Happy Feeds Limited v Okoth t/a Kisire Suppliers (Civil Appeal E305 of 2023) [2025] KEHC 104 (KLR) (Civ) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E305 OF 2023

RC RUTTO, J

JANUARY 17, 2025

BETWEEN

HAPPY FEEDS LIMITED ..... APPELLANT

AND

KENNEDY OUOCH OKOTH T/A KISIRE SUPPLIERS ..... RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi (V.M. Mochache, PM.) delivered on 16th June 2023 in SCCCOMM Case No. E1189 of 2023)

JUDGMENT

1. This is an appeal from the judgment of the small claims court that awarded the respondent a principal sum of Kshs. 406,560.00 for sale of goods together with interest. The gist of the claim is as contained in the statement of claim dated 17th February 2023, where the respondent averred that he was in a business relationship with the appellant for the supply of sliver cyprinid fish alias omena in the local market. That on 22nd June 2021, the respondent supplied the appellant with 4,620 kilograms of the said dry fish at an agreed cost of Kshs. 88.00 per kilogram totaling Kshs. 406,560.00. However, in spite of that delivery, the appellant failed and/or refused to pay the respondent the said sum hence the suit. The appellant filed its memorandum of appearance on 3rd March 2023 and its statement of response dated 16th March 2023. The appellant denied the contents set out in the statement of claim.

2. In its judgment dated 16th June 2023, the trial court found that the respondent proved his case on a balance of probabilities. Consequently, judgment was entered in his favor against the appellant for a principal sum of Kshs. 406,560.00. Interest at the rate of 12% from the date of filing suit until payment in full was also awarded. Aggrieved by this finding the appellant lodged this appeal.

3. In its memorandum of appeal dated 15th November 2023, the appellant has raised seven grounds as follows; that the trial court was in error as proof of delivery of the goods in question was not established to the required standard; that there was no valid agreement between the appellant and the respondent; that the learned magistrate awarded the claim on wrong principles of the law since she shifted the burden of proof to the appellant; that the learned magistrate acted extraneously for determining the matter outside the scope of the *Small Claims Court Act*; and that the award on interest and costs was improper.

4. On these grounds, , the appellant urged this court to allow the appeal, set aside the judgment of the trial court and substitute the same with an order dismissing the respondent's statement of claim. The appellant further prayed for costs of the suit.

5. The appeal was disposed of by way of written submissions. In its submissions dated 19th September 2024, together with its list and bundle of authorities evenly dated, the appellant argued that there was no valid contract between the parties herein. That there was no proof of intention to be in a legally binding relationship. It pointed out that based on previous forms: the delivery note, invoice, Goods Received Note (GRN) and a remittance advice, as produced by it, the documents relied on by the respondent were insufficient as to prove a legally binding agreement. It complained that the delivery note relied on by the respondent was a forgery and there were no documents to justify this particular transaction. Furthermore, the weighbridge slip was not conclusive proof that the goods had been delivered to the appellant. Further that, no delivery notes in respect to this particular transaction had been adduced. It also pointed out grave inconsistences in the testimonies of the respondent's witnesses as to warrant a dismissal of their claim. The appellant then argued that the court was in error in taking 88 days to deliver the judgment acting outside the ambit of the *Small Claims Court Act*. In view of the foregoing, the appellant asked this court to set aside the judgment of the trial court with costs.

6. The respondent relied on his written submissions, together with his list and bundle of authorities, both dated 23rd September 2024 to submit that by dint of section 3(1) and 5 of the *Sale of Goods Act*, while there was no written agreement, the same was done orally and could be inferred from the conduct of the parties. In any event, the appellant accepted the goods and by dint of section 6(1) and (3) of the said Act, a contract did exist. Furthermore, there was a delivery note dated 22nd June 2021 which was acknowledged and stamped. While the signature was disputed, by the appellant, it was submitted that it failed to substantiate by inviting the store manager to adduce evidence. In addition, the weighbridge slip was proof that the documents had been delivered. That the absence of the Goods Received Note did not vitiate the transaction.

7. Finally, on jurisdiction, the respondent urged that the delayed judgment did not discharge its veracity as it was a sound judgment. He ultimately urged this court to dismiss the appeal with costs.

8. To begin with, the duty of this court as an appellate court is well prescribed under Section 38 of the *Small Claims Court Act* which limits the jurisdiction of this Court to matters of law only. It provides that:

   38.

   (1) A person aggrieved by the decision or an order Appeals of the Court may appeal against that decision or order to the High Court on matters of law.

   (2) An appeal from any decision or order referred to in subsection (1) shall be final."

9. What constitutes points of law, has been settled. In the case of Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA), the Court of Appeal stated as follows: -

> "The court held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law."

10. Based on the above provision of law and the authority referred to, this Court has considered the grounds of appeal as they appear in the Memorandum of Appeal dated 15th Nov 2023, the proceedings of the lower court, and the Appellant's submissions and discerns the following as the questions of law that calls for determination: whether the Respondent proved its case on a balance of probabilities as required by law to establish that a sale of goods existed between the parties? And whether the judgment of the Small Claims Court is valid having been delivered beyond the statutory timeline.

11. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act* which is to the effect that "whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist." This was further buttressed in the Court of Appeal case of Mumbi M'Nabea v David M. Wachira [2016] eKLR where, in discussing the standard of proof in civil liability claims in our jurisdiction the appellate Court held as follows:-

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

12. The duty of proving the averments contained in the statement of claim lies squarely upon the Respondent(the claimant in the small claims court). Thus, in order to establish whether the respondent proved its case by establishing a sale of goods did exist, I find it necessary to reproduce the abridged facts as captured in the record. The respondent CW1 testified that he was engaged with the appellant to supply sliver cyprinid fish. This is what occurred on 22nd June 2021 when the respondent supplied the appellant with 4,620 kilograms of the said dry fish following a request from the appellant's agent Mr. Tobias Oketch. He was not issued with a Local Purchase Order. According to CW1, the cost was orally agreed at Kshs. 88.00 per kilogram totaling Kshs. 406,560.00.

13. CW1 followed CW2 Bernard Mugambi, a hauler, to the premises. CW1 and CW3 Robert Ouma rode together following CW2 who was hired by the respondent to deliver the goods. That he did so with

his motor vehicle registration number KBY 070A. He was accompanied by the appellant's agent Mr. Tobias Oketch. He delivered the goods at 11:00 am where he was asked to proceed to the weighbridge at Cianda Drive. Thereafter, the cargo was off loaded at the respondent's premises.

14. CW1 relied on the delivery note dated 22nd June 2021 as to demonstrate that the consignment was delivered to the appellant. The delivery note conspicuously bears the stamp of the appellant and was executed by a Mr. Ngeno. The original was retained by the appellant. The respondent also relied on the weighbridge slip demonstrating that the consignment weighed 4,620 kilograms. The same was weighed upon the appellant's behest while in motor vehicle registration number KBY 070A.

15. However, in spite of that delivery, the appellant did not pay him. The respondent was to be issued with a Goods Received Note and demanded orally for payment of the said transaction. CW1 relied on mutual trust that the transaction would run seamlessly by dint of their previous conduct.

16. The appellant called Kimani Mungai RW1, its operations manager to the stand. His evidence was that the respondent previously supplied omena on 4th January 2021. He enumerated the process of making a purchase as follows: the supplier is furnished with a Local Purchase Order (LPO). The goods are delivered with a delivery note. On receipt of the goods, the appellant issues a Goods Received Note (GRN) and an invoice issued to the supplier for payment and authority to testify all marked into evidence. Taking this process into account, the appellant denied that goods were delivered on that day since those documents, which were apparently absent, would have verified the transaction. He disputed the mark on the delivery note as not belonging to anyone from the appellant. In addition, he confirmed that he knew Mr. Tobias Oketch but met through CW1. He urged the trial court to dismiss the claim since no sale of goods agreement existed between the parties, and no document was stamped by Mr. Kaberia.

17. In support of his testimony, RW1 produced the delivery note and invoice for Kshs. 21, 120.00 both dated 4th January 2021, delivery note from Kisire Supplies dated 4th January 2021 for 9,760 kilograms of the fish whose price per kilogram was indicated as Kshs. 88.00, Goods Received Note dated 4th January 2021, invoice for Kshs. 858,880.00, remittance advice as at 11th January 2021 and another as at 20th February 2023.

18. It is not in dispute that there was no Local Purchase Order or written agreement for the delivery of the consignment that according to the respondent took place on 22nd June 2021.

19. Section 3(1) of the *Sale of Goods Act* provides that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. The Court of Appeal in Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR held as follows regarding the general nature of a contract:

> "It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."

20. From the above binding authority, it is established thus that a contract can be inferred from the conduct of the parties. However, to establish its validity, the Court of Appeal held as follows in the case of

William Muthee Muthami vs. Bank of Baroda (2014) eKLR that it must comply with the following rudimentary requirements:

> " In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

21. Was there a binding contract leading to the sale of goods between the appellant and the respondent? In support of this assertion, the respondent relied on the testimonies of CW1, CW2 and CW3 who corroborated that a consignment of dry sliver cyprinid fish was delivered from the respondent's premises to the appellant's premises. The respondent further relied on the delivery note dated 22nd June 2021 bearing the stamp of the appellant and the weighbridge slip indicative of the appellant as its customer.

22. As rightly pointed out by the trial court, the legal burden of proof in civil cases rests on the person who claims and, in this instant, the respondent. However, the evidentiary burden is not static and shifts time and again where evidence is called and the adversary is invited to disprove it. In this case, the respondent relied on the delivery note dated 22nd June 2021. It bears the stamp of the appellant. In his evidence, RW1 stated:

> " The stamp looks similar but I don't think it's ours. It is not clear, ours is always clear and signed in the middle. I am not aware of any signature below that doc."

23. At this juncture, the burden of proof shifted to the appellant to demonstrate if this was a forgery, or an act of fraud committed by the respondent. Further, no evidence was adduced to lay out a distinction between a genuine stamp and signature and one that is fake. All the appellant did was to deny. Taking this into account, I do agree with the findings of the adjudicator that indeed the onus was on the appellant to countermand this evidence by establishing with credible evidence, and not just by word of mouth, that the stamp did not belong to it.

24. Notably, upon being cross examined, RW1 stated that there was no need to stamp a delivery note upon its arrival to process payment. In that case then, it was immaterial whether the delivery note was stamped or not. Therefore, the inference that can be drawn is that indeed a consignment of fish was delivered unto the appellant's premises. It was weighed at the weighbridge and a slip issued confirming the weight of the consignment.

25. The evidence of the respondent's witnesses corroboratively and consistently demonstrated that indeed on 22nd June 2021, the respondent delivered fish to the appellant weighing 4,620 kilograms. That evidence is further supported by the documents on record. Furthermore, RW1 did not deny knowledge of Mr. Tobias Oketch seen as another instrumental person in the transaction process. One wonders why the appellant never called him as a witness to either confirm that he was present or absent during the consignment and contingently bear weight on its case.

26. Taking all this into account, I therefore find that a valid agreement for sale of goods existed between the appellant and the respondent. There was an offer in which the respondent delivered the goods and was accepted by the appellant upon entry into the weighbridge. The merchantability was not challenged. The appellant became a party to the agreement by accepting the consignment in fulfillment of the provisions of section 6 of the *Sale of Goods Act*. In addition, the appellant failed to offer an explanation why its name appeared on the weighbridge slip if indeed the consignment never took place. On the consideration, the respondent testified that the agreed figures arrived at was a consensus ad idem. The

respondent enumerated the figures pleaded in his statement of claim. That amount was not disputed or opposed by the appellant.

27. On the issue of validity of the judgment delivered by the Small Claims Court. Section 34 (1) of the *Small Claims Court Act* provides as follows:

> " All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim."

28. While it is not disputed that the suit was concluded 38 days after the lapse of the statutory limited period, the question for determination is whether the decision is rendered inoperative, null and void by dint of that lapse? In Biosystems Consultants vs. Nyali Links Arcade [2023] KEHC 21068 (KLR) ruminated itself as follows:

> " The purpose of the *Small Claims Court Act* was to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result was that balancing the two may result at times to overshooting the 60 days. The 60 days did not have penal consequences for good reason. They were aspirational. That was part of having access to justice over amounts that needed not be in the normal system. Allowing the application would open floodgates that would eventually defeat the purpose of the Act.
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> The non- compliance went to the court's performance and was answerable internally. It could not affect parties who were in court and ready to be heard. Defendants used various gimmicks to have matters adjourned and thereafter turned around to say, 60 days were over. The parties had wasted a full month arguing in the court and with preliminary objections that were much ado about nothing."

29. Notwithstanding the statutory limitations set out in the Act, I find that the decision rendered therein was not invalid on account of the lapse of time. I therefore find that the appeal on this ground must fail.

30. The upshot of the above is that the adjudicator rightly held in favour of the respondent. Consequently, I do find that the present appeal lacks merit. It is hereby dismissed with costs to the respondent.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant: