



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Appeal 103 of 2001

KENITAL (K) LTD:.....APPELLANT

VERSUS

CHARLES MUTUA MULU

ESTHER NTHENYA MUTUA

GRACE KAVULI MUTUA

NICKY NGUTU MUTINDA

PETER NDUNDA MASYUKO

All suing for and on behalf of MULLY CHILDREN'S FAMILY HOME) :.....RESPONDENTS

JUDGEMENT

The plaintiff instituted proceedings against the Defendant in the Senior Principal Magistrate's court at Eldoret Civil Suit No.1329 of 1999 on 23rd September,1999. The plaintiff sought refund of Kshs.145,000/=which it had paid as a deposit towards the purchase of four solar panels and one solaflur submersible pump together with accessories from the Defendant. The agreed price for the said equipment was Kshs.295,000/=.

In its complaint, the plaintiff claimed that at the time of entering the said contract it made it known to the Defendant that the purpose for which the equipment were required were for the pumping of underground water for supply to a big institution. The plaintiff stated that upon making inquiries it realized that the said equipment could not meet the intended purpose and as a result decided to call off the agreement.

The Defendant filed an Amended Defence and set up a counterclaim for specific performance of the contract and payment of the balance of the purchase price in the sum of Kshs.150,000/=. Upon hearing this suit, the Trial Magistrate found in favour of the plaintiff and entered judgment in the sum of Kshs.145,000/= with costs.

In this appeal, the Appellants argued Ground 4 first which appeared to be the most crucial for them among the four grounds raised. In this ground, the Appellant pleaded that:-

· The Honourable Magistrate erred both in law and in fact in failing to find that the Respondents were obliged to serve notice upon the Appellant requiring performance of the contract before they would be entitled to avoid the same.

The judgment does not make any reference to this question of Notice. A perusal of the Defence and counterclaim reveals that the Defendant did not plead this point of law. A reading of the proceedings shows that the Defendant did not offer any evidence and did not call any witness to testify. The first time the issue of Notice was raised in the Defendant's written submissions. It was in response to the pleadings and evidence of the plaintiff. In its Defence to counterclaim, the plaintiff also pleaded that the Defendant was in breach of contract by failing to supply the equipment in time.

It is my view that from the plaint, the plaintiff's cause of action was based on the alleged lack of quality or fitness of the equipment for the purpose for which it was purchased. The issue of delay in delivery, non-availability or whether time was of the essence was never pleaded and was only introduced in the Defence to the counterclaim. This does not make it, therefore, the basis of the cause of action.

As a result any submissions or arguments regarding the issue of delay in the delivery of the equipment or whether time was of the essence or not was unnecessary and misdirected. It follows, therefore, that any decision on this question by the trial court would amount to a misdirection and error in law. It follows, therefore, that the question of Notice in Ground 1 of the Memorandum of Appeal is really a non – issue. If the judgment of the trial court was based on this ground or reason alone then certainly the judgment would be flawed and invalid.

It is my view that the trial magistrate on a balance of probability found in favour of the plaintiff on the following grounds:-

1. That the equipment to be supplied were not fit for the purpose they were purchased
2. They were not of the standard expected by the plaintiff.
3. The goods were not supplied within the stipulated period of 21 days.

On the basis of the pleadings , findings 2 and 3 were unnecessary and not questions arising from the pleadings. In any case, they were not causes of action pleaded by the plaintiff in his plaint. Those grounds or issues were merely raised in the Defence to the counterclaim and could not be constituted into the plaintiff's claims. On this basis, I hold that the aforesaid two findings amounted to consideration of extraneous matters and a misdirection in law.

The only question now is for this court to determine whether finding 1, above, was properly reached.

In Ground 3 of the Memorandum of Appeal, the Appellant contends that the trial magistrate erred both in law and fact in finding that the evidence of the Respondent was unchallenged when they were cross-examined on the same. In my view, it is a very significant fact that the Defendant, (the Appellant) did not call any witness, to testify on its behalf. It is quite true that the plaintiff's only witness. PW1 was cross-examined by the Defendant's counsel. However, ultimately, it was within the trial magistrate's duty and discretion to weigh the evidence laid before the court and make a finding on liability. The trial magistrate exercised this discretion and on a balance of probability found in favour of the plaintiff. She said so in her judgment. It is not correct that the decision was made merely because the Defendant did not call any witness. While the magistrate may have opined that the Defendant's evidence was "unchallenged" yet she went ahead to state that the plaintiff had proved its case on a balance of probability which is the required standard of proof. All said and done, it is trite to state that in all adversarial legal system like ours, a party undermines his case drastically by not calling or failing to call witness. This fact cannot be disregarded whatsoever and the evidential implications are clear. Regarding specifications, it was equally necessary on the part of the Defendant to tender evidence of the type of pump available and its accessories. The plaintiff claimed that the equipment made available were not fit for the purpose intended. It was the Defendant's duty to show that the equipment supplied or available were those described in the contract and/or that they fitted the purpose for which they were purchased. The Defendant did not prosecute its counterclaim by not calling any witnesses. The court was therefore not obliged to look at the counterclaim when making its decision. They remained allegations.

In Ground 2, of the Memorandum of Appeal, the Appellant says that the Honourable Magistrate erred in law and in fact in failing to take cognizance of the Appellant's submissions and authorities in coming to her decision. It says that the trial magistrate did not analyse and take into cognizance the submissions by the Appellant's counsel.

I must agree that the judgment of the trial magistrate was very brief and did not expressly analyse the submissions of both parties and did not refer to any of the authorities relied on. However, this cannot be a ground for quashing the decision of the trial court. It is not a requirement that a court should set out at length the evidence of each party and the submissions. A summary will suffice. Not each judicial officer have the same style. Some are lengthy in their judgments while others are brief. The court ought to consider the pleadings, the issues involved, the number of witnesses and the submissions made.

It is my view that this was a very straight – forward and simple case. There was substantially only one issue to consider. There was only one witness for the plaintiff who testified. The Defendant did not call any witness. The parties filed written submissions. The submissions also dwelt on questions not premised on the plaintiff's claim/cause of action. It is my opinion there was no need to write an elaborate judgment though the trial magistrate could certainly have done better. I am not convinced that the trial magistrate did not consider the cross-examination of PW1 and the submissions.

In conclusion, I do hold that there is no basis in law or fact to interfere with the decision of the trial magistrate court. Considering all issues I think the Honourable magistrate was entitled to reach the conclusions and decision reached.

I do hereby dismiss the appeal with costs to the Respondent.

DATED AND DELIVERED ELDORET ON THIS 7TH DAY OF JUNE, 2006.

M. K. IBRAHIM

JUDGE.