REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI
CIVIL APPEAL NO. 106 OF 2010

JAMII WHOLESALERS LTD.....….....APPELLANT

VERSUS

MOUNT KENYA BOTTLERS LTD.....RESPONDENT

(Being appeal against the judgment of Monica Nyakundi, Senior Resident Magistrate in Nyeri Chief Magistrate's Civil Case No. 633 of 2005 delivered on 17th June 2010)

JUDGMENT

This judgment is the result of the appeal against the judgment of Honourable Nyakundi, learned Senior Resident Magistrate, vide **Nyeri C.M.C.C.C. No. 633 of 2005** delivered on 17th June 2010. In the aforesaid judgment, the learned Senior Resident magistrate entered judgment in favour of Mt. Kenya bottlers Ltd. in the sum of Ksh.563,250/= plus costs. Jamii Wholesalers ltd., were aggrieved hence they filed this appeal.

On appeal, the Appellant put forward the following grounds in its Memorandum of appeal:

1. ***The Learned Senior Resident Magistrate erred in law and fact in not finding and holding that the Amended Plaint dated 27th October, 2000 did not comply with the mandatory provisions of Order VIA, rule 7 (1), Civil Procedure rules as it does not contain the endorsement of the order allowing the amendment and the same ought to have been struck out and disregarding High court authorities to this effect which were binding on the Lower Court. A miscarriage of justice was thereby occasioned.***
2. ***The Learned Senior Resident Magistrate erred in admitting the Plaintiff's exhibits 1 (a), (b), (c) and 11(a), (b), and (c) which were produced by PW 1, WILSON MAINA GACHAU when he was not the maker contrary to Section 35, Evidence Act when the Plaintiff had not laid any basis for the said PW 1 WILSON MAINA GACHAU producing the same. A miscarriage of justice was thereby occasioned.***
3. ***The Learned Senior Resident Magistrate erred in law and fact in not finding and holding that the Plaintiff' exhibit 1(b), L.P.O. number 7278 ordering the supply of 10 tonnes of sugar on 25th March, 1992 could not have been supplied two months earlier between 14th January, 1992 and 21st February, 1992 vide Plaintiff's exhibits three (3) to ten (10). A miscarriage of justice was thereby occasioned.***
4. ***The Learned Senior Resident Magistrate erred in law and fact in not holding and finding that .P.O. number 9662 (Plaintiff's exhibit 11(b) of 3rd June, 1993 ordering the supply of ten (10) tones of sugar could not have been paid on the same day without the sugar being supplied and when no explanation was made for this by the Plaintiff and not finding that this payment could only have been for earlier supplies and deliveries. A miscarriage of justice was thereby occasioned.***

5. ***The Learned Senior Resident Magistrate erred in law and fact in not finding and holding that the Plaintiff had not discharged its burden on the transactions as required under Section 109, Evidence Act, Cap 80, Laws of Kenya. A miscarriage of justice was thereby occasioned.***
6. ***The Learned Senior Resident Magistrate erred in law and fact in admitting exhibits 1© and 11(c) to wit, payment vouchers which were carbon copies and with un countersigned alterations in contravention of Section 68, Evidence Act. A miscarriage of justice was thereby occasioned.***
7. ***the Learned Senior Resident Magistrate erred in law and fact in not holding and finding that the Plaintiff had not proved how an order for supply and payment was made on the same day and for what reasons before the supply was made and the Plaintiff did not prove that this was the normal cause of business between the Plaintiff and the Defendant. A miscarriage of justice was thereby occasioned.***
8. ***The Learned Senior resident Magistrate erred in law and fact in not finding and holding that the Plaintiff's claim was not credible as it had demanded Kshs.896,750/= on 21st October, 1993 but demanded Kshs543,250/= on 21st February, 1997 without explaining how the purported debt had reduced and was therefore fictitious. A miscarriage of justice was thereby occasioned.***
9. ***The Learned Senior Resident Magistrate erred in law and fact in not finding and holding that the Plaintiff had not proved its case as by law required. A miscarriage of justice was thereby occasioned.***
10. ***The Learned Senior Resident Magistrate erred in law and fact in shifting the burden to the Defendant to fill the gaps in the Plaintiff's case. A miscarriage of justice was thereby occasioned.***

When the appeal came up for hearing, learned counsels from both sides entered a consent order to have the appeal disposed of by written submissions.

I have reconsidered the evidence presented before the trial court plus the written submissions. Before delving deeper into the merits or otherwise of the appeal, let me set out in brief the facts leading to this appeal. The Plaintiff's (Respondent's) case had one witness just like the Defendant (Appellant). Wilson Maina Gachau (P.W.1) told the trial Magistrate that the respondent used to sell to the appellant refined sugar for the making of soft drinks. The duo entered two transactions one in 1992 and the other in 1993. For the first transaction, it is the Respondent's case that sugar was delivered first by the appellant which the respondent later confirmed by an L.P.O. and then paid for. P.W. 1 stated that on 24th March 1992, L.P.O. requisition No. 1191 for 100,000Kgs of sugar was made at a price of Ksh.19.50 pet Kg. as the delivery price which included Ksh.1 as transportation cost per Kg. It is said Ksh.1,950,000/= was paid on 25th March 1992 by L.P.O. No. 7278 vide cheque No. 35652. The payment is supported by a payment voucher. The Respondent claimed that the appellant delivered 80,000Kgs instead of 100,000Kgs leaving a balance of 20,000Kgs worth Ksh.370,000/=. P.W.1 also gave detailed evidence on the second transaction. It is said that the Respondent paid for the sugar in advance and deliveries were made later. P.W. stated that the Respondent raised L.P.O. requisition No. 3992 for 100,000 Kgs of sugar at a price of Ksh.35 per Kg thus making a total of Ksh.3,500,000/= and confirmed by L.P.O. No. 9662. A payment voucher was raised on 3rd June 1993 by the respondent for half the figure i.e. Ksh.1,750,000/= which was settled vide cheque No. 43534. For that payment, the appellant was to deliver 50,000 Kgs of sugar. It is said that the appellant only delivered 45,050 Kgs of sugar leaving a balance of Ksh.4,950 Kgs valued at Ksh.173,250/=. **Wanjuki Chiuri (D.W.1)**, a manager with the Appellant, stated that the purchaser would issue them with L.P.O. ordering for the supply of goods who in turn supply and invoice the purchasers and get paid. The appellant did not tender any documentary evidence. It is the case of the appellant that they were not paid before supplying sugar and that it was not possible for orders to be made and be paid for on the same day. D.W. 1 was unable to show this Court the L.P.O. made at one time and paid for later. D.W. 1 further testified that on 25th February 1992, the appellant supplied the respondent 100,000 Kgs of sugar in 100 Kg bags which was paid for though he did not tender any documentary evidence. After considering the aforesaid evidence, the trial learned Senior Resident Magistrate gave the respondent judgment as prayed. The gist of the appellant's appeal rests on five main grounds. The first ground is whether the trial court erred in not finding that the amended plaint dated 27th October 2000 did not comply with the mandatory provisions of ***Order VIA rule 7 (1)*** of the Civil Procedure Rules. It is the Respondent's submission that the issue was put to rest on 19th February 2009 hence it could not be raised

again. With respect, I think I agree with the Respondent's view. It is an abuse of the court process for the appellant to raise a similar issue at this stage.

The second ground of appeal is to the effect that the Magistrate erred when she admitted the Respondent's exhibits which were produced by P.W.1 contrary to *Section 35* of the Evidence Act. It is argued that the issue relating to the objection in respect of production of documents is overtaken by events in that the documents were produced with no objection at all. With respect, I agree with the Respondent that such an objection ought to have been raised at the trial. It is now too late and unreasonable to raise the issue at this late stage.

The third ground argued on appeal is to the effect that the trial Magistrate erred when she held that the Respondent had discharged the burden of proof under *Section 109* of the Evidence Act. There is no doubt that the Appellant was contracted by the respondent to supply sugar to it. The Appellant admitted receiving Ksh.1,950,000/= for the supply of 100,000Kgs of sugar and 1,750,000/= for the supply of 50,000 Kgs of sugar. The thrust of the respondent's evidence and the submission before the trial is that though the appellant received the admitted amount, it only supplied 80,000 Kgs of sugar as against 100,000 Kgs. Of sugar in the first transaction whereas it supplied 45,050 Kgs of sugar as against 50,000 Kgs of sugar in the second transaction. A balance of Ksh.563,250/= was not supplied to the Respondent. I have on my part re-evaluated the evidence and I think the learned Senior Resident Magistrate cannot be faulted. The Respondent had proved its case to the required standards i.e. on a balance of probabilities.

The fourth ground of appeal is to the effect that the trial Magistrate erred when she admitted exhibits 1 (c) and 11 (c) contrary to *Section 68* of the Evidence Act. I think determining this issue is not difficult. The appellant questioned the payment vouchers No. 34933 and 42699. In my view, if the objection was sustained, then that will contradict the evidence of D.W. 1 in which he admitted on oath that the Appellant received the money in question. Furthermore in business usage the original of a payment voucher would be found with the Appellant hence *Section 68* of the Evidence Act cannot assist the Appellant.

The last ground of appeal is to the effect that the trial Magistrate erred when she did not find that the demand was not credible as the respondent had demanded Ksh.896,750/= on 21st October 1993 yet on 21st February 1997 it demanded to be paid Ksh.543,250/=. The Respondent admitted it issued the two contradictory demand notices. The Appellant requested for particulars which were promptly supplied. In my view, the demand letters are material in determining the credibility of the Plaintiff but it cannot be treated as evidence. A claimant must tender evidence to establish the amount pleaded.

In the end I find no merit in the appeal. The appeal is dismissed in its entirety with costs to the respondent.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mugambi for the Respondent and no appearance for the Appellant with Notice.