Stuart & another v Philco Electrical Associate & another (Civil Appeal 96 of 2016) [2023] KEHC 20311 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20311 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 96 OF 2016

OA SEWE, J

JULY 11, 2023

BETWEEN

COLIN STUART ..... 1ST APPELLANT

SEA TURTLE LTD ..... 2ND APPELLANT

AND

PHILCO ELECTRICAL ASSOCIATE ..... 1ST RESPONDENT

PHILIP OOKO ODHIAMBO ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree Hon. P.K. Mutai, SRM, in Kwale CMCC No. 37 of 2013 delivered on 22nd June 2016)

JUDGMENT

1. The appellants were the defendants in Kwale Chief Magistrates Civil Case No. 37 of 2013: Philco Electrical Associate Hardware Limited and Another v Colin Stuart & Another, in which they had been sued for the sum of Kshs. 107922.50 on account of goods sold and delivered. The contention of the respondent before the lower court was that the 2nd appellant ordered for various goods from the 1st respondent's hardware shop totalling Kshs. 242,295.50; which goods were duly delivered; and that the appellants only paid Kshs. 133,425/= by cheque, leaving a balance of Kshs. 107,922.50 which was yet to be paid.

2. Although the appellants denied the claim and filed a Defence, the learned magistrate, upon hearing the parties, was convinced of the truthfulness of the appellants' evidence that the appellants were yet to

pay the full amount due for the goods purchased. Accordingly, in his judgment dated 22nd June 2016, the lower court held:

> "I have carefully looked at the delivery book and invoices. The value of goods supplied as shown in the invoices covering the period 13th July 2012 and 10th August 2012 as pleaded is Kshs. 281,872.
>
> The plaintiff produced invoice, statement as exhibit. The total amount stated as paid is Kshs. 193, 350. It therefore means the amount outstanding is now Kshs. 88,525 not Kshs. 107,922 as claimed. The 1st defendant raised concerns about goods billed but no delivery. He did not provide any evidence to back up this claim and as such it remains bare allegation. The 1st defendant was duty bound to prove a fact as alleged. It is therefore my finding that the plaintiff has proved Kshs. 88,525 as outstanding balance."

3. Being aggrieved by that decision, the appellants filed this appeal on 25th July 2016 on the following grounds:

   (a) That the learned magistrate erred in law and fact by delivering judgment in favour of the respondents who were not party to the suit.

   (b) That the learned magistrate erred in law and fact in failing to ascertain the parties to the contract the subject matter of the suit.

   (c) That the learned magistrate erred in law and fact in lumping the parties together in his judgment.

   (d) That the learned magistrate erred in law and fact in awarding Kshs. 88,525/= to the respondents whereas the case against the appellants was not proved on a balance of probability.

   (e) That the learned magistrate erred in law and fact in awarding Kshs. 88,525/= to the plaintiffs in the absence of delivery notes.

   (f) That the learned magistrate erred in law and fact in failing to give reasons in his judgment.

4. Thus, the appellants prayed that the judgment of the lower court be set aside and the respondents' suit be dismissed with costs.

5. Directions were thereafter given herein on 1st March 2022, that the appeal be urged by way of written submissions. Mr. Muriithi pointed out at the outset that the judgment appearing at pages 48 to 50 of the Record of Appeal bears the names of wrong parties in the title; and explained that the error may have been attributable to the fact that the trial court was handling three related matters, namely:

   (a) Kwale CMCC No. 35 of 2016: Colin Stuart & Another v Solomon Wao Odhiambo T/A Loi Enterprises.

   (b) Kwale CMCC No. 36 of 2016: Colin Stuart & Another v Miya Enterprises and Another.

   (c) Colin Stuart & Another v Philco Electrical Associate Hardware Limited & Another.

6. Counsel therefore appreciated that in the body of the judgment, the court no doubt had the instant suit and the parties in mind. On that account I would treat the 1st ground of appeal as abandoned; which I hereby do. Counsel proceeded to submit that since both the 2nd appellant and the 1st respondent are limited liability companies, they are distinct and separate legal entities from their directors, the 1st appellant and the 2nd respondent; and therefore that the learned magistrate ought to have made the

distinction in his judgment, in line with the principle laid down in Salomon v Salomon & Company Limited [1897] AC 22

7. In respect of Ground 6, Mr. Muriithi made reference to Order 21 Rule 4 of the Civil Procedure Rules and the case of Regina Karimi Mbuchi & 2 Others v Francis Mbuchi Kithaka [2018] eKLR to underscore his argument that the lower court's judgment failed to meet the standards set by the law in terms of content. In particular, counsel submitted that the learned magistrate failed to address all the issues raised by the parties or give reasons for his decision.

8. Lastly, it was the submission of Mr. Muriithi that the lower court fell into error in arriving at the decision that the appellants were indebted to the respondents in the sum of Kshs. 88,525/=. He relied on E.P. Communications Limited v East Africa Courier Services Limited [2019] eKLR for the proposition that the court could not solely rely on the invoices in the absence of corresponding delivery notes; especially not in this case where the appellants complained that some of the goods they were billed for were not delivered. Thus, Mr. Muriithi prayed that the appeal be allowed with costs.

9. As this is a first appeal, this Court is enjoined to re-evaluate the evidence on record with a view of coming to its own conclusions and findings, while giving allowance for the fact that this Court did not have the opportunity of seeing or hearing the witnesses (see Selle v Associated Motor Boat Company Limited [1968] EA 123).

10. Accordingly, I have perused the record of the lower court and noted that the 2nd respondent, Philip Odhiambo, testified as PW1 before the lower court on 15th July 2015 in his capacity as the director of the 1st respondent. He explained that their cause of action against the appellants was premised on goods supplied and delivered to the appellants between in July and August 2012 for which full payment had not been made. PW1 further explained that the 1st appellant had approached him and told him that the Cooperative Bank was funding his project to the tune of Kshs. 2,000,000/= and that the goods would be paid for within two weeks of delivery. PW1 added that the 1st appellant in fact showed him a copy of the letter to that effect from the Cooperative Bank dated 2nd August 2012.

11. PW1 further told the lower court that although the appellants made payments by cheque, not all the cheques were honoured. He produced one of the unpaid cheques as an exhibit before the lower court along with its Returned Cheque Advice (marked the Plaintiff's Exhibit 3 and 4). He concluded his evidence by stating that since the appellants persisted in their refusal to pay for the goods, he had no option but to seek legal advice on the matter; whereupon the subject suit was filed.

12. On behalf of the appellants, the 1st appellant, Colin Stuart (DW1) testified before the lower court on 2nd March 2016. He explained that the was a director and shareholder of the 2nd appellant and conceded that he had a business relationship with the plaintiff pursuant to which he obtained electrical equipment. DW1 further conceded that he did not fully pay for the goods supplied by the respondents because he found out that not all the goods ordered for were delivered; and that even some of the goods delivered were in fact second-hand. He therefore maintained his ground that he could only pay on proof of delivery.

13. In the light of the foregoing summary of the evidence presented before the lower court; and taking into account the grounds of appeal and the written submissions filed herein by learned counsel, the issues for determination arising from the grounds of appeal are:

    (a) Whether the respondents discharged the burden of proving their case on a balance of probabilities.

    (b) The learned magistrate erred in law and fact in failing to give reasons for judgment.

14. A careful consideration of the totality of the evidence placed before the lower court by the parties. There is no dispute that the appellants approached the 1st respondent for a credit arrangement, whereby the appellants would collect electrical materials on account and pay for them within two weeks. It is also common ground that indeed the appellants ordered for goods for which payment was only partially made. The explanation given by the 1st appellant was that not all the goods ordered for were delivered. He also complained that some of the goods delivered by the respondents were substandard.

15. A careful consideration of the record of the lower court shows that the respondents backed up their evidence with documentary proof from which the lower court was satisfied as to delivery and non-payment. The documents included a Statement of Accounts as well as delivery book and invoices to justify the claim. Further to the foregoing, the respondents exhibited copies of dishonoured cheque and Return Cheque Advice to demonstrate that indeed, the 2nd appellant issued cheques in payment which were returned unpaid.

16. In the face of the foregoing evidence, the appellants contended that not all the goods were delivered; and that even then, some of the delivered goods were substandard. Needless to say that the burden proof is on the party who would fail if no evidence is presented to prove a point in issue. Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit that:

    (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."

17. Likewise, Section 108 of the *Evidence Act* provides that:

> The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

18. Accordingly, in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, it was held that: -

> " ...As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act..."

19. In the circumstances, it was of importance for the appellant to rebut the allegations by the respondent that the goods in question were in fact delivered to it and collected by the appellants' own agents from the respondent's shop. The respondent also exhibited a copy of a dishonoured cheque along with a Return Cheque Advice for which the appellants needed to prove replacement payment or sufficient cause for the dishonour. The Return Cheque Advice shows the reason for dishonour to be insufficient funds. No such proof was availed by the appellants and therefore the learned magistrate cannot be faulted for coming to the conclusion that the respondent had proved his claim to the requisite standard.

20. Section 109 of the *Evidence Act* is explicit that:

> " 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."

21. Moreover, Section 112 provides that:

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

22. Hence, I agree entirely with the position taken by Hon. Rawal, J. (as she then was) in Drappery Empire v Attorney General (supra) that:

> " ...where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendants to adduce evidence the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff."

23. In arriving at the foregoing conclusion, I have taken into consideration the persuasive authority relied on by the appellants, namely, E.P. Communications Limited v East Africa Courier Services Limited [2019] eKLR, wherein the court found that it was imperative for the appellant to whow that the goods were delivered; which could only be done by production of delivery notes. It is noteworthy however that in this case, the respondents produced both the invoice book as well as the delivery note book. It was therefore upon the appellants to prove which items were billed for and not delivered; and which items were substandard as alleged by them. As indicated herein above, no proof was availed to support the appellants' own assertions.

24. Counsel made reference to the case of Salomon & Co. Ltd v Salomon (supra) to demonstrate that it was imperative for the lower court to specify who was to pay the debt. In that case, it was held:

> " The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act..."

25. I have looked at the parties' pleadings and the evidence presented before the lower court. It is manifest that the suit was filed against the two appellants and that the 1st appellant was enjoined as a director of the 2nd defendant. There is however no gainsaying that the 1st appellant was merely acting on behalf of the 2nd appellant in whose name all the invoices were raised. It is also plain that although the cheque marked the Plaintiff's Exhibit 3 was written and delivered to the respondents by the 1st appellant, it was issued in the name of the 2nd appellant. It was therefore imperative for the learned magistrate to pronounce himself explicitly as to which party was liable for the judgment debt; and if minded to hold the 1st appellant liable, he ought to have stated so and given his reasons for his decision.

26. Ordinarily, a director/shareholder ought not to be held personally liable for the debts of the company in which he is a director/shareholder. In Multichoice Kenya Ltd v Mainkam Ltd & Anor. [2013] eKLR, it was held: -

> " ...I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since the famous case of Salomon v Salomon (1897) A.C. 22, Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity...."

27. In this case, the respondent did not seek for the piercing of the corporate veil and therefore the issue did not arise at all before the lower court. It is therefore plain that only the 2nd appellant is liable for the judgment debt and that the lower court erred in failing to so hold.

28. The last issue is whether the learned magistrate erred in law and fact in failing to give reasons for judgment. Having perused the judgment of the lower court, I have no hesitation in rejecting the appellants' submissions in this regard. That the learned magistrate set out the issue for determination at page 49 of the Record of Appeal and proceeded to analyse the evidence in that regard and to give the reasons for his decision.

29. In the result, other than the finding that the judgment debt ought to be paid by the company, the 2nd appellant, I find no merit in the appeal. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF JULY 2023

OLGA SEWE

JUDGE