



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 310 of 2005

SAROVA HOTELS LIMITED..... APPELLANT
VERSUS
LYNTON PHARMACY LTD.RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Lyntons Pharmacy Limited, hereinafter referred to as the respondent. The suit was against Sarova Hotels Limited, hereinafter referred to as the appellant from whom the respondent sought judgment for Kshs.144,098.50 being the balance of amount due and owing from the appellant to the respondent, pursuant to a credit facility granted to the appellant in respect of pharmaceutical products supplied to it. The respondent also claimed interest on the outstanding amount at the rate of 30% p.a. from July, 1999 till payment in full.
2. The appellant filed an amended defence in which it denied having received pharmaceutical products worth Kshs.150,771.50 from the respondent on credit. The appellant admitted having obtained credit of Kshs.6,673/= only and maintained it had verified the authenticity of the respondent's claim and established that only Kshs.4,301/= and

Kshs.2,372/= were justified. The appellant denied being liable to the respondent maintaining that it did not requisition for any goods, and that the goods were delivered without following the laid down procedure. The appellant further denied liability to the respondent for interest on the amount outstanding.

3. During the trial in the lower Court three witnesses testified for the respondent. These were Joyce Gusunda, a pharmacist cum manager of the respondent, Beta Wangui Mwangi, an accountant with the respondent and Solomon David Agengo Oro, also an accountant. Their evidence was briefly that the appellant and the respondent had an arrangement for the respondent to supply medicine to the appellant and its subsidiaries under a medical scheme. It was mutually agreed that approved doctors would prescribe medicine and the patients would present the signed prescriptions together with invoices and be supplied with the medication. At the end of the month, a statement was prepared from all the invoices and forwarded to the appellant.
4. Initially the appellant settled the invoices regularly but later it started paying leaving some balances. Beta Wangui Mwangi who was the respondent's accountant testified that the total amount outstanding as at the time of filing the suit was Kshs.139,830/=. She produced invoices and statements. Solomon who was an accountant with the respondent, produced a copy of the demand letter written by the respondent's advocate to the appellant on 1st July, 1999, a letter dated 9th July, 1999 in which the appellant responded pleading for time within which to reconcile the account and organize payment; and a further letter dated 16th July, 1999 in which the appellant claimed that some of the amount claimed had already been paid by two cheques numbers 1331 and 1332; a response from the respondent dated 28th July, 1999 showing that the two

cheques were applied towards the amount outstanding in respect of the month of April, 1999 and a further letter dated 29th July, 1999 in which the appellant indicated that he could only finalize the account if the amount of Kshs.47,991/= was sorted out. And a summary of the statement showing how the payments were made and the balance of Kshs.139,830/=.

5. The appellant testified through its accountant, Anthony Njoroge. He explained that the appellant was not liable for the accounts in respect of Hotel Ambassador as it was an independent limited liability company, nor was it liable for account No.150 in respect of Mara Hotels as the hotels do not fall under Sarova, or account No.044 Panafric Hotel which also does not fall under Sarova. He explained that apart from those particular accounts, the other statements were not settled as the invoices and prescriptions were never received. Under cross examination, the witness explained that there was no particular hotel known as Sarova Hotels but that the appellant was a company which owned and manages property under agreement such as Panafric, Mara Limited, Ambassador Investments Ltd. and Lions Hill Limited. He explained that New Stanley was a subsidiary of Sarova Hotels Limited.
6. Counsel for each party filed written submissions, each urging the Court to find in favour of his client. In his judgment, the trial Magistrate found that the respondent did supply the medicines to the employees of the entities presented to them by the appellant. He found that the respondent performed his part of the contract and therefore the appellant was liable. Accordingly he entered judgment for the respondent as prayed in the plaint.
7. Being aggrieved by that judgment the appellant has lodged this appeal raising 6 grounds as follows:

(i) The learned Magistrate erred in granting judgment as prayed in the plaint whereas the plaintiff did not prove its case on a balance of probabilities.

(ii) The learned Magistrate erred in granting judgment as prayed in the plaint whereas the plaintiff's witness, PW2 Beth Wangui Mwangi testified that the sum owed was Kshs.139,830/=.

(iii) The learned Magistrate erred in granting judgment as prayed in the plaint, and in essence, interest at 30% per annum from July 1999 whereas there was no evidence adduced to prove that the plaintiff was entitled to the stated rate of interest.

(iv) The learned Magistrate erred in granting judgment as prayed in the plaint against the defendant whereas it was proved by the defendant that part of the debt claimed was claimable from third parties being: Panafric Hotels Limited, Ambassador Investments Limited and Isokom Mara Limited.

(v) The learned Magistrate erred in finding that the plaintiff supplied medicine to employees of the defendant whereas no prescriptions emanating from the defendant's employees were proved.

(vi) The learned Magistrate erred in holding that the issue of which persons were to pay the sum claimed was upon the defendant to establish whereas the defendant had no burden of proof and further the defendant in its evidence had established the same.

8. Following an agreement between the parties' advocates, written submissions were filed and the Court urged to determine the appeal on the basis of those submissions.
9. For the appellant it was submitted that there was lack of consistency in the evidence adduced by the respondent's witnesses, and that none of the witnesses claimed that the appellant owed the respondent the sum of Kshs.144,098.50. It was further maintained that the claim for interest at the rate of 30% p.a. was not proved. It was further contended that the

defence did produce evidence to show that part of the sum claimed was only claimed against Sarova, Mara Hotels, Panafric Hotels and Ambassador Investments. It was maintained that the companies involved being incorporated companies; they were separate legal entities whose rights could not be exercised by another company. It was submitted that the trial Court was wrong to hold the appellant liable for the debts of those companies. It was argued that the trial Magistrate misdirected himself as to who had the burden of proof, thereby shifting the burden on to the appellant. It was submitted that the invoices and bundle of prescriptions produced by the respondent were not matched and therefore the invoices were not proved.

10. For the respondent it was submitted that the respondent's witnesses gave credible and unshaken evidence. It was submitted that although the respondent's claim as initially demanded was for Kshs.150,771.50, as at the time of filing the claim, the amount was Kshs.144,098.50 the appellant having paid a sum of Kshs.6,673/= by two cheques. The amount was further reduced to Kshs.139,830/= after a further payment of Kshs.4,367.10 was made before the hearing of the suit. It was submitted that although there was a written agreement between the parties, the same could not be produced as it could not be traced.

11. It was argued that the appellant did not deny that there were dealings between the appellant and the respondent. It was contended that the appellant had admitted that there were transactions and therefore the production of the agreement should not be an issue. It was submitted that a list of approved doctors was produced in evidence, as was a list of orders from the head office, prescriptions issued by the company doctors and invoices. It was maintained that a delivery note was produced by the

respondent confirming delivery. It was submitted that Beta Wangui could not match the invoices and prescriptions because she was not the one dealing with them. The Court was urged to note the admission contained in the original defence.

12. It was further submitted that the appellant's witness joined the company after the transactions. And therefore only testified as to what he learned from other witnesses. It was maintained that the agreement was for all the organizations centralized and managed by the respondent company and that receipt of all invoices by the appellant confirmed that arrangement. The Court was further urged to note the appellant's letter heads, which referred to several other entities. The Court was therefore urged to uphold the judgment of the trial Magistrate and dismiss the appeal.

13. I have reconsidered and evaluated the evidence which was adduced before the lower Court. I have also considered submissions made in the lower Court and before me. I find that although the agreement signed between the appellant and the respondent was not produced in evidence, it was not denied that there was an arrangement between the appellant and the respondent for the respondent to supply medication to staff of several establishments on the appellant's account. Indeed when the respondent's advocate first sent a demand letter to the appellant, the appellant did not deny being responsible for payments in respect of medication supplied to staff of those establishments.

14. The appellant initially did not dispute owing the money except for payment regarding two cheques totaling to a sum of Kshs.47,991/= which they claimed did not appear to have been accounted for. It is evident that the defence that the appellant was not liable to payments in respect of Panafric Hotel, Hotel Ambassador, and Mara

Hotels was just an afterthought. Indeed as pointed out by the respondent's counsel the appellant's letterheads show that it is interconnected with several other establishments including the abovementioned establishments. The trial Magistrate was therefore right in rejecting that line of defence. I find that the respondent did produce appropriate prescriptions, invoices and statements confirming that it did supply medication in accordance with the arrangement it had with the appellant.

15. It is evident to me that although the respondent claimed a sum of Kshs.144,098.50 in the plaint, the respondent did admit that the appellant paid a further sum of Kshs.4,367.10 thereby leaving a sum of Kshs.139,830/= due and outstanding. It is apparent that the sum of Kshs.4,367.10 was paid after the filing of the suit. In the light of the above the trial Magistrate was right in giving judgment as claimed in the plaint as that was the amount due as at the time of filing suit. Obviously when it comes to execution the sum of Kshs.4,367.10 which was paid will be taken into account.

16. With regard to interest, which was claimed in the plaint at the rate of 30% p.a. the respondent did not lay any basis for this rate of interest therefore the rate of interest awarded ought to have been the Court rates.

17. The upshot of the above is that I uphold the judgment of the lower Court and dismiss the appeal except for the rate of interest which I order to be at Court rates. The appellant shall pay costs of this appeal to the respondent.

Those shall be the orders of this Court.

Dated and delivered this 4th day of December, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mari for the appellant

Njuguna holding brief for Muriuki for the respondent

Eric, court clerk