REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 395 of 2003

SUPER FOAM LIMITED…….…….. APPELLANT

VERSUS

AVON MARKETING SERVICES (K) LTD.……RESPONDENT

J U D G M E N T

The appeal filed in Court on 30/6/04, against the Judgment of the Senior Principal Magistrate, delivered on 29/5/03 is on the following grounds:

1. The Lower Court erred in law and fact by making substantive and adverse orders on a date the case was fixed for mention only.

2. The Lower Court erred in law by condemning the appellant unheard in breach of the principles of natural justice and fairness.

3. The Lower Court erred in law by failing to appreciate that the case had not been proved to the required standard.

4. The Lower Court erred in law by taking into consideration extraneous matters in arriving at the decision it reached.

5. The Learned Magistrate erred in law and fact by shifting the burden of proof to the Defendant.

6. The Lower Court erred in law and fact by holding that the Plaintiff had proved its case on a balance of probability.

7. The Lower Court erred in law by awarding costs to the Respondent.

Wherefore the appellant prays that the appeal be allowed with costs; judgment entered be set aside, and the matter remitted for retrial in the Subordinate Court, before any other Magistrate.

The simple facts in the case are that the Plaintiff sued the Defendant claiming K.Shs.444,857/90 being the balance of the agreed amount for goods sold and delivered to the Defendant in Nairobi, in 1995. The Defendant denied owing the Plaintiff the sum claimed.

From the record before me, the Respondent/Plaintiff, called one witness and closed its case on 11/12/01.

The Appellant/Defendant was to present its case – defence – on 17/4/02. On that date, the parties entered into a consent – in court – by which the defence hearing was fixed for 29/5/02. That date the Appellant/Defendant was not present, and the presiding Magistrate, in light of the fact that the matter was part-heard before another Magistrate, ordered that the matter be placed before the Magistrate before whom the matter was part-heard, on 10/6/02.

On that date – 10/6/02 – again the Appellant/Defendant was not present. But the record shows the court ordering that "**written submissions to be filed."** No date was given as to when such written submissions were to be filed.

Somehow, the Respondent/Plaintiff filed its written submission on 5/7/02. The next record is Judgment in favour of the Respondent/Plaintiff, dated 29/5/03.

I have given the above chronology of the events – that led to the judgment of the Lower Court and the upshot of the appeal before me. This puts the grounds of appeal herein in a proper context.

Having carefully perused the pleadings and the grounds of appeal, I have reached the following findings and conclusions.

The day the Lower Court ordered that written submissions be filed, was effectively a mention date, and the appellant was not present in court as it had not been present when the mention date was fixed, on29/5/02.

Under Order 9B rule 3, of the Civil Procedure Rules, no substantive order, such as that made by the court on submissions, can be made, other than on a hearing date. Accordingly, that order, even if a date for such submissions had been indicated, is null and void. It was an illegal order.

Of even greater concern is that the Appellant had not given any evidence in its defence. One wonders on what basis the written submissions were based in the absence of evidence from the Appellant/Defendant, more so given that a written statement of defence had been filed.

The upshot of all the foregoing is that the appellant was condemned unheard, which is a violation of one of the fundamental principles of natural justice – no one may be condemned unheard.

Turning to the judgment of the learned Magistrate, it is difficult to understand the rational basis of the conclusion that the Respondent had proved its case as required by law. That standard is on the balance of probabilities. How could the Respondent do that when the proceedings closed before the appellant had adduced its evidence in support of its written statement of defence, as per the record.

It cannot be argued that the appellant had no defence since the day the order for written submissions was made, was a mention date, not a hearing date, even if the Appellant had been present in court.

The last challenge against the lower court's judgment is on the shifting of the burden of proof from the Plaintiff/Respondent to the Appellant/Defendant. This challenge is founded on the lower court's position that the Appellant/Defendant never gave any evidence in defence. That conclusion, on the part of the lower court, is unfortunate and erroneous in law. There is no burden of proof placed on the Defendant/Appellant. The law is that he who alleges – the Plaintiff/Respondent – bears the burden of proof.

Secondly, even if the law had placed any burden of proof on the Appellant/Defendant – which is not the case- the appellant never had the opportunity to do so. The case closed and the judgment was delivered before the Appellant was given a chance to defend itself. I have already found and held that, that was a violation of the Appellant's right to be heard, under the principle of natural justice.

All in all, I find and hold that the entire proceedings constituted unmigated in justice.

Accordingly, I allow the appeal with costs in favour of the appellant and against the respondent – both at this appellate level and at the Subordinate Court.

I further order that the case be tried **de-novo,** by a different Magistrate, at the Milimani Commercial Courts, Nairobi.

DATED and delivered in Nairobi, this 25th Day of June, 2007.

O.K. MUTUNGI

JUDGE