



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 56 OF 2018

KHILAN SHAH T/A KHIMJI DEVSHI SHAH.....APPELLANT

VERSUS

DEDAN KIMATHI UNIVERSITY OF

TECHNOLOGY.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgment of Hon. P.Mutua (PM) delivered on 18/09/2018 in Nyeri CMCC No.293 of 2015.
2. The appellant sued the 1st respondent in the lower court for the sum of Kshs.200,270/95 being a double VAT tax paid to the 2nd respondent;
3. The appellant being dissatisfied by the decision instituted this Appeal and listed four (4) grounds of appeal as summarized hereunder;
 - (i) The trial magistrate failed to analyze the evidence on record and therefore arrived at a wrong conclusion;
 - (ii) The trial court misdirected itself on the issues for determination; and on the law of burden of proof;
 - (iii) And its holding the claim of late delivery of the withholding certificates was an afterthought as it had not been pleaded;
4. At the hearing the parties highlighted their respective written submissions; the appellant was represented by learned counsel Mr.Nderi whereas the 1st respondent was represented by learned counsel Mr.Wahome and the 2nd respondent by learned counsel Mr.Marigi; hereunder is a summary of were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of their respective rival submissions;

APPELLANT'S CASE

5. The appellant submitted that he had supplied the 1st respondent with assorted stationary and education material which attracted VAT; at the time of the transaction the 1st respondent was a collecting agent for the 2nd respondent and had authority to withhold the VAT and remit it to the 2nd respondent;
6. The time of the transaction was between May and June 2011 and the goods supplied attracted VAT in the sum of Kshs.200,270/95 which amount the 1st respondent withheld but delayed in issuing the appellant with certificates; that there was evidence to demonstrate that the withholding certificates were issued to the appellant on the 27/09/2012;hence the appellant was constrained to pay another amount of Kshs.200,270/95 directly to the 2nd respondent;
7. The appellant sued the 1st respondent as an agent of the 2nd respondent claiming a refund of the amount paid; and the 1st respondent enjoined the 2nd respondent as a third party;
8. The trial court erred in dismissing the suit on the grounds that the date of receipt of the certificates was raised during cross-examination and hence an afterthought; that by the time the appellant received the certificates the agency of the 1st respondent had been withdrawn; the appellant had already made payment in lieu of the certificates; the legal regime for claim of refunds had also changed;

9. The 1st respondent had admitted to being an agent of the 2nd respondent; it admitted to having issued the certificates and admitted to the change in legislation; it only contested the dates it issued the certificates to the appellant; and denied having received back the certificates from the appellant after the same were rendered useless due to the lapse; and advised the appellant to follow the 2nd respondent for the refund; that is why it enjoined the 2nd respondent as a third party;

10. The only issue for determination at trial was when the withholding certificates were delivered to the appellant; the trial court however misdirected itself and framed the wrong issue of double payment by the appellant; such an issue never arose from the proceedings as none of the respondents cross-examined the appellant on it and none of them submitted on it; the only issue was that it was late for a refund because the withholding certificates were delivered out of time by the 1st respondent to the appellant;

11. The trial court erred in holding that the appellant did not prove that the certificates were delivered outside the window allowed for refund; the 1st respondent transmitted the certificates on 27/09/12 yet the transaction took place in June, 2011; and there was correspondence produced in evidence showing the discussion between the appellant and the 1st respondent after its agency had been revoked;

12. That the appellant proved its case orally and through documentation; the burden of proof then shifted to the 1st respondent to rebut the evidence; the 1st respondent withheld special facts in its possession; the register to show when the appellant collected the certificates was not produced; therefore an adverse inference ought to have been made by the trial court that the hidden evidence would be prejudicial to the 1st respondents case; case-law relied on **Janet Njoki Kirigo vs Benson Irungu Wanjohi & Another Nairobi HCCC 350/2008 [2016]**;

13. Equity will not suffer an injury without a remedy; the 2nd respondent had been paid twice against the principle of unjust enrichment; the court must reaffirm the appellants rights under Article 40 of the Constitution; the trial court also disallowed the appellants application to amend the Plaintiff on the grounds that the appellant was introducing a claim which was barred by limitation period; the trial court ought to have looked at the date of the original plaintiff and not when the cause of action arose;

1st RESPONDENTS RESPONSE

14. In response the 1st respondent submitted that the appeal was devoid of merit and ought to be dismissed; the law requires at Section 107 of the Evidence Act requires that he who alleges a fact must prove it; that the plaintiff does not specify when the certificates were issued nor when the appellant received them; that all the issues that were framed flowed from the appellants own pleadings; and the appellant did not prove when the certificates were delivered to him; the date only arose during re-examination; and no injury was established that could be remedied by the court;

15. The 1st respondent was a gazetted withholding agent and remitted the tax it withheld; and it wasn't true that the 2nd respondent had withdrawn the 1st respondents agency; that the appellant had admitted to having not checked whether the 1st respondent had paid or remitted the tax to the 2nd respondent and proceeded to pay the 2nd respondent without having first checked; having erroneously paid the tax twice he ought to have followed the right procedure under the law to reclaim the double payment from the 2nd Respondent;

16. The 1st respondent did not have any burden to produce documents and urged the court to dismiss the appeal for lack of merit.

2ND RESPONDENT'S RESPONSE

17. The 2nd respondent submitted that parties are bound by their pleadings; in his Plaintiff the appellant pleaded that upon late receipt of the certificates the appellant demanded payment from the 1st respondent and the 1st respondent refused to oblige;

18. The right procedure the appellant ought to have adopted was as provided under Section 24(b) of the Value Added Tax Act (Cap.476); which provides for the procedure of claiming a refund from KRA for any tax paid in error; which must be done within twelve months from the date the tax became payable;

19. The decision of the Commissioner of Domestic Taxes on the refund could be challenged through the laid down procedures set out in the Act; as set out under the provisions of Section 52 through the Tax Appeals Tribunal; or by moving the court under Article 47 of the Constitution on fair Administrative Action;

20. The appellant never requested for a refund from KRA and therefore he has no claim against it; that the appellant circumvented the process and opted for an ordinary civil suit instead of following laid down administrative procedure as set down in the Act;

21. The 2nd respondent urged the court to dismiss the appeal with costs for lack of merit.

REJOINDER

22. In his rejoinder the appellant submitted that he was not privy to the agency relationship between the 1st respondent and the 2nd respondent; and did not know whether the 1st respondent made returns on time and would only have known when the certificates were issued to him; he was required by law to make VAT returns by the 20th of every month and therefore had to pay the taxes because the certificates were not issued to him; that he received the certificates late and hence suffered injury;

23. That the revocation of the agency was admitted; that the court misapprehended the date on which the certificates were issued to the

appellant; that the appellants claim is against the 1st respondent and not the 2nd respondent;

24. The appellant urged the court to allow the appeal.

ISSUES FOR DETERMINATION

25. After hearing the parties rival presentations this court has framed the following issues for determination; which are;

- (i) Whether the appellants suit was properly before the trial court;
- (ii) Whether the appellant proved his claim for Kshs.200,270/75 to the desired threshold;

ANALYSIS

26. In considering the appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; it held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, the Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law.

Whether the appellants suit was properly before the trial court;

27. The appellant submitted that he had supplied the 1st respondent with assorted stationary and education material which attracted VAT; at the time of the transaction the 1st respondent was a collecting agent for the 2nd respondent and had authority to withhold VAT and remit it to the 2nd respondent;

28. In his Complaint the appellant pleaded that upon late receipt of the certificates he demanded payment from the 1st respondent and the 1st respondent refused to oblige as it had already remitted the VAT to the 2nd respondent;

29. The legal position in this instance was that the 2nd Respondent had appointed all public institutions as withholding tax agents; and that if there was any breach of any legal obligation beyond their statutory mandate these agents were personally liable and could be sued for the same and this liability was not transferable to any other party;

30. Transactions, dealings and payments took place between the appellant and the respondents but it was incumbent upon the appellant to demonstrate on a balance of probabilities having first checked on whether the 1st respondent had paid or remitted the tax to the 2nd respondent in a manner consistent with the agency; the court record reflects that the appellant admitted to having proceeded to pay the 2nd respondent without having first checked with the 1st respondent;

31. It is also not disputed that the appellant never requested for a refund from KRA; in the absence of any evidence on any wrong doing on the 1st respondent, the procedure the appellant ought to have adopted is as provided under Section 24(b) of the Value Added Tax Act (Cap.476); which provides for the procedure of claiming a refund from KRA for any tax paid in error; in the event of the refund being denied there is also a laid down procedure for appealing against the decision of the Commissioner which is as set out under the provisions of Section 52; had he done so and had the refund been denied by the Commissioner then his first port of call against this decision would have been the Tax Appeals Tribunal;

32. This court makes reference to the Court of Appeal decision of **Speaker of National Assembly vs Njenga Karume [2008] 1KLE 425** where it was held;

“Irrespective of the practical difficulties enumerated....these should not in our view be used as a justification for circumventing the statutory procedure. In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”

33. It is apparent that the appellant circumvented the legal process and opted for an ordinary civil suit instead of following the strictly laid down administrative procedure as set down in the Act;

34. In the circumstances this court finds that the appellants suit was not properly before the trial court.

Whether the appellant proved his case to the desired threshold;

35. The appellant contends that the only issues for determination at trial was when the withholding certificates were delivered to the appellant and a refund because the withholding certificates were delivered out of time by the 1st respondent to the appellant; and that the trial court however misdirected itself and framed the wrong issue of double payment by the appellant; such an issue never arose from the proceedings as none of the respondents cross-examined the appellant on it and none of them submitted on it;

36. This court concurs with the appellant that the main issue for determination at trial was when the withholding certificates were delivered to the appellant;

37. Upon re-evaluating the evidence the first flaw noted by this court is that in the appellant's pleadings he failed to plead and indicate at Clause 9 of his Complaint as to when the Certificates Nos.0885680 and 0881654 were forwarded to him;

38. The appellant argued that there was evidence to demonstrate that the withholding certificates were forwarded to him on the 27/09/2012; and produced a letter dated 8/02/2013 that he had written to the 1st respondent which letter mentions the 1st respondent's letter dated 27/09/2012 forwarding the certificates; that after making these allegation she submitted that the burden of proving these facts then shifted to the 1st respondent and it was upon the 1st respondent to rebut this evidence by producing the letter of 27/09/2012 and a register showing when the appellant collected the certificates;

39. What this court notes was that this letter of 8/02/2013 was authored by the appellant to the 1st respondent and that he received no reply from the 1st respondent either confirming or denying the contents; nor was the letter of 27/09/2012 ever produced in court by the appellant as evidence;

40. The appellant further contended that the 1st respondent withheld special facts in its possession such as the register and having failed and or neglected to produce this register he submitted that an adverse inference ought to have been made by the trial court that the hidden evidence would have been prejudicial to the 1st respondents case; and he relied on the **Janet Njoki Kirigo vs Benson Irungu Wanjohi & Another Nairobi HCCC 350/2008 [2016]**;

41. On the issue of a court presuming adverse evidence it is this courts considered view that this can only apply in criminal cases and not in civil litigation; the position in civil litigation is that a party must prove its case on a balance of probabilities;

42. To rebut the allegations of delay the 1st and 2nd respondent placed reliance on the stamped dates on the face of the Withholding Tax Certificates which demonstrated when the payments were made which was on the 31/05/2011 and 30/06/2011 and both the defence witnesses for both respondents stated that the certificates were issued to the appellant on the same dates;

43. Upon re-evaluating the evidence on record this court is satisfied that the only dates that are supported by documentary evidence are the 31/05/2011 and 30/06/2011; these dates are documented on the face of the Withholding Certificates as the date they were issued;

44. This court concurs with the trial court that whereas the applicable law is found at Section 112 of the Evidence Act; which section provides that when any fact is especially within the knowledge of any party in civil proceedings the burden of proving or disproving that fact lies upon him; but in this instance the trial court made an observation in its judgment that it was also upon the appellant to have known when the certificates were delivered; and it reads as follows;

“... In this case the plaintiff was also expected to know when the certificates were delivered to him. It was therefore not a fact especially within the knowledge of the defendant alone.”

45. It is not disputed that the date 27/09/2012 formed the basis of the appellant's case and it was upon the appellant to prove on a balance of probabilities that the 1st respondent delayed and delivered the certificates on this date; which date it is noted was neither pleaded nor proved to the desired threshold; or he could have demonstrated that 1st respondent had delivered the certificates after the 12/09/2011 when it had ceased being an agent and was therefore still withholding the monies claimed;

46. From the foregoing reasons this court finds no good reason to interfere with the trial courts finding that the appellant failed to prove the date of delivery of the certificates and also failed to prove the claim for refund of the sum claimed; and is satisfied that the appellant failed to prove its case to the desired threshold;

47. This ground of appeal is found lacking in merit and it is hereby disallowed.

FINDINGS & DETERMINATION

48. From the foregoing reasons this court makes the following findings and determinations;

- (i) This court finds that the appellant's initial suit was not properly before the trial court;
- (ii) The appellant is found to have failed to have proved his case to the desired threshold;
- (iii) The appeal is found lacking in merit and it is hereby dismissed; the judgment of the trial court is hereby affirmed;
- (iv) The appellant shall bear the respondents costs.

Orders Accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 4th day of February, 2021.

HON.A.MSHILA

JUDGE