



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 170 of 2001

HASSAN JUMAPILIAPPELLANT

V E R S U S

**COAST TOBACCO DISTRIBUTORS LIMITED ...
RESPONDENT**

J U D G M E N T

The Appellant, Hassan Jumapili, was sued in the lower court by the respondent for the recovery of the sum of Kshs. 445,591.25 being the price of goods sold and delivered. Upon application by the respondent, summary judgment was entered against the appellant against which he appealed to this court.

The grounds of appeal are that –

1. *The learned magistrate erred in law and fact in holding that the appellant's defence was a general denial yet the defence raised triable issues.*
2. *The learned magistrate erred in law and in fact in that she failed to understand the mode of operation and payment between the parties.*
3. *The learned magistrate erred in law and fact in restricting herself to the alleged agreement without considering other facts.*
4. *The learned magistrate erred in law and fact by concluding that the accounts had been reconciled yet that was not the correct position.*

Appearing for the appellant, Mr. Alwenya argued all the grounds together and submitted that the claim in the plaint was at variance with the application for summary judgment since the latter was apparently grounded on provision of insurance services while the respondent was a tobacco distributor. He further contended that the defence raised triable issues inasmuch as the defendant had denied owing the money, and had alleged that the undertaking by the appellant to pay the money was obtained through duress and intimidation, and that all these were triable issues. He asked the court to allow the appeal.

Mr. Omwenga for the respondent submitted that the appellant's submissions were not included in the grounds of appeal and that the issues argued were new. He also argued that the defence was a general denial in that it did not give the particulars of the duress and intimidation, and the appellant did not produce any receipt in respect of the payments which he alleged to have paid both in cash and by cheques. He therefore submitted that the ruling appealed from was proper and well founded.

In a short reply Mr. Alwenya urged the court to allow the appeal as the respondents would not be prejudiced since the suit will still be there and they will have a chance to prove the case.

Having considered the pleadings and submissions of counsel, and stripped of all its side issues, the issue to be determined in this matter is whether the learned trial magistrate correctly entered summary judgment for the respondent. The application for that judgment was founded on an agreement between the parties by which the appellant conceded that having verified the accounts with the respondent, he agreed that he owed the respondent the sum of Kshs. 557,654.50 (Kshs. Five hundred fifty seven thousand, six hundred fifty four cents fifty) only. This agreement was entered into between the parties on 12th April, 2001.

It was the respondent's case that the appellant did pay Kshs. 75,000/- on 7th May, 2001, and a further Kshs. 37,063/25 on 29th May, 2001, thereby leaving a balance of Kshs. 445,591/25 due and payable. It was in respect of this sum that summary judgment was sought and duly entered against the appellant. In his replying affidavit, the appellant deposed that in addition to the sums acknowledged by the respondent as having been paid by the appellant, the appellant made further payments which were not taken into consideration by the respondent as follows-

(a) On 31st March 2001, he paid Kshs. 178,940.00

(b) On 10th June, 2000, he paid Kshs. 89,400.00

(c) On 17th June, 2001, he paid Kshs. 69,270.00

(d) On 29th June, 2001, he paid Kshs. 65,980.00

(e) On 9th July, 2000, he paid Kshs. 67,000.00

TOTAL Kshs. 470.590.00

A simple arithmetical calculation shows that this sum exceeds the sum claimed by the respondent by Kshs. 24,998.75. If the appellant's allegation of the above payments were truthful, he has not explained why he did not counterclaim the excess payment.

A closer examination of these alleged payments reveals that whereas the agreement on which the respondent's claim was based was entered into on 12th April, 2001, the payments under (a), (b) and (e) above were allegedly made on 31st March, 2001; 10th June, 2000; and 9th July, 2000, respectively, all of which dates were long before the subject agreement was entered into. The appellant's claim therefore lacks bona fides. Assuming that the remaining two payments were actually effected, they amount to a total of Kshs. 135,250.00, which would still leave the appellant indebted to the respondent in the sum of Kshs. 310,341.25. The reality of this matter, therefore, is that if the appellant's statements are taken at their face value, then he would have overpaid the amount owed to the respondent and yet he is not asking for the excess payment. And why would he want to overpay in the 1st place? Secondly, he did not produce any receipts or other documentary evidence to demonstrate the payment. Thirdly, most of the dates when the moneys were allegedly paid fall before the date of the agreement, which renders the payments, if any, irrelevant to the agreement upon which the claim is based. On the contrary, from the appellant's own explanation, he still owes the respondent Kshs. 310,341.25. Between the respondent's version and that of the appellant, I would find, on a balance of probability, that the respondent's version of the state of accounts between the parties is the more probable.

Finally, the appellant alleges that the respondent obtained from him the undertaking for the payment of the money under consideration by duress and intimidation. In my view, this can best be described as an afterthought. And, as for the issue that the respondent purported to claim for insurance services rendered, I take the view that the claim is based on a written document, and written documents speak for

themselves. I therefore find that the respondent, on a balance of probability, was entitled to summary judgment, and that the learned trial magistrate rightly and properly entered that judgment.

For the above reasons, this appeal is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 11th day of December, 2008.

L. NJAGI

JUDGE