



SBI International AG Holding Kenya v Kipsigis Traders Limited (Civil Appeal E026 of 2021) [2024] KEHC 954 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEHC 954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E026 OF 2021
JR KARANJA, J
FEBRUARY 8, 2024**

BETWEEN

SBI INTERNATIONAL AG HOLDING KENYA APPELLANT

AND

KIPSIGIS TRADERS LIMITED RESPONDENT

(Being an appeal arising from the Judgment of Chief Magistrate Hon. S.M. Mokuu, Chief Magistrate's Court at Kericho, Civil Case No. 509 of 2014 delivered on 28th July 2021)

JUDGMENT

1. This Appeal arises from the decision of the Chief Magistrate in Kericho Civil Case No 509 of 2014, in which the Appellant, SBI International AG Holding Kenya was the Defendant to the claim made by the Plaintiff Kipsigis Traders Limited for the sum of Kshs 1,653,498/15cts together with interest at the rate of 22% from 20th December 2012 to the date of payment being the outstanding amount due and owing to the Plaintiff from the Defendant for the supply of goods on credit to the Defendant by the Plaintiff.
2. In the amended plaint dated 4th September 2017, it was pleaded that between the dates of 7th November 2011 to January 2013, the Plaintiff supplied to the Defendant goods amounting to Kshs 16,960,154/90cts but only the sum of Kshs 14,332,542/- was paid into the Plaintiff's account by various cheques and through electronic funds transfer thereby leaving an outstanding balance of Kshs 1,653,498/15cts.

It was further pleaded in the further amended plaint dated 17th June 2019 that upon supply of the goods to the Defendant the Plaintiff issued invoices inclusive of 16% VAT from the month of January 2011 to May 2012 resulting in further claim of Kshs 1,040,419/- being the value added tax (VAT) charged on their invoices without receipt by the Plaintiff of the withholding Certificate.



3. The Plaintiff averred that although on several occasions through e-mails and verbal communications demands were made to the Defendant for the payment of the sum of 1,653,498/- and withholding tax of Kshs 1,040,419/68cts, the Defendant refused, ignored and/ or neglected to pay the amounts aforesated.

The Plaintiff therefore prayed for judgment against the Defendant for the said amounts together with costs of the suit and interest.

4. The statements of defence dated 5th February 2015 as amended on 18th October 2017 and 29th July 2019, were effectively a denial by the Defendant of all the allegations made against itself by the Plaintiff and a contention that the entire claim was cut out of a larger scheme operated and orchestrated with the knowledge of the Plaintiff aimed at unjustly enriching themselves by assembling an array of illicit claims against the Defendant.

5. The Defendant therefore prayed for the striking out of the entire claim and dismissal of the suit against itself with costs.

Having heard the matter on the basis of the pleadings and the evidence in support thereof by both parties, the trial court in its judgment delivered on 28th July 2021 concluded that the Plaintiff's claim had been proved against the Defendant on a balance of probabilities and entered judgment in favour of the Plaintiff against the Defendant for the amounts of Kshs 1,653,498/15cts and Kshs 1,040,419/68cts being withholding tax. The claim of interest at the commercial rate of 22% with effect from 20th December 2012 to the date of payment was declined in favour of interest at court rates from the date of further amendment of the plaint i.e. 17th June 2019 until payment in full. The Plaintiff was further awarded costs of the suit.

6. Being aggrieved with the decision the Appellant preferred the present appeal on the basis of the grounds set out in the memorandum of appeal filed herein on 9th September 2021 and dated 23rd August 2021 by the Messrs. Professor Albert Mumma & Company Advocates. the appeal largely proceeded by way of written submissions with brief oral highlights by Mr. Kamande, Learned Counsel for the Appellant and Mr. Migiro, Learned Counsel for the Respondent and this court, having given due consideration to the grounds in support of the appeal and those in opposition thereto as may be deciphered from the rival submissions had a duty as a first Appellate Court to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, *Selle v Associated Motor Boat Company and others*) (1968) EA 123)

7. Accordingly, the Plaintiff's case through its director, Prakash Bambal Patel (PW1) was briefly that hardware goods including cement and steel were supplied to the Defendant Company in the period between the year 2011 and the year 2013 and when the Plaintiff undertook a reconciliation of its account it gathered that the Defendant had effected payments for the supplies delivered and received by them save for the sum of Kshs 1,653,498/15cts and the sum of Kshs 1,048,376/58 being value added tax (VAT)

8. The statement of account dated 30th April, 2014 availed herein by the Plaintiff Company was a reflection of how the outstanding amount of Kshs 1,653,498/15cts was arrived at. The Plaintiff indicated that VAT was charged for the supplied goods but that the Defendant failed to provide documents showing that the amount being claimed by the Plaintiff was remitted to the Government. It was thus the Plaintiffs contention that VAT ought not to have been paid by itself if the Defendant had provided the necessary exemption certificates.



9. The Plaintiff indicated that such exemptions are given to a company seeking exemption through a process which brings on board the Ministry of Foreign Affairs and the Kenya Revenue Authority (KRA) for necessary approval. A pro-forma invoice is in that regards issued.

The Plaintiff stated that a letter was issued to them respecting the remission of VAT, but that they failed to produce a record of the goods supplied to the Defendant Company and also certificates signed by the receiver of the goods.

10. Nonetheless, the Plaintiff contended and maintained that it was owed by the Defendants the amounts claimed in the plaint.

In addition to the Plaintiff's oral testimony the Plaintiff while supporting its claim against the Defendant also relied on its witness statement dated 4th July, 2014, specifically for the amount of Kshs 1,653,498/15cts with interest at the rate of 22% per annum from 20th December 2012 till payment in full.

11. The statement dated 17th June 2019 indicated that goods worth Kshs 16,960,154/90cts were supplied to the Defendant during the period starting from November 2011 to January 2013 and that only the sum of Kshs 14,332,542/- was paid by the Defendant through cheques and electronic funds transfer (EFT) thereby leaving an outstanding balance of Kshs 1,653,4978/15cts. It is also indicated that upon supply of the goods invoices were issued by the Plaintiff inclusive of VAT from the period January 2011 to May 2012 when this stopped after the Defendant indicated that it was exempted by the Government (GOK) from paying VAT. The Plaintiff therefore claimed VAT in the sum of Kshs 1,040,419.68/- for the period between January 2011 to May 2012.

12. The Defendant's defence was a denial of the Plaintiff's claim. Through its chief account, Osborn Onsembe (DW1), the Defendant did not in essence dispute that goods were indeed supplied to itself by the Plaintiff Company at the material time for purposes of undertaking the construction of the Mau Summit Kericho - Kisumu Road. This was done by the raising of local purchase orders (LPOS) requiring supply of the goods by the Plaintiff Company which would then issues invoices and after the supply would issue delivery notes.

13. The Defendant contended that the claim by the Plaintiff Company/ Respondent was invalid as all the goods supplied to itself by the Plaintiff were subsequently paid for. As regard VAT, the Defendant contended that the project at hand was exempted from VAT and other duties after a projection of what could be supplied was given by the supplier after which necessary application would be made to KRA for VAT exemption.

The Defendant further contended that the Plaintiff Company was not supposed to charge VAT and in any event, it did not issue invoices reflecting the element of VAT.

14. In the Defendant's witness statement dated 5th February 2015, it is reiterated that the goods supplied to the Defendant by the Plaintiff were fully paid for thereby rendering the Plaintiff's claim untenable. It is therein contended that the VAT exemption certificate from the government was duly forwarded to the Plaintiff for usage in offsetting VAT against credit notes. That the Plaintiff's statement of accounts produced herein was incapable of establishing the amount sought by the Plaintiff and in any event Plaintiff never made any such demand nor issue a notice of intention to sue and if it did, then the demand and notice were erroneous as the Plaintiff was fully paid for the goods supplied to the Defendant.

15. The pleadings as supported by all the foregoing evidence indicated that there was no dispute with regard to the supply of the goods to the Defendant by the Plaintiff within the material period.



The relationship which emerged between the two parties at that material time was apparently a contractual buy and sell relationship in which the Plaintiff was the vendor and the Defendant a buyer of the material goods or commodities. Such a transaction would invariably involve basic transactional documents like invoices, receipts, delivery notes and local purchase orders (LPOs)

16. It was clearly indicated in evidence that such documents were used in the material transaction between the Plaintiff and the Defendant. The testimony of the Plaintiff's director (PW1) and that of the Defendant's Chief Accountant (DW1) confirmed as much.

An invoice is a general commercial document normally issued by a vendor to a buyer relating to a sale transaction. It is a source document that shows all details of sale including the product being supplied and its quantity, the agreed price, terms of payment and perhaps mode of payment.

17. A Local Purchase Order (LPO) is normally issued by a buyer to a seller. It also shows the product being purchased and its quantity together with the agreed purchase price while a delivery note confirms the delivery to and receipt of the supplied goods by the purchaser.

All the foregoing documents were alluded to by both the Plaintiff and the Defendant by way of their respective oral and documentary evidence in the effort to buttress their respective positions on the non-payment or payment of part of the supplied goods and all that which may have appertained thereto such as the question of value added tax (VAT).

18. What therefore emerged as the major issue for determination was whether the Defendant was truly and justly indebted to the Plaintiff for the claimed amount or amounts arising from the material transaction between both parties.

In that regard, the trial court found in favour of the Plaintiff/ Respondent notwithstanding the fact that it was very much alive to the legal principle that he who alleges has the obligation to prove the allegation. This is clearly stipulated in Section 107 of the *Evidence Act* as follows: -

- “(1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

19. Under Section 108 of the *Evidence Act*, the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

So, in this case, the burden of proof lay with the Plaintiff to establish and prove by necessary evidence that the Defendant is indebted to it in the entire amount claimed in the plaint as amended on 17th June 2019.

20. With regard to the sum of Kshs 1,653,498/15cts together with interest at the rate of 22% per annum from 20th December 2012 to the date of payment, the Plaintiff essentially relied on its own statements of accounts and its reconciliation of accounts statement in an attempt to show how the amount was arrived at and ultimately prove that the Defendant is indeed indebted to it in that amount together with interest. However, viewed against the Defendant's account summary of payments made to the Plaintiff and considering that the relevant transactional documents such as the LPOs, invoices, receipt and delivery notes were not availed by the Plaintiff as conceded by its witnesses (PW1), it would follow that the Plaintiff failed to discharge its burden of proving that it is owed the amount claimed by the Defendant.



21. In the circumstances, the Plaintiff could not be heard to say that it was not fully paid by the Defendant for the goods it sold and supplied to the Defendant at the material time. The claim for the sum of Kshs 1,653,498/15cts together with interest was therefore unwarranted for want of proof and ought not have been awarded to the Plaintiff by the trial court on the basis of the availed statements of accounts generated by the Plaintiff without credible supporting documents.
22. With regard to the sum of Kshs 1,040,419/68cts being VAT, the Plaintiff through its witness (PW1) indicated that it charged VAT for goods supplied to the Defendant, but failed to provide any documentary proof or evidence of the fact. The witness indicated that the Plaintiff would not have been required to pay VAT had the Defendant provided it with the exemption certificate from the KRA. However, he admitted or implied in Cross-Examination that he was aware that the Defendant was exempted from VAT thereby disentitling him of the amount claimed as VAT.
23. The Defendant's witness (DW1) indicated that the project the Defendant was undertaking was exempted from VAT and that the invoices issued by the Plaintiff Company did not reflect any element of VAT.
24. The witness (DW1) indicated further that the Plaintiff's claim for VAT was an afterthought coming only after this case had been filed in court. He stated that letters of VAT exemptions were provided to the Plaintiff as they were treatable as exemption certificates which were being awaited from the concerned public body.

The trial court alluded to the said letters of exemption and believed the Plaintiff's witness (PW1) when he stated that such letters were never received by the Plaintiff thereby implying that the Plaintiff was not aware of any exemption or no such exemption existed in favour of the Defendant at the material time.

25. Barring the question of exemption or letter of exemption, the Plaintiff was required to prove by necessary documentary evidence that it was required to charge VAT and did charge VAT thereby entitling it to claim the same from the Defendant. However, by its failure to provide necessary documents pertaining to the entire transaction with the Defendant, the Plaintiff was unable to prove that the sum of Kshs 1,040,419/68cts was due to itself from the Defendant as VAT or anything related to the Tax.
26. In sum, the Plaintiff failed to prove to the required standard that the Defendant was truly and justly indebted to it in the sums of money claimed in the further amended plaint.

Consequently, this appeal is allowed in its entirety to the extent that the judgment rendered by the trial court on 28th July 2021 be and is hereby set aside and substituted with judgment dismissing the Plaintiff's claim with costs to the Appellant/ Defendant together with costs of the Appeal.

DELIVERED AND DATED THIS 8TH DAY OF FEBRUARY 2024

J. R. KARANJAH,

JUDGE

