



Jumbo Tonner & Ink Market Limited v Sony Commercial Agencies Limited (Civil Appeal E657 of 2021) [2024] KEHC 9218 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E657 OF 2021**

**BM MUSYOKI, J
JULY 24, 2024**

BETWEEN

JUMBO TONNER & INK MARKET LIMITED APPELLANT

AND

SONY COMMERCIAL AGENCIES LIMITED RESPONDENT

(Being an appeal from judgement and decree of Honourable Edgar Kagoni PM dated 22-09-2021 in Chief Magistrate's at Milimani Commercial Courts civil case number 6227 of 2019)

JUDGMENT

1. The respondent filed civil case number 6227 of 2019 at the Chief Magistrate's court at Milimani Commercial Courts claiming a sum of Kshs 1,288,000/= being refund of purchase price paid for goods supplied to the respondent's customer which the customer rejected and the respondent returned to the appellant. The trial court entered judgement against the appellant for the pleaded sum plus costs and interest. It is this judgment dated 22-09-2022 which is the subject of this appeal.
2. The appellant has raised 17 grounds of appeal which to me are repetitive. In my view, the said grounds can be collapsed to two issues as it shall be clear hereinbelow once I reproduce the evidence adduced before the lower court. Looking at the plaint and the defence filed by the parties, the appellant did not deny that the respondent paid for the goods at Kshs 1,288,000.00. All that was in contention was whether the goods were defective and whether they were returned to the appellant as claimed.
3. This is a first appeal and as such I must conduct it in a form of a re-hearing. This court is required to re-examine and re-evaluate the evidence on record and come to its own conclusion always bearing in mind that it did not have the advantage of taking the evidence and seeing the demeanor of the witnesses.



The respondent's case at the lower court

4. The respondent called three witnesses. PW1 was one Jacob Mbaka who described himself as the driver working with the respondent. He adopted his witness statement dated 15-12-2019 and stated that in or about the months of August and September 2018, he was instructed by the respondent to collect goods from the appellant company and have them delivered to Ethics and Anti-Corruption Commission (hereinafter referred to as 'the' EACC) offices at Integrity Centre Nairobi which he did.
5. On 18-09-2018, Patrick Otieno, a colleague of his asked him to drop him off at the EACC offices as the goods the witness had previously delivered there had been rejected. He dropped off Mr. Patrick Otieno and on the same day under instructions from Patrick and the respondent's director one Mr. Robert Kamau, he collected the rejected goods from EACC in the company of Patrick Otieno and Mr. Nicholas Oduor. They collected the goods late in the evening and they had to temporarily store them at the plaintiff's offices because it was late. The witness added that the following day, he delivered the goods to the appellant's offices although he personally did not go into the offices as he was left in the offloading zone to take care of the vehicle. He was told by Mr. Nicholas Oduor that the goods were returned and verified by one Mr. Mutua an employee of the appellant. In cross examination, he stated that he did not deal with the documentation.
6. The second witness was Robert Kamau Wachira, a director of the respondent. He adopted his witness statement dated 19-08-2019. According to this witness, EACC issued to the appellant a Local Purchase Order (LPO) dated 20-08-2018 for supply of some items listed therein. He referred to the LPO which showed the costs of the goods to be supplied as Kshs 421,250.00. He stated that the items in the LPO dated 20-08-2018 were supplied to EACC by the respondent on account of the respondent and the appellant made payment of Kshs 1,288,000.00. He listed the payments made to the appellants as Kshs 48,000.00 vide receipt number 17995 dated 16-08-2018, Kshs 192,000.00 vide receipt number 19807 dated 20-08-2018, Kshs 360,000.00 vide receipt number 19828 dated 22-08-2018, Kshs 360,000.00 vide receipt number 19846 dated 23-08-2018 and Kshs 328,000.00 vide cheque number 005337 dated 4-09-2018.
7. The witness added that on 18-09-2018, the goods were inspected by EACC and found to be unfit for the purpose they were ordered and were therefore rejected upon which the plaintiff through its officer Mr. Patrick Otieno notified the appellant of the rejection. He produced a document dated 18-09-2018 which was authorising the said Otieno to collect the rejected goods. The witness stated further that the appellant offered to replace the defective goods with a suitable batch and when the plaintiff took the replacement batch to EACC, the same was also rejected because they were also defective. According to this witness, the respondent also accepted the second batch back and thereafter remained silent on whether to refund the money paid for the goods. In addition to the letter of intention to enter into contract by EACC, the LPO dated 20-08-2018 and the receipts listed above, the witness produced demand letter by the respondent's advocates dated 6-02-2019 and reply to the demand letter dated 20-02-2019. In cross examination, the witness confirmed that the receipts issued by the appellant indicated that once goods sold, they were not returnable. He also admitted that the returned goods were not acknowledged by documentation.
8. PW3 was the respondent's messenger one Nicholas Oduor. He testified that in August and September 2018, he was instructed to accompany PW1 to the appellant's company to collect goods for delivery to EACC which he did. He stated that on 18-09-2018, Mr. Patrick Otieno who worked with the respondent informed him that the goods they delivered to EACC had been rejected and he should accompany the driver to EACC to collect the goods. They went to collect the rejected goods and went back to the office and since it was late, they temporarily stored the same in the respondent's offices until



the following day when he helped the driver to deliver the rejected goods to the appellant's premises. This he did with PW1 only after which he called Patrick and informed him of the delivery. The witness said that he was received at the appellant's offices by one Mr. Mutua who received the goods and verified by looking through the boxes but he did not sign any delivery note to confirm receipt. He claimed that he knew the said Mr. Mutua from their previous engagements. He stated that he did not know about the debt but he confirmed that the goods were delivered. In cross examination, he stated that he was not issued with any documents when he returned the goods.

9. The last witness for the respondent was Patrick Otieno Odhiambo. He testified by adopting his statement dated 10-01-2020. He was an accountant with the respondent at the time of the alleged transaction. He testified that the respondent had settled to source goods for EACC from the appellant. He stated that the appellant made available the goods and that the appellant was aware the purpose for which they were being sourced. He added that PW1 collected the goods and delivered the same to EACC. Subsequently, on diverse dates between 16th August 2018 and 4th September 2018, the respondent made payments of Kshs 1,288,000/= as purchase price. He added that on 18-09-2019, the EACC informed the respondent that the goods were defective and not fit for the intended purpose and instructed respondent to collect and replace them with goods that matched the description given in the purchaser orders.
10. According to the witness, he informed the appellant's director who agreed to meet him at EACC to verify the rejection. He added that PW2 accompanied him to EACC and they were attended by one Mr. Kenneth Mugambi in presence of the appellant's director and it was confirmed that the goods were defective. The witness added that the appellant's director promised to supply new batch of goods and required them to return the rejected goods to its offices. He added that himself, PW1 and PW3 collected the rejected goods from EACC and temporarily stored them at their offices as it was late. He further stated that the next day, PW1 and PW3 returned the goods to the appellant. Thereafter, he visited the appellant's offices several times to check the status of replacement of the goods but all was in vain. In cross-examination, he also stated that no documents were issued on return of the goods.

Appellant's case

11. Eric Kivuvani Musau testified on behalf of the appellant. He adopted his statement dated 18-12-2019. He stated that he was a director of the appellant. He told the court that in August 2018, the respondent approached the appellant to supply and deliver stationery and common user items. He added that the appellant in August 2018 and September 2018 supplied the respondent with various supplies through receipts numbers 17995, 19807, 19828, 19846 and the supplies were fully paid for. The witness stated that all the goods supplied were fit for the purposes and that they were accepted and payment made. The witness stated that on 6-02-2019, the respondent issued a demand letter which the appellant's advocates responded to vide their letter dated 20-02-2019. According to him, there were no debts as goods were supplied and paid for. In cross examination, he stated that they usually issue goods return note in the event of any goods being returned. He admitted that he had not exhibited one. He also stated that he had not denied that he went to EACC. He confirmed that he went to EACC with PW4 but maintained that he went there to inspect the goods as is the norm with delivery to government agencies. He also confirmed that he was at EACC with PW3. He reiterated that the goods were not returned though the goods he supplied were the subject of the suit.

Analysis and determination

12. Having set out the above I discern that there is no dispute that the respondent purchased goods from the appellant. The dispute is whether or not they were all supplied to EACC and if so whether they were rejected and if they were rejected whether they were returned to the appellant.



13. The respondent claimed that the appellant was made aware that the goods were being bought for supply to the EACC. The appellant's stand is that there was no such agreement. This issue was not considered by the trial magistrate and I do believe that the same was not a necessary issue for determination. It is common ground that the goods were sold to and paid by the respondents. If the court finds that the goods were returned to the appellant, it would not matter whether the same were destined to EACC or any other entity or for the respondent's own consumption. The destination or the end user of the goods is a peripheral issue which I do not think it should take time analysing.
14. The respondent's claim that the goods were returned is premised on the alleged rejection by the EACC. I have gone through the documents said to be evidence of rejection by the EACC. This is the gate pass dated 18-09-2018. It lists the rejected goods as follows;
- a. CE 400A- 16 pieces.
 - b. CE 401A- 19 pieces.
 - c. CE 402A- 19 pieces.
 - d. CE 403A- 19 pieces.
 - e. CE 505 A- 10 pieces.
 - f. CE 250 A- 6 pieces.
 - g. CE 251 A 6 pieces.
 - h. CE 252 A 6 pieces.
 - i. CE 253 A- 6 pieces.
15. With the above in mind, I have also gone through what was sold to the respondent as per the receipts produced by both parties in the lower court. These receipts showed that the appellant sold the following items;
- a. Receipt number 17995 - HP 507 for Kshs 48,000.00.
 - b. Receipt number 19807- total of 16 pieces of HP 507 of different colours for Kshs 192,000.00.
 - c. Receipt number 19828- a total of 30 pieces of HP 507 of different colours for Kshs 360,000.00.
 - d. Receipt number 19846 - a total of 30 pieces of HP 507 of different colours for KShs 360,000.00.
16. It is obvious that the goods which were purportedly rejected by EACC vide gate pass dated 20-08-2018 are not the same as those sold to the respondent if the above description is anything to go by. Even if I were wrong on this issue of description, it would appear that the numbers did not tally suggesting that not all the goods were rejected. Those rejected were fewer than those sold. In the circumstances, the respondent would not be justified to claim the whole amount.
17. PW2 is on record saying that after the first batch was rejected, the appellant replaced it with another batch which was also rejected. PW1, PW2 and PW4 told a different story. They did not talk of a second delivery or 2nd rejection. This was a material inconsistency which should influence the mind of the court to conclude that there was lack of truthfulness in the respondent's evidence. The respondent claims in its submissions that there was admission that Mr. Mutua was an employee of the appellant. I have not seen such admission in the proceedings. In the circumstances, the appellant's invitation to this court to make inference under Section 175(3) of the Evidence Act is not tenable in this case.



18. I have also looked at the respondent's document number 3 which is the Local Purchase Order which is said to have kicked off the transaction between the parties herein. This document talks of goods valued at Kshs 421,250.00. If indeed the respondent supplied goods worth Kshs 1,288,000.00 which he bought from the appellant, then all of it was not going to EACC. Even more interesting is that the first receipt number 17995 came on 16-08-2018 which was before the issuance of the Local Purchase Order. This calls again into question the truthfulness of the respondent when it maintains that the goods were bought from the appellant solely for purpose of supplying to EACC.
19. I have seen the judgement of the trial court where it lays blame on the appellant for not having called one Mr. Mutua who was alleged to have received the returned goods. The court also posed a question as to why the appellant did not exhibit a sample of their Return Note. With all due respect to the magistrate, this amounted to shifting burden of proof to the appellant. The position in law is that he who wants the court to believe in existence of particular position has the burden of proving existence of the facts. In this case, the respondent was the one alleging that it returned the goods. Section 107 of the *Evidence Act* provides that;

'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.'
20. In *Abmed Mohammed Noor v Abdi Aziz Osman* (2019) eKLR the court held that;

'For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the claimant.'
21. The burden of proving that the goods were returned was on the respondent which I hold that it failed to discharge. The respondent had no duty to prove that goods were not returned. I also do not believe that a prudent business entity would just return goods worth Kshs 1,288,000.00 and fail to ask or demand for an acknowledgement of the demand. If that was the case, then the respondent must bear the costs of the ignorance. A court of law must act and make decisions based purely on the law and facts presented before it. There was no evidence that the respondent returned the goods and the trial court had no justification to impute the fact based on evidence the appellant failed to call.
22. The respondent claims that the contract was sale of goods by description. However, I have not seen any description given to the appellant by the respondent. What is exhibited are receipts which only give the brands and types of the goods sold. There is no order from the respondent which would lead this court to conclude that the sale was by description. For the sale to be said to have been by description, there must be a document or evidence to show what description was given to the seller or dealer.
23. The appellant alleges that the letter dated 8-08-2018 by EACC was the description it gave to the appellant. That letter is addressed to the respondent and not the appellant. The letter was an expression of intention and not an order for supply. Actually, that letter denotes that the respondent was prequalified for supply of the listed items and shows that a contract was to be signed later. There is no indication that the contract was ever signed and if so where the appellant was coming in.
24. There is no corresponding letter or evidence to show what description the respondent gave the appellant during the transaction. In my view this was an absolute sale where the buyer walks in and gives the names, brands and types of the goods he desires to buy. In such a case, the seller has no legal obligation to guarantee the quality of the goods. If there is any defect on the goods, the same must be attributed to the manufacturer. Further, I hold the view that it is not enough for the buyer to claim that the goods were defective. It must go further and give specific areas where the defect was. It is also not enough to state that the goods were not fit for the purpose. Which purpose were they intended



for and what was wrong with the goods to make them unfit? These are questions the respondent was bound to unravel before the trial court.

25. In conclusion, I hold that the learned magistrate erred in entering judgement for the respondent as he did. The said judgement dated 22-09-2021 is hereby set aside and substituted for an order dismissing the respondent's suit in the lower court with costs to the appellant. The appellant will also have the costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24^T DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

