



Laminate Tube Industries Ltd v County General Supplies Limited (Civil Appeal E172 of 2021) [2023] KEHC 19269 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E172 OF 2021
JRA WANANDA, J
JUNE 16, 2023**

BETWEEN

LAMINATE TUBE INDUSTRIES LTD APPELLANT

AND

COUNTY GENERAL SUPPLIES LIMITED RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment delivered on December 8, 2021 in Eldoret Chief Magistrates Court Civil Case No 207 of 2019.
2. By the Plaintiff filed on March 3, 2019 through Messrs Andambi & Co Advocates, the Appellant pleaded that the Respondent approached the Appellant and requested to be supplied with pet bottles and also printed shrink labels and seals, the Respondent undertook to pay the Appellant a total sum of Kshs 604,529.11 being amount due for supply of the pet bottles and printed labels and seals, the Respondent in acknowledgement of the supply issued the Appellant with a part payment of Kshs 104,529/-, the Respondent then issued cheques for Kshs 112,195/- and Kshs 50,216/- as further part-payment which cheques upon presentation to the bank were returned unpaid, the Respondent has not made good any of the agreed amount of Kshs 505,000/- which amount the Plaintiff claimed from the Respondent. The Appellant also claimed that it incurred a further Kshs 70,000/- in investigations, demand letter and legal charges as a result of the Respondent's action which amount the Appellant also claimed. The Appellant also claims for costs and interest.
3. The Defendant filed its Statement of Defence on April 12, 2019 through Messrs Anyango Ogotu & Co. Advocates. The Defence generally denied the Appellant's claims
4. The case then proceeded to trial.



Appellant's evidence before the trial court

5. PW1, one Francis Opanga Mung'aya testified that he is employed as an Accountant by the Appellant, they supplied goods to the Respondent but the Respondent did not pay. He also produced copies of demand letters issued to the Respondent before filing of the suit, local purchase orders and invoices regarding the deliveries. However, his attempt to produce computer generated bounced cheque advices was objected to and it was ordered that the maker thereof be called to produce the same. In cross-examination, he conceded that he did not produce a written contract. He also conceded that he did not produce delivery. In Re-examination, he reiterated that the goods were sold and the Respondent acknowledged through a letter.
6. PW2 was Mercy Koech who testified that she was from Diamond Trust Bank. She produced images of the two bounced cheques from the Respondent. In cross examination, she stated that she dishonoured the cheques because one had irregular dates and the other was stopped by the drawer, the dishonour was not due to insufficient funds.

Respondent's evidence before the trial Court

7. From the lower Court file, there does not seem to be a clear record of the evidence given by the Respondent's witness(es). However, I note that in the Judgment, it is stated that one George Ojiko testified as DW1. It is further stated that the said DW1 adopted his Witness Statement and testified that the purported payments were illegally done by collusion of some of the Respondent's staff and the Appellant. It is also stated that in cross-examination, DW1 testified that the local purchase orders did not emanate from the Respondent. The Submissions filed by the parties before the trial Court and also before this Court also refer to the evidence of the said DW1. I therefore safely presume that indeed the said DW1 testified as stated.
8. I have looked at the Defendant's Witness Statement made by the said George Ojuka and note that he stated that he is a Manager at the Respondent. He distanced the Respondent from the alleged transactions and stated that if any ever existed between such parties, then such was purely based on the approval of the company directors, the invoices produced were illegally done by collusion of some of the Respondent's staff, all the transactions legally concluded by the parties were duly honoured save for this one which the Respondent had no clue of, the Appellant in collusion with some of the Respondent's junior staff operated a parallel account aimed at swindling the Respondent, there were no deliveries ever done with regard to the transaction hence the alleged payments could not be honoured, upon realizing the fraud initiated by the Appellant, the Respondent was left with no option but to sack such dishonest staff and who remained terminated, if any genuine transactions ever existed between the parties, the same was honoured to the latter.

Judgment of the trial

9. Upon considering the pleadings, witness statements, testimonies of the witnesses and the evidence tendered in Court, by the Judgment delivered on December 8, 2021, the trial magistrate dismissed the suit with costs. Being aggrieved with the decision, the Appellant filed the present Appeal vide the Memorandum of Appeal filed on December 20, 2021. The same is premised on the following 9 grounds;
 - i) That the learned magistrate erred in law and in fact in failing to evaluate the evidence and submissions of the appellant and failing to find that the appellant had proved its case as on a balance of probability as required by law.



- ii) That the learned magistrate erred in law and in fact in holding that no evidence was adduced by the appellant to prove existence of any contract between the appellant and the respondent.
 - iii) That the learned magistrate erred in law and in fact in holding that there was no evidence to buttress the appellant's position that the respondent breached contract.
 - iv) That the learned magistrate erred in law and in fact in finding that the dishonoured cheques cannot form sufficient proof of there being a contract as they do not indicate the purpose for which they were drawn.
 - v) That the learned magistrate erred in law and in fact in applying the wrong principles of law in arriving at her judgement and failing to find that the respondent's submissions did not raise satisfactory defence against the applicant's claim.
 - vi) That the learned magistrate erred in law and in fact in considering issues that were neither raised, pleaded or submitted upon by the respondent while making her decision.
 - vii) That the learned magistrate erred in law and in fact in her assessment of the submissions and evidence before the court and the applicable law and thus arrived at an erroneous finding.
 - viii) That the learned magistrate erred in law and in fact in failing to find that the respondent's evidence was full of inconsistencies and falsehoods thus unreliable.
 - ix) That the learned magistrate erred in law and in fact in predisposing her mind to a position favourable to the respondent against the appellant and thereby arrived at a wrong finding.
10. It was then directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant through Messrs Mukabane and Kagunza Advocates filed its Submissions on February 2, 2023. On its part, despite being given the opportunity on several occasions, the Respondent did not file its Submissions.

Appellants' Submissions

11. Counsel for the Appellant submitted that PW2 being a manager at Diamond Trust Bank produced the bounced cheques, she confirmed that the same were drawn by the Respondent in favour of the Appellant and that the same "bounced" due to insufficient funds. Counsel further submitted that the evidence before the trial Court, both oral and documented, revealed that there were dealings between the parties, the same was also admitted by the Respondent, invoices, deliveries and local purchase orders produced as exhibits proved supply of the pet bottles and printed shrink labels, the invoices, deliveries and local purchase orders were produced as exhibits without any objection from the Respondent who chose only to contest that the same were not genuine without any iota of evidence to that regard, the evidence reveals bills and invoices exchanged between the parties, a conduct consistent with existence of a valid agreement for supply of pet bottles and printed shrink labels, letter from the Respondent dated June 12, 2018 addressed to the Appellant acknowledged that it owed the Appellant the sum of Kshs 604,529.11/=, in essence the Respondent was requesting for time to settle the debt, out of the outstanding amount of Kshs 604,529.11/=, it is not in dispute that the Respondent deposited Kshs 104,529.00/=, the acknowledgment contains an unequivocal recognition and acceptance of the claim made with a promise to pay and/or recognition and acceptance of liability towards the Appellant, the acknowledgment is evidence that an agreement existed, in cross-examination, DW1 admitted that the acknowledgement was on the Respondent's letter-head, that the letter was acknowledging debt owed, that the cheques that bounced were drawn by the Respondent in favour of the Appellant.



12. Counsel submitted further that in cross-examination, DW1 admitted that regarding the allegations that the acknowledgment, invoices, deliveries and local purchase orders were forgeries and/or not being genuine, the Respondent did not have any documentary evidence to prove that any complaint was ever reported to the police. He cited the case of *Telkom Kenya Limited v Kenya Railways Corporation* [2018] eKLR.

Analysis & Determination

13. This being a first appellate Court, its duty, as was set out in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, is as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. Upon considering the Record, Memorandum of Appeal and the Submissions, I find that the issue that arises for determination to be “whether the trial Court was justified in dismissing the Appellants’ suit”.

15. It is trite law that he who alleges must prove. In this respect, Section 107 of the *evidence Act* provides as follows:

- i. 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.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

16. The Court of Appeal in the case of *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR discussed the issue of burden of proof and stated thus:

(16) “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”

(23) “The Defendant was the one who supplied the documents to the Plaintiff representing payment to KRA. The Defendant therefore bore the evidential burden of proof to prove that that payment was indeed made to KRA. The Defendant failed to shift that burden of proof.”

17. The Appellant called as a witness, PW2, a manager at Diamond Trust Bank. She produced copies of bank advices confirming that the two dishonoured cheques were issued by the Respondent to the Appellant. She stated that one cheque was dishonoured because of irregular dating and the second one was stopped by the Respondent before payment.

18. It is also not in dispute that there were regular dealings between the parties. As proof of supply of the pet bottles and printed shrink labels the subject of this matter, the Appellant produced copies of alleged invoices, deliveries and local purchase orders. The Appellant also produced copies of several



alleged demand letters issued to the Respondent prior to filing of the suit. I note that receipt of the demand letters was not denied by the Respondent. Of particular interest however is the letter dated June 12, 2018 alleged to have been issued by the Respondent and addressed to the Appellant. The letter expressly acknowledges that the Respondent owed the Appellant the sum of Kshs 604,529.11/= and seeks for time to settle the debt.

19. The Respondent's defence was that the invoices produced were illegally issued by collusion of some of the Respondent's staff, that the Appellant in collusion with some of the Respondent's junior staff operated a parallel account aimed at swindling the Respondent, that upon realizing the fraud initiated by the Appellant, the Respondent was left with no option but to sack such dishonest staff. I observe that despite making such serious allegations, the Respondent did not produce any kind of evidence to back the allegations. For instance, there is no correspondence produced alluding to the allegations, no evidence was produced to support the very serious allegation that the Appellant in collusion with some of the Respondent's junior staff operated a parallel account aimed at swindling the Respondent, there is no evidence that any reports of the fraud were made to the police, copies of the alleged dishonest staff termination letters were never produced, there is also no sufficient explanation on why the Court should doubt the authenticity of the purchase orders, invoices, delivery note and also the letter dated June 12, 2018 written on the Plaintiff's letter-head and duly signed. The Respondent did not provide evidence that the person who signed the letter had no authority to sign it. The Respondent did not also make any attempt to procure the attendance of the alleged sacked staff to come to testify. The Respondent had the option of seeking issuance of witness Summons to compel the staff to appear in Court but never did so.
20. Further, the Respondent did not deny that it indeed issued the two cheques that were dishonoured, it however failed to explain the purpose for which the dishonoured cheques were issued to the Appellant, the reason why it stopped payment of one of the cheques and the reason why it never replaced the cheques after they were dishonoured.
21. It is true that although the Appellant claimed that out of the outstanding amount of Kshs 604,529.11/=, the Respondent paid Kshs 104,529.00/=, the Respondent denied making such part-payment. I agree that the Appellant's failure to produce any document to prove the part-payment was a costly omission. However, the said omission is ameliorated by the Respondent's worse but suspicious omissions as set out above.
22. In these circumstances, can the Respondent be said to have controverted the evidence produced by the Appellant? My view is that the Respondent did not do so. Apart from making mere general denials, the Respondent did not place any evidence before the Court to create doubt on the Appellant's claims.
23. On the issue of the dishonoured cheques, I quote the Judgment of Hon Justice Riechi in [*Fredrick Owino t/a Cool & Smartech Agencies v Board of Management Kamuriai Sec. School*](#) [2021] eKLR in which he stated as follows:

“Upon supply of the goods, the appellant was issued with 2 postdated cheques which ultimately bounced. The respondent contends these cheques were a forgery. No evidence however was adduced in this regard.

Section 47(1)(a) of the [*Bills of Exchange Act*](#) provides:

“A bill is dishonoured by non-payment:- (a) when it is duly presented for payment and payment is refused or cannot be obtained.



Sub-section (2) thereof provides:-

“Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder.”

The case of Hassanali Issa & Co v Jeraj Produce Store [1967] 1 EA 555, while discussing the issue of a bounced cheque, the Court of Appeal for East Africa held;

The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.’

This position was affirmed in Paresh Bhimsi Bhatia v Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported);

“ A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken.

In the circumstances of this case, the respondent issued the cheques in satisfaction of the debt. It did not prove that the cheques were a forgery or that there are circumstances that disentitle the respondent to payment upon presentation. In the circumstances, I find that the appellant is entitled to judgement based on the dishonoured cheques.”

24. I fully associate myself with the reasoning in the above holding and find that the trial Magistrate erred when she dismissed the Appellant’s entire suit. I am convinced that as regards the claim for the sum of Kshs 505,000/-, the Appeal has merit and find that the Appellant established the claim to the required standards on a balance of probabilities.
25. However, as regards the Appellant’s claim of Kshs 70,000/- being allegedly the amount incurred in investigations, demand letter and legal charges, I find that the same was not proved and therefore not awardable.

Final Orders

26. In the premises, I order as follows:
 - i. This Appeal is partly allowed.
 - ii. The Judgment of the trial Court is hereby set aside and substituted with an order entering Judgment in favour of the Appellant at the sum of Kshs 505,000/- with interest from the date of filing suit.
 - iii. The Appellant’s claim for Kshs 70,000/- being an amount allegedly incurred in investigations, sending out demand letters and legal charges remains dismissed.
 - iv. Costs of both the lower court suit and this Appeal are awarded to the Appellant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

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WANANDA J.R. ANURO

JUDGE

