



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 95 OF 2018

ARYSTA LIFESCIENCE KENYA LTD..... APPELLANT

VERSUS

COUNTRY FARMS LTD..... RESPONDENT

[An appeal from the Judgment of the Chief Magistrate's Court at Kisumu (Hon. Julius Ng'arnq'ar CM)]

delivered on the 18th September 2019 in CMCC NO. 425 of 2017]

JUDGMENT

The Appellant, **ARYSTA LIFESCIENCE KENYA LIMITED**, had sued the Respondent, **COUNTRY FARMS LIMITED**, claiming Kshs 2,080,000/= and USD 60,460.60. The Appellant had also claimed interest on the principals sums, together with the costs of the suit.

1. After a full trial, the learned trial magistrate dismissed the suit, with costs to the Defendant.
2. In the appeal before this Court, the Appellant raised 15 grounds of appeal.
3. In the Judgment, the trial court set down 6 issues for determination, and gave the following answers to the said issues;

“ i) Whether there was a request or order made by the Plaintiff for supply of the agro-chemicals from the Defendants?”

4. The answer was as follows;

“As it is, no document was exhibited by the Plaintiff to show that indeed there was a request or an order made by the Defendant. The Defence evidence was that they had containers which they were keeping the items/goods and it is only upon use that they would pay at the end of the season.”

5. The second issue which the trial court spelt out was as follows;

“ii) Whether the defendants accepted the order/request?”

6. The answer which the trial court gave in that respect was in the manner following;

“On the issue of whether the defendants accepted the goods, it is clear from the narration above, that according to them, the acceptance was by way of use. That since they did not utilize the goods for being unfit and expired, no acceptance was done. The delivery was by the plaintiffs on their own.”

7. The third issue raised by the trial court was as follows;

“ iii) Whether the defendants supplied the agro-chemicals in issue?”

8. The learned trial magistrate answered that issue thus;

“To answer the third issue, the supply was done and is not in doubt, but it was not ordered for or requested.”

9. The fourth issue was set out in the following words, by the trial court;

“iv) Whether the goods supplied were fit and utilized for the intended purposes.”

10. And the trial court gave the following answer to that issue;

“It is clear that the goods were found not suitable and expired.

A communication was done to the Plaintiffs to this effect, but they did not act.”

11. The learned trial magistrate concluded that there was no contract in place, which was capable of being enforced.

12. Accordingly, the suit was dismissed because the Plaintiff had failed to prove its case to the required standards in law.

13. The Appellant has faulted the findings of the trial court.

14. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions, whilst bearing in mind the fact that I did not have the advantage of observing the witnesses when they were giving their evidence.

15. However, the re-evaluation of the evidence will take into account the submissions made by the parties. Therefore, where a party has made concessions, the court does not have to conduct an indepth analysis of the evidence which is relevant to any such concession.

16. The starting point for me is the submission **Number 4**, in the Respondent’s written submissions. The said submission reads as follows;

“4. My Lord, it is not in dispute that the parties herein entered into a binding agreement for the supply of the said products. The said agreement resulted into implied terms and were thus bound by the Sale of Goods Act Cap. 31 Laws of Kenya.”

17. In the light of that express concession by the Respondent, I find that the Respondent is in agreement with the Appellant on the most fundamental question; that is whether or not there was a contract which was capable of being enforced.

18. It therefore follows that when the trial court concluded that there was no contract that was capable of being enforced, that was an error. To that extent, I find that the appeal must succeed.

19. In any event **DW1** testified that the Plaintiff used to supply them with weed-killers, herbicides, fungicides and other products.

20. According to him, the Defendant would make payments at the end of the season.

21. At that time, the Defendant would pay for the products which they had used, but they would return to the Plaintiff, the products that had not been used.

22. **DW1** testified that the Plaintiff used to collect the unused products. He testified that the Defendant wrote to the Plaintiff to collect the said products. This is what he said;

“Chemicals made in 1913 were supplied.

It is 2013 not 1913. We have no photos.

We told them the products had expired.

In 2013, once the season ended, we told them to pick the products.”

23. However, when **DW1** was asked to identify the letter which the Defendant had written to the Plaintiff, at the end of the season in 2013, **DW1** produced a letter dated 20th July 2015.

24. The Defendant did not produce any letter written at the end of the season in 2013, asking the Plaintiff to collect the unused products.

25. I find that although the Defendant received products from the Plaintiff in the year 2013, the Defendant only wrote in 2015, to complain about some unused or some expired products.

26. If, as **DW1** said in his evidence, the Defendant ought to have paid at the end of the 2013 season, for the products they had received and used, there is nothing to show that as at the end of the 2013 season there were any unused or expired products.

27. The Respondent submitted that;

“According to the evidence on record, the Appellant did not rebut the Defendant’s averments that the chemicals supplied had expired.”

28. By virtue of the provisions of **Section 112** of the **Evidence Act**, the law stipulates that when a fact was especially within the knowledge of any party to proceedings, the burden of proving or disproving that fact was upon the said party.

29. Averments do not constitute evidence: It is an allegation or a formal statement by a party, which the said party is thereafter expected to prove through evidence.

30. In this case the Defendant had indicated that it had engaged the District Agricultural Officer, who destroyed the products which had allegedly expired. However, the said officer did not testify at the trial. Therefore, there was no evidence adduced by the Defendant to prove its assertions about the alleged expiry of the products which the Plaintiff had provided to the Defendant.

31. It is indeed intriguing, that the Defendant should contend that the products had expired, yet **DW1** confirmed that the said products which were supplied to the Defendant in the year 2013, were actually made in that same year!

32. Accordingly, there was no basis upon which the court could positively find that the products were not fit for use, or that the same had expired.

33. In conclusion, I find that the learned trial magistrate erred in dismissing the suit, when the Plaintiff had adduced sufficient evidence to prove that it supplied the specified products to the Defendant; and that the Defendant had not paid the sums claimed.

34. I therefore allow the appeal; set aside the Judgment of the trial court and I substitute it with a Judgment in favour of the Plaintiff for Kshs 2,080,000/= and USD 60,460.60.

35. The said sums will attract Interest at Court rates from the 12th of September 2018 when the trial court delivered its judgment.

36. The costs of the appeal and the costs of the suit are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 13TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE