



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

H.C.CIVIL APPEAL NO.29 OF 2001

SADRU NANJI.....APPELLANT

Versus

BAYUSUF INVESTMENTRESPONDENT

Coram: Before Hon. Justice Mwera
Omolo for the Appellant
Aboo for the Respondent
Court clerk – Sango

J U D G E M E N T

This appeal arose from the judgment of J. Oseko, Snr. Resident Magistrate delivered on 20-3-2001. The suit before her, by M/s Bayusuf Investments Ltd., the respondent herein, was instituted by what may be termed a simple plaint against Sadru Nanji, the present appellant.

The facts constituting the claim were to the effect that the plaintiff/respondent was seeking to recover Sh.75,390/- from the defendant/appellant being the amount over-paid to the latter by the former in respect of services which were partly offered and further in respect of goods short-delivered during the year 1993. That the defendant knew the full particulars of the claim.

A short defence was filed on 30-1-96. The defendant/appellant admitted paragraphs 1 and 2 of the plaint which paragraphs describe the plaintiff/respondent as Bayusuf Investments Ltd., a limited liability of Mombasa and the defendant/appellant as an adult male resident also of Mombasa.

The defence however denied that the respondent had overpaid the appellant any money or that any goods were short-delivered. It was however added that if there was any short delivery of goods the respondent had authorized it on 12-5-93. But the defence added that the respondent was not the owner of the goods and thus the plaint did not disclose a reasonable cause of action.

On 18-7-2000 the trial opened and one Justus Munyao a manager with the respondent company (in the typed script he is said to be the manager of the defendant company!) said that his employer had a contract of transporting goods for M/s Care International which it sub-contracted to the appellant. The appellant was to transport 100 tonnes of maize to a place called El Wak. That that arrangement was verbal, to pay Sh.5,500/- per tonne and Sh.317,500/- was paid in advance. That this money was paid by a payment voucher dated 26-3-93 (Ex.1) which bore the names:

“Mohamed Ahmed Bayusuf & Bros.”

This name of a firm came into focus both in the lower court and here when the appellant argued that that payment issued by a firm evidences a contract with it and not with the respondent – a limited liability company. That of the 3 lorries involved in the journey, one (re No. KWA 901) with 42 tonnes had an accident on the way so its cargo was diverted to Garisa. The other 2 trucks finished the trip and so Sh.452,350/- payment was justified. That reducing what the stranded lorry involved, and the short-delivery and www.kenyalawreports.or.ke 3 damage of the total load, all worked out at sum of Sh.75,390/- claimed . That contrary to the defence the respondent did not agree to forfeit that sum. That instead complaints/demands were filed with the appellant to pay up and two letters were referred to: that of 3-7-93 and 9-8-93 both to which there was no response from the appellant.

In cross examination it appears that the load of maize had been transferred from M/V KAW 901 to KWR 713 with a trailer. That the appellant brought a copy of “delivery “ note showing that M/V KRW 713/ZA 4464 or its driver one Juma Ali had acknowledged that the total load had 46 less bags and 69 damaged ones. Referring to the vouchers used for any payments Munyao (PW.1) told the learned trial magistrate that, these belonged to Mohamed Bayusuf & Bros. but the cheques came from the respondent. Then he produced a certificate of incorporation of the respondent w.e.f 2-4-93. Munyao added that the contract to transport was entered into before incorporation of the respondent.

In re-examination the verbal contract was referred to again and that goods were given to the appellant to deliver; he was paid. The full load was not delivered at El Wak. And that the “delivery” note (which was referred to Exh. 2) had been given to the respondent by the appellant himself. It has earlier been referred to as showing so many bags less or damaged. The certificate incorporating the respondent was produced as an exhibit 6 and that closed the respondent’s case.

The appellant gave evidence denying that he did enter into the contract with the respondent. That he did so with Mohamed Ahmed Bayusuf Brothers to transport the goods to El Wak on 23-3-93. He was paid on 26-3-93 and he acknowledged it (Exh.1). That of the 3 trucks doing the job one was involved in an accident and some goods had to be off-loaded at

Garissa. That there was no agreement verbal or otherwise as to what would happen in such an event. But he informed Mr. Bayusuf of all that took place. That even the rates were not agreed and that in any case the goods belonged to Care International. The appellant maintained that he had no contract with the respondent Bayusuf Investment Ltd. and it paid him no money. So it should reclaim none from him. That he was not aware of the loss either.

In cross examination the appellant agreed that he entered into contract to deliver maize but one truck did not get to the destination and so the contract was not fully performed. That the appellant did not know of any short-delivery but during the accident some goods must have been damaged. That he showed all this to Mr. Bayusuf who promised to think about it but he (Bayusuf) did not indicate that he would forget/forfeit the money involved. And that all the issues the appellant had ventilated in his evidence he had not brought to the attention of Bayusuf. That the appellant although aware of the shortage, his driver did not tell him of it. He maintained however that because his drover did not sign (Exh.2) delivery note, then he could not accept that 46 bags were short-delivered. Nothing is said of the 69 bags noted there as damaged.

Both sides submitted in writing and this court being the first appellate one, went over all this as it had already done with pleadings and the evidence. For instance the respondents’ side stressed how the appellant departed from his defence by testifying way off the point. That he denied the short-delivery only to admit that he knew of it. Mr. Aboo repeated as much as he told the lower court that the appellant should not resile from his pleadings and thereby create a totally new case which he had not done by amending his defence e.g. whom he contracted with. The submissions in the lower court ended with a plea that the respondent had proved its case . This court also had a close view of that the appellant submitted before the learned trial magistrate. It included the argument that he contracted with Mohamed Ahmed Bayusuf & Bros to transport the goods and he was paid as per their voucher of 26-3-93. That he did not contract with the present respondent – a limited liability company which came into being only on 2-4-93 after the contract. The stress in the lower court and here was that the two entities were not the

same and so privity of contract excluded the respondent from waging the claim all the way from the lower court to this one.

The learned trial magistrate however heard all the above but found for the respondent, hence this appeal.

It had 5 grounds which were argued by Mr. Omolo more or less globally. That the suit was not instituted by the right party, the present respondent in view of the fact that while the contract to transport the goods was concluded on 23-3-93 the respondent was incorporated on 2-4-93. That such a state of things constituted a bare impossibility of contracting before incorporation. Again the issue of privity of contract was raised as between the parties. So it was said, this appeal must succeed with costs here and in the lower court.

Mr. Aboo again stressing that the appellant had given evidence that went far off and outside his pleadings, added that all that he was doing was to try to avoid paying for the loss and the overpayment that he received in the deal here. That the appellant had not even suggested that if the plaintiff was a wrong party, he was ready to pay the sum claimed to the right party which, according to him it was either Mohamed Bayusuf & Bros or Care International. That having pleaded in the defence, including admitting the description of the respondent, the appellant cannot be heard to bring in by way of ambush an issue the identity of that litigant together with its capacity to litigate here.

The learned trial magistrate in her judgment had gone over the issues that the parties raised in their pleadings, evidence and submissions. She concluded that even if the goods in question belonged to Care International, it had contracted their transportation to the respondent whom in turn subcontracted the same to the appellant. That the question was not about the ownership of those goods. It was the transportation and the contract was concluded in that regard including payment that was made. To her the goods being short-delivered and damaged while the owner (Care International) had entrusted them to the respondent, made it the special owner to claim as it did.

Having gone over the whole matter as above, this court finds that true the payment voucher of 26-3-93 is on the letter heads of Mohamed Ahmed Bayusuf & Bros and that the respondent was incorporated after that date. Logically the respondent could not contract before it was incorporated. But should the appellant be allowed to resile from his pleadings in the defence? Not at all. Parties are bound to go by their pleadings. No trial by ambush. If the appellant thought that he was going to argue in that regard, he should have amended his defence to deny that he contracted with the present respondent. After all he always had the payment voucher; he knew whom he contracted with. But he could not and cannot be allowed to bring up a totally different case from the witness box. That can defeat the purpose of pleadings and spawn riot in civil litigation. After all the appellant does acknowledge that he contracted to deliver the maize – full load of 100 tonnes to El Wak. That his lorry broke down and some goods must have been damaged. His driver Juma Ali brought to him the delivery note showing 46 bags less and 69 bags damaged. He knew of all this although he did not bring it to the attention of Bayusuf. The appellant did not deny in his defence that a letter and reminder were sent to him demanding payment to the present appellant. He even pleaded that the respondent had authorized the loss on 12-5-93. The respondent denied such authority or waiver of right to debt. And he has not offered to pay or repay any money to any party if he is right to deny that the respondent is the right party. He wants, so to speak, to unfairly enrich himself on account of the argument that he entered into the contract on 23-3-93 but the respondent was incorporated on 2-4-93.

Technically right, but wrong and untenable in the area of justice, wrong and right.

In the circumstances of this case, this court is inclined to dismiss the appeal with costs and it is so ordered.

Delivered on 28th July, 2004.

J.W. MWERA

JUDGE