



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 392 OF 1999

THRIFTEC LIMITEDVE...R...SAUPSPELLANT

MARIDADI BUILDING CONTRACTORS LTD.RESPONDENT

JUDGMENT

The claim by the respondent in the court of the Senior Principal Magistrate at Milimani Commercial Courts, Nairobi (E.J. No. 335 of 1998) was for payment of the balance of the purchase price for goods sold and delivered.

The respondent had made an order for one (1) door, one (1) drop safe and two (2) ventilators from the appellant.

The items were supplied save that the key to the door was not released due to the unpaid balance of the purchase price. This balance was put at Kshs.369,760/= and was the subject of the lower court case.

The appellant denied owing the respondent any money or that if there was some owing, it could not be Kshs.369,760/=.

In the lower court, the appellant, through its witness, stated that the respondent had supplied an old safe, did not complete the job in time and/or did not install the fitting as agreed and/or that they did not supply the keys to the safe as expected.

The appellant further testified that because of the failure by the respondent to deliver the keys to the safe, it had incurred costs to the tune of Kshs.100,000/= to get another set of keys in order to operate the safe.

The learned magistrate (C.O. Kanyangi) wrote and delivered his judgment on 19th August 1999 and awarded the respondent the amount claimed less kshs.160,000/= being the cost of the lock and keys which had been fabricated afresh after the respondent failed to hand over the keys for the safe.

This appeal was filed to contest the deduction of Kshs.160,000/= from the award of Kshs.369,760/= made to the appellant because no such claim had been made in the lower court through a counter claim, hence there was no basis for such deduction.

This complaint formed the two (2) grounds of appeal set out in the memorandum of appeal filed in this court on 16th September, 1999.

The appeal was heard in this court on 4th December, 2002 wherein counsel for both parties appeared and either proposed or opposed the appeal.

During the hearing of this appeal it emerged that there were two appeals in this matter, one by the appellant and other by the respondent.

Counsel for the appellant submitted that his client was in a position of an unpaid seller and that he was entitled to sue the respondent, as it did, for the balance of the purchase price. That in fact the respondent did not deny owing the appellant the balance of the purchase price.

Otherwise, there was nowhere during the lower court proceedings where the defence witness sought payment of Kshs.160,000/= awarded by the learned magistrate. Counsel prayed that his client's appeal be allowed. Counsel for the respondent submitted that the appellant did not prove its case on the standard required.

That what was introduced in the lower court were running account figures distinct and separate from the figures on the invoices and that this evidence should not have been admitted and used in deciding the case.

That the appellant was in breach of contract and that the appellants witness could not state the condition of the safe delivered. He prayed for the cross-appeal to be allowed and the appellant's appeal to be dismissed.

Parties are bound by their pleadings – see Order VIII Rule 2 and Order VI Rules 3 and 4(1) of the Civil Procedure Rules.

There is nowhere in the defence filed in the lower court on 26th June 1998 where the respondent made a counter claim of Kshs.100,000/= or Kshs.150,000/= or even Kshs.160,000/= being costs incurred for whatever reason, leave alone fabricating safe keys.

That the respondent witness or witnesses testified on some figures the respondent incurred in course of its duties or relationship with the appellant did not make out a case worth consideration given that this was in the nature of a special damage to be specifically pleaded and strictly proved.

Even those defence witnesses did not produce evidence to strictly prove that the respondent was entitled to the Kshs.160,000/= which the learned magistrate awarded to it by the lower court.

Thus I agree with counsel for the appellant that the court had no basis for awarding the respondent a sum of Kshs.160,000/= being a set off from the formal award of Kshs.369,760/=.

I would, and do hereby dismiss the cross-appeal.

As for the appellant's appeal, the learned magistrate saw and heard the witnesses who testified before him and was in a better position, than, this court to assess their credibility.

In particular the witnesses who testified for the respondent admitted there was some money owing to the appellant but were hesitant to say how much it was.

This is why they did not bother going for the safe key which had been held by the appellant until payment of the full purchase price was made. The evidence about the appellant supplying goods which were not according to specification was an attempt by the respondent to avoid meeting its side of the bargain by paying the balance of the purchase price.

The magistrate's judgment was sound and reasonable except for the deduction of Kshs.160,000/= from the sum claimed. I allow the appeal and set aside the magistrate judgment and substitute it with one which awards the appellant the whole sum of Kshs.369,760/= with costs and interest from the date of filing suit.

Delivered this 13th day of February, 2003.

D.K.S. AGANYANYA

JUDGE