



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 60 OF 2009

NJOKA TANNERS LTD1ST APPELLANT

ALICE WERUMA NTHIGA.....2ND APPELLANT

VERSUS

PAUL KIGIA RESPONDENT

(An appeal against the judgment of Hon. W.K. Korir Principal Magistrate in Meru CMCC Case No. 486 of 2006 delivered on 23rd June 2009)

JUDGMENT

The respondent in this appeal sued the two appellants before the Chief Magistrate Court Meru in CMCC No. 486 of 2006. The respondent sued the appellants for the debt of Kshs. 826,297/=. The respondent also claimed for dishonoured cheques totaling Kshs. 826,297/= drawn by the 2nd appellant. The chief magistrate court entered judgment for the respondent as prayed in the plaint on 23rd June 2009. This appeal is against that judgment. The appellants have filed the following grounds in this appeal.

- 1. The learned trial magistrate erred in law and facts in that he entered judgment in favour of the plaintiff for the amount claimed when he knew or ought to have known that the entire amount claimed had been paid to the plaintiff through direct deposit into the plaintiff's account.***
- 2. The learned trial magistrate erred in law and fact in holding that the plaintiff had proved his case on a balance of probability when he knew or ought to have known that the defendants had discharged their burden and had proved by documentary evidence that the plaintiff had been paid the sum claimed.***
- 3. The learned trial magistrate erred in law and fact in entering judgment in favour of the plaintiff when he knew or ought to have known that the same amounted to double payment and unjust enrichment to the plaintiff who had already been paid.***

4. ***The learned trial magistrate erred in law and fact in that he failed to consider all the evidence documents produced and submissions by the defendants and thus arrived a wrong conclusion.***

5. ***The said judgment is contrary to law and is not supported by evidence adduced.***

This is the first appellant court. The Court of Appeal in the case **Eveready Batteries (K) Limited Vs. Simon Kinyua** Civil Appeal No. 281 of 2004 set out the duty of the first appellant court as follows:-

“This being a first appeal, it is our duty to re-evaluate the evidence, analyze it and come to our own conclusions but in so doing we must give allowance to the fact that we have neither seen nor heard the witnesses – se Selle V. Associated Motor Boat Company [1968] E.A. 123 and Jivanji vs. Sanyo Electrical Company Ltd [2003] KLR 425.”

I shall be guided by that principle as I consider this appeal. The respondent in evidence before the chief magistrate court stated that he was a businessman carrying out the business of buying and selling animal skins. In that regard, he said that he had business dealings with the 1st appellant which dealing started in the year 2000. He said that he was selling animal skins to the 1st appellant between the years 2000 to 2001. In explaining their business dealings, he stated that the 1st appellant would be supplied with the required animal skins and once these were delivered, the 1st appellant would sign the delivery notes. The respondent stated that there was no dispute between him and the 1st appellant in respect of those deliveries. He said that he supplied skins to the 1st appellant and the 1st appellant would subsequently pay for them. He said the 1st appellant always paid by cheques. He said that he was issued with a cheque of Kshs. 300,000/= which was drawn by the 2nd appellant. That cheque was given to him by the 1st appellant's director who told him that the 1st appellant company account had been attached by Kenya Revenue Authority (KRA). That director informed him that his wife, the 2nd appellant, would be issuing him with cheques for payments of deliveries made. The respondent produced as exhibits in evidence cheques for Kshs. 300,000/=, Kshs. 46297 and Kshs. 48,000/=. He stated that 2nd appellant issued those cheques on behalf of the 1st appellant. He banked those cheques at his Barclays Bank account but all of them were dishonoured. He informed the appellants about the dishonor and in response the director of the 1st appellant told him that the 1st appellant company was broke. The 2nd appellant in turn told him that the account from which those cheques had been drawn had no funds. The respondent denied that the appellants either told him not to bank the cheques or paid him in cash the amounts of those cheques. On cross examination, the respondent said that he did not issue invoices to the 1st appellant but that the number of skins was indicated in the delivery notes which the 1st appellant signed. He however confirmed that the delivery notes did not indicate the value of those skins. He reiterated his denial that he banked the cheques against the advice of the 2nd appellant. He also said that he was unaware that the 2nd appellant had stopped payment of those cheques. He denied that the 1st appellant deposited cash directly into his account of the amount represented by those cheques. He also denied having supplied the appellants with his bank statements. DW1 Robert Njoka Muthara was the director of the 1st appellant. He said that the 2nd appellant was an employee of the 1st appellant company. That she was its cashier. He confirmed that the respondent supplied animal skins to the 1st appellant company the value of which was Kshs. 826,297/=. He stated that the respondent was paid for those skins. That the 2nd appellant issued three cheques because at that time the company's accounts had been seized by KRA. That on informing the respondent about that seizure of their accounts, the respondent requested for security for the debt he was owed by the 1st appellant. He stated that the respondent continued to supply the 1st appellant with skins because he was issued with postdated cheques by the 2nd appellant. He said that the respondent was

supposed to hold those cheques as the 1st appellant company continued to remit cash into the respondent's bank account. He exhibited in evidence the bank deposit slips which are as follows:-

1. **26th October 2010** – **Cash Kshs. 124,760/=**
2. **8th November 2001** – **Cash Kshs. 300,000/=**
3. **13th November 2001** – **Cheque Kshs. 150,050/=.**
4. **14th November 2001** – **Cheque Kshs 50,000/=**
5. **19th November 2001** – **Cheque Kshs. 100,000/=**
6. **19th December 2001** – **Cash Kshs. 100,000/=**
7. **28th December 2001** – **Cash Kshs. 70,000/=**
8. **27th May 2002** – **Cheque Kshs. 40,000/=**

All those deposits show that those amounts were banked in Barclays Bank account in the name of the respondent. PW1 stated that the respondent made a complaint to the police whereby he accused him as the director of the 1st appellant company of having obtained goods from him by false pretences. When he produced the banking slips reproduced above to the police, the police requested the respondent to produce his bank statements which he did. DW1 exhibited two pages in evidence which he described as the respondent's bank statements. DW1 said that the payments by cheques drawn by the 2nd appellant were stopped since the 1st appellant was making cash payments into the respondent's account. The 2nd appellant DW2 stated that between the years 2001 and 2002 she worked for the 1st appellant company. She confirmed that the three cheques mentioned above in this judgment were drawn by her in favour of the respondent. She confirmed that the account on which the cheques were drawn was her account. She stated that it was the 1st appellant director (DW1) who approached her and told her that the 1st appellant company was indebted to the respondent for goods supplied by the respondent but that the 1st appellant company was unable to pay the debt because its accounts had been seized by KRA. DW1 informed her that the respondent required security for that debt. She therefore wrote three cheques in favour of the respondent. She said that she was the one who deposited cash into the respondent's account with Barclays Bank. That although that cash was deposited into the respondent's account, the respondent refused to return the three cheques drawn by her. Because of his refusal, she stopped the payment of those cheques. She however in cross examination was unable to say when she stopped the cheques. On further cross examination, she confirmed that the amount she drew in those three cheques was the amount the 1st appellant company owed the respondent. She reiterated that the cheques drawn by her were intended to be security for the debt owed by the 1st appellant to the respondent. That was the evidence that was adduced before the trial court. In this appeal, I intend to deal globally with all the grounds of appeal. I will begin by considering whether a case was proved on a balance of probability against the 1st appellant. The director of the 1st appellant DW1 stated that 1st appellant owed the respondent the amount claimed in the plaint, that is, Kshs. 826,297/=. He however stated that that amount was paid by cash deposits into the

respondent's account. The 1st appellant through its director exhibited banking slips into the respondent's accounts. It is pertinent to note however that only four of those deposits were cash deposits. Those four deposits are for the total amount of Kshs. 594,760/=. The other four deposits were cheque deposits. There is no evidence that those cheque deposits were honoured. The 1st appellant through its director produced defence exhibit number 2 which the said director stated was the respondent's bank statements. That exhibit does not have the logo of Barclays bank which was the bank of the respondent and the banking slips which were produced related to. For all intents and purposes, the alleged exhibit could have been computer generated by anyone as suggested by the respondent's counsel in his submissions. The other issue is that if indeed those documents are respondent's bank statements, they do not reflect the 1st appellant's deposits of 19th December 2001 of Kshs. 100,000/= of 28th December 2001 of Kshs. 70,000/= and of 27th May 2002 of Kshs. 40,000/=. That being so, the only credit the 1st appellant can be given of the debt admitted by DW1 is of Kshs. 594,760/=. That amount deducted from the debt admitted by the 1st appellant of Kshs. 826,297/= shows that the 1st appellant owed the respondent Kshs. 231,537/=. The appellant in their submissions argued that the respondent's claim should have received negative inference due to the respondent's failure to respond to the notice to produce served on the respondent before trial seeking the production of the respondent's bank statements. Section 69 of the Evidence Act Cap 80 provides that where a party is intent on relying on secondary evidence, such a party should serve on the opposite party who has possession and power over the document, notice to produce. The service of the notice to produce does not render the case of the opposite party liable to have adverse influence if the document is not produced. That submission by the appellants was in my view in error. The case against the 2nd appellant relates to the dishonored cheques. Under section 73 of the Bill of Exchange Act Cap 27 cheques are defined as bill of exchange. That section provides as follows:-

“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) (a) 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.

It becomes clear from the reflection of the above sections that there can be no defence or counterclaim to a claim of dishonoured cheques. In the web page of *The Independent* while quoting the case **Esso Petroleum Co. Ltd vs. Milton [1997] Court of Appeal** as per Lord Justice Simon Brown, Lord Justice Thorpe and Sir John Balcombe it was stated thus:-

“A payment by direct debit, like a payment by cheque, was to be treated as equivalent to cash, in that no defence of set-off should be available to a person sued for breach of a contract under which such

payments were to be made for goods already supplied.”

As can be seen from that decision, a cheque is regarded as cash payment. In the same Web page, they referred to the case **Nova (Jersey) Knit Ltd vs. Kammgarn Spinneri GmbH [1977] 1 WLR 713 A** House of Lords decision as follows:-

“House of Lords refused to allow a plaintiff’s action upon a dishonoured bill of exchange to be stayed pending the resolution of the defendant’s counterclaim for unliquidated damages: see per Lord Wilberforce at p. 721.”

It therefore follows that the 2nd appellant can raise no defence as she seeks to do to the respondent claim for the value of the cheques she issued. The only defence she can raise is one of duress, fraud or illegality. It is also noteworthy that the 2nd appellant draw the cheques on dates after the 1st appellant made cash payments into the respondent’s account. The cheques that were issued by the 2nd respondent were as follows:-

1. 27th November 2001 for Kshs. 300,000/=.
2. 20th February 2002 for Kshs. 46,297/=.
3. 26th March 2002 for Kshs. 480/=

Looking at the alleged cash deposit by the 1st appellant as reproduced above in this judgment, it becomes clear that at least two of those cheques, that is, the ones of 20th February and 26th March 2002 were issued after the cash deposits by the 1st appellant. It therefore follows that those two payments could not have been for the debt clear by the cash deposits. 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 Jayesh 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 inasmuch 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.”

The 2nd appellant did not shift the onus on her that she was indebted to the respondent. For that reason and for the reasons stated in this judgment, the judgment of this court is as follows:-

- 1. The judgment in CMCC Meru No. 486 of 2006 dated 23rd June 2009 in respect of Njoka Tanners Limited is hereby set aside.*
- 2. Judgment is hereby entered against Njoka Tanners Limited in favour of Paul Kigia for Kshs. 231,537/= with costs and interest.*
- 3. The appeal in respect of the 2nd appellant Alice Weruma Nthiga is hereby dismissed with costs to Paul Kigia.*
- 4. Njoka Tanners Limited shall pay half of the costs of this appeal to Paul Kigia.*

Dated, signed and delivered at Meru this 31st day of March 2011.

MARY KASANGO
JUDGE