



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 321 OF 2018

AQUILA DEVELOPMENT COMPANY LIMITED.....APPELLANT

VERSUS

PETER JAIRO ALOO T/A MINDS EXPORT IMPORT ENTERPRISES.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. P. Muholi (Mr.)

(Senior Resident Magistrate) delivered on 13th June, 2018

in CMCC NO. 3443 OF 2016)

JUDGMENT

1. The appellant in this instance instituted Civil Suit No. 3443 of 2016 before the Chief Magistrate's Court at Milimani Commercial Courts by way of the plaint dated 19th May, 2016 and sought the sum of 47,701.30 Euros (Kshs.5,390,213/=) against the respondent as the sum allegedly outstanding on payment for goods supplied to the respondent.
2. The appellant largely pleaded in its plaint that the parties herein enjoyed a business relationship at all material times, whereby the appellant would supply flowers to the respondent on order basis, and that the respondent would pay for the flowers; that on diverse dates in the years 2011 and 2012 the appellant supplied and delivered flowers to the respondent at a cost of 47,701.30 Euros (Kshs.5,390,213/) but that the respondent declined to receive the goods and further neglected and/or refused to pay for them.
3. Upon service of summons, the respondent entered appearance and filed his statement of defence on 6th September 2016 to deny the appellant's claim. In his defence, the denied receiving the consignments alleged in the plaint and further denied owing the appellant the sums indicated in the plaint.
4. At the trial, the appellant relied on the testimony of one (1) witness whereas the respondent testified as the sole witness for the defence case.
5. Upon filing of submissions by the respective parties, the trial court found that the appellant had not proved its case on a balance of probabilities and therefore dismissed it with costs.
6. The aforesaid decision precipitated the appeal presently before this court. The memorandum of appeal dated 10th July, 2018 constitutes a total of 10 grounds essentially challenging the trial court's dismissal order.
7. The appeal was disposed by way of filing of written submissions. The respondent opted to rely on his earlier submissions filed before the trial court.
8. In addition to adopting its submissions filed before the trial court, the appellant filed submissions before this court contending that the trial court failed to appreciate that the respondent had admitted having placed an order for delivery of the goods forming the subject matter of the dispute, and erred in law and fact in holding that, it was the duty of the appellant to demonstrate the respondent had made orders for every consignment of goods delivered.
9. The appellant further urges this court to disregard the evidence tendered by the respondent that, the persons who received some of the consignments and signed the delivery notes were not his agents, or that the delivery notes, packing lists and invoices tendered at the trial were forgeries, in the absence of contrary evidence.

10. It is also the submission of the appellant that, the trial court did not appreciate the sums sought in the plaint were the result of a reconciliation of accounts for goods supplied to the respondent from time to time between June, 2011 and July, 2012. According to the appellant, the delivery of goods by itself and acceptance of the same by the respondent gave rise to a binding obligation on the part of the respondent to make payment for the said goods.

11. The appellant is of the view that, the trial court ought to have applied the proper legal burden of proof rather than placing a higher burden of proof upon it. To buttress its sentiments, the appellant cited *inter alia*, the case of **D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati [2014] eKLR** where the court appreciated the balance of proof in civil cases is that of a balance of probabilities.

12. I have considered the rival submissions on record alongside the relevant authorities cited. As is the requirement for a court sitting on a first appeal, I have re-evaluated the evidence placed before the trial court and considered the judgment in question. As earlier noted, it is clear the appeal lies against the decision of the trial court dismissing the appellant's claim. I will therefore address the 10 grounds of appeal under the four (4) limbs hereunder.

13. The first limb has to do with whether the learned trial magistrate was correct in finding the appellant did not prove that an order relating to the 45 packing lists carrying 555,890 stems ("the material goods") material goods had been made by the respondent.

14. Abhay Marathe who was PW1 stated in her evidence that the respondent was a customer of the appellant since 24th June, 2011 and that the appellant continually supplied the respondent with a variety of fresh flowers in exchange for payments agreed upon by the parties; that the respondent had placed an order for the material goods for the month of July, 2012. In his evidence as DW1, the respondent denied signing the witness statement filed on his behalf.

15. In his judgment, the learned trial magistrate held that the appellant did not bring any evidence to show that the material order(s) had been made by the respondent either in July, 2011 or July 2012.

16. Upon my re-examination of the material and evidence tendered at the trial, it is not in dispute that the parties herein enjoyed a business relationship in the manner set out hereinabove. It is also not in dispute that the nature of their contractual agreement was such that the respondent would place an order via email for the supply of the goods, with specifications and that the same, if available, would be delivered by the appellant to Swiss Port at Jomo Kenyatta International Airport, accompanied by a delivery note and packing list, while an invoice would later follow prompting payment by the respondent

17. It is apparent from the pleadings and evidence that the dispute largely relates to the material goods. Upon my examination of the emails attached to the record of appeal, specifically on pages 40-42, I observed that the respondent had placed an order for some flowers on 21st July, 2011 and though there were a few email correspondences thereafter between the parties, it is not clear whether such order was ever confirmed, in the absence of any packing list or delivery note. Concerning the month of July, 2012 I similarly observed that the appellant did not bring any credible evidence to show that the respondent had placed any orders for 45 packing lists carrying 555,890 stems, especially in the face of a denial by the respondent that such items were ever ordered.

18.

19. In that respect, I concur with the finding of the learned trial magistrate. The relevant grounds of appeal on this issue cannot stand.

20. Under the second limb on appeal, I am required to determine whether the learned trial magistrate was correct in finding that the appellant had not demonstrated by way of evidence, that the material goods had been delivered to the respondent so as to substantiate any demand for payment.

21. It was the evidence of PW1 that, as the appellant's accountant was preparing the books during the course of the subsisting contractual relationship between the parties, he noted some discrepancies in the books, specifically that the packing lists for the month of July, 2012 were missing from the system, and that further investigations revealed that it was the 45 packing lists carrying 555,890 stems that were in fact missing. Though the said stems had not been invoiced, the delivery notes were issued in respect to the uninvoiced material goods.

22. It was also the evidence of the witness that in a meeting held on 10th August, 2012 the respondent admitted liability but refused and/or neglected to pay for the material goods.

23. In contrast, the respondent in his oral testimony denied ever being supplied with the material goods and further denied ever attending any meeting in respect to the same. The respondent also denied owing any sums in respect to the material goods.

24. Upon hearing the parties, the learned trial magistrate held that the appellant did not adduce any evidence to show the packing lists in respect to the material goods had been issued to the respondent. The learned trial magistrate also held that none of the packing lists tendered in evidence related to the month of July, 2012, while the packing lists which were tendered did not correspond with the emails availed. In the end, the learned trial magistrate found that the issue of payments did not arise in the absence of evidence either of an order made or delivery in respect the material goods to the respondent.

25. Upon my re-examination of the pleadings, material and evidence which the learned trial magistrate had the benefit of considering, I observed, as the learned trial magistrate did, the appellant did not bring any credible evidence to support its argument that the material goods had been supplied or otherwise delivered to the respondent. In addition, there is no credible evidence on record to show that the existence of the packing lists or delivery notes relating to the material goods, or to show that any invoices arising out of the purported delivery were subsequently issued to the respondent. From the record, it also remains unclear who received the material goods or the relevant invoices if at all they were supplied to the respondent or his agent.

26. I note, as the learned trial magistrate did, that the documentary evidence which was availed at the trial makes it difficult, if not impossible, to make any clear connection between orders made and delivery notes issued generally. Moreover, save for the unsigned minutes which were tendered by the appellant and whose contents were refuted by the respondent, there is no credible evidence to show that the respondent ever admitted liability in respect to payment for the material goods.

27. I am therefore satisfied that the learned trial magistrate arrived at a correct conclusion when he found that the appellant did not prove its claim.

28. This brings me to the third limb on appeal which relates to, whether the learned trial magistrate had placed upon the appellant a higher standard of proof than that required in civil cases. From my reading of the impugned judgment, I note that the learned trial magistrate held that the appellant had not discharged its burden of proof on a balance of probabilities. Despite the submissions brought advanced by the appellant, I have found nothing to lead to the conclusion that a standard higher than that of a balance of probabilities was applied to the appellant. Consequently, this facet of the appeal fails.

29. In relation to the fourth and final limb on appeal, it is upon me to determine whether the learned trial magistrate in any way disregarded the evidence and submissions by the appellant. Upon my re-examination of the totality of the pleadings, evidence and submissions by the appellant, coupled with my reading of the impugned judgment, I have not come across anything to suggest that the learned trial magistrate overlooked any of the material placed before him.

30. In the premises, I am satisfied that the learned trial magistrate upon considering all the evidence on record, arrived at a proper finding, which I am not inclined to set aside. The judgment of the trial court is therefore upheld.

31. Consequently, the appeal is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 13th day of May, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Botani holding brief for Kabau for the Appellant

Mr. Onyango for for the Respondent