



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 517 of 2005

DALBIT PETROLEUM LIMITED.....APPELLANT

VERSUS

JACKTON OUMA ODUNGA.....RESPONDENT

J U D G M E N T

Dalbit Petroleum Limited, (hereinafter referred to as the appellant) is dissatisfied with the ruling of the Senior Resident Magistrate delivered on 13th July, 2005 in Milimani CMCC No.11591 of 2004. The appellant has filed a memorandum of appeal raising 8 grounds as follows: -

- (i) The learned Senior Resident Magistrate erred in law in striking out the defence and entering judgment in light of the conflicting evidence.
- (ii) The learned Senior Resident Magistrate erred in law and fact in believing the evidence offered by the plaintiff and disbelieving the defendant.
- (iii) The learned Senior Resident Magistrate erred in law and fact in finding that the defendants defence was a sham when it clearly raised triable issues.
- (iv) The learned magistrate erred in law and fact in arriving at a decision that went against the weight of the evidence.
- (v) The learned magistrate erred in law and fact in failing to find that the various aliases used by the plaintiff pointed at a possible fraudulent intent on this part an issue that could only have been resolved at a full trial.
- (vi) The learned magistrate erred in law and fact in striking out the defendant's defence in the absence of expert evidence on the authenticity of the two conflicting receipts both bearing number 010315 and allegedly issued by the defendant.
- (vii) The learned magistrate erred in law and fact in totally failing to consider the defendants replying affidavits sworn by Humphrey K. Ndegwa and John Mwanu Waithaka and hence arriving at an entirely erroneous decision.
- (viii) The learned magistrate erred in law and fact in exercising the rear discretion to strike out on the light of overwhelming conflicting evidence.

In her ruling the Senior Resident Magistrate found that the defence raised by the appellant to the suit brought against the appellant by the respondent Jackton Ouma Odunga was a sham and did not raise any triable issues. She accordingly struck out the defence and entered judgment in favour of the respondent.

The gist of the respondent's claim against the appellant was contained in paragraph 4 & 5 of the plaint which stated as follows:

"4. On or about the 28th day of May, 2004, the plaintiff purchased from the defendant, at the defendant's said Kisumu depot, 8,000 litres of Super Petrol and 6,000 litres of Kerosine at the total price of Kshs.686,000/=. The plaintiff paid for the said purchase in cash against the defendant's Cash Receipt NO.010315 dated 28th May, 2004 and the defendant undertook to deliver to the plaintiff the said 8,000 litres of Super Petrol and 6,000 litres of kerosene on the same date.

5. In breach of the contract for sale of the said goods, the defendant wrongfully refused and/or neglected to deliver the said goods to the plaintiff on the agreed date and has refused to deliver the same to date."

The gist of the appellant's defence to the claim is captured in paragraphs 3, 4, 5 & 8 of the defence which states as follows:

"3. In answer to paragraph 4 of the plaint the defendant avers that the plaintiff ordered for 8000 litres of Super petrol and 6000 litres of kerosene at the agreed total price of Kshs.686,000. The plaintiff gave a bankers cheque number 000649 for Kshs.686,000.00 drawn on the Cooperative Bank of Kenya Kisumu Branch. The plaintiff was to take delivery of the fuel after verification of the bankers cheque by the defendant.

4. The defendant avers that pending verification of the bankers cheque the plaintiff was issued with receipt number 010315 which clearly bore the details of the cheque numbers and amounts.

5. The defendant avers that it called the Cooperative Bank of Kenya Kisumu Branch on the same day who disowned the cheque whereupon the defendant withheld the release of the fuel to the plaintiff.

8. The defendant avers that the contract of sale was rendered null and void due to the total lack of consideration by the plaintiff."

In his affidavit filed in support of his application for the striking out of the appellant's defence, the respondent denied having made payment to the appellant through a bankers cheque and maintained that he made payment in cash and was issued with a cash receipt No.010315 which he exhibited as JOO.1. In response to the application for striking out the defence, the appellant's director Humphrey K. Ndegwa swore an affidavit in which he maintained that the respondent made payment through a bankers cheque No.000649 (HK1) and was issued with a cash receipt No.010315. (Marked HK2). He explained that the bankers cheque issued by the respondent was established not to be genuine and therefore the fuel products were withheld as there was no consideration. He contended that the cash receipt marked JOO1 exhibited by the respondent was a forgery.

I have carefully considered the application and the affidavits which were tendered before the trial magistrate as well as the annexures and the submissions which were made by both counsels.

I do note that the receipt exhibited by the appellant as "HK2" and the one exhibited by the respondent as JOO-1, bore striking similarities, to the extent that they bore the same cash receipt No, date, amount, document No, name and signature of the person who received the payment. The only point of departure in the two documents is the surname of the customer one being Jackson "Odunga" and the other being Jackson "Onyango", and one payment having been made by cash whilst the other payment was made by bankers cheque. In her ruling the trial magistrate stated as follows.

"The defence dated 2/11/04, whereas the paragraph 3,4,5 seem to raise triable issues. However the same must deemed to be a sham as the receipt given for the bankers cheque is issued to JACKSON ONYANGO

not plaintiff JACKSON OUMA ODUNGA. The bankers cheque does not show on instructions whose the bankers cheque was issued as is usually the case and is not helpful. It is noteworthy that if defendant's defence does not deny the plaintiff receipt which indicates that cash of Kshs.686.000/= was paid. The defendant response to plaintiff's claim by giving a receipt of a stranger only serves to confuse issues and it is for that reason I find the defence a sham and not an answer to plaintiff's claim which is backed by the receipt in plaintiff's name. To that that extent I find there is no need to go to a trial and the defendant's defence does not raise any triable issues. The same is struck out to that extent.

Clearly the trial magistrate contradicted herself and misdirected herself. The receipt in respect of the bankers cheque payment was issued to Jackson Onyango and the one for the cash payment was issued to Jackson Odunga, the two receipts appeared to be for the same payment. Moreover, the plaintiff's name is Jackton Ouma Odunga and not Jackson Odunga. It was therefore necessary for the suit to be heard for the court to resolve which receipt was genuine, who made the payment, and how the payment was made. In so doing the court would also determine the issue as to whether there was any consideration paid by the respondent for the fuel products.

It cannot therefore be said that the facts were crystal clear and revealed a plain and obvious case such that it can be concluded that the defence was groundless or lacked bonafide.

I come to the conclusion that the defence advanced was a reasonable defence and the trial magistrate was wrong in striking out the same.

Accordingly I allow the appeal, set aside the order of the trial magistrate striking out the defence and entering judgment for the respondent, and substitute thereof an order that the respondent's chamber summons dated 18th November, 2004 shall be dismissed. I award costs of this appeal to the appellant.

Those shall be the orders of this court.

Dated and delivered this 4th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Kinoti for the appellant

Advocate for the respondent absent