss. Njuguna – No objection. We conceded to 30 days stay.

Court – The appellant to be provided with the copies of the typed proceedings. 30 days stay is allowed.

G.L.NZIOKA
JUDGE
27.6.2012.