



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 82 OF 2019

RICHARD OYUGI ODIANGO.....APPELLANT

VERSUS

KISII BOTTLERS LIMITED.....RESPONDENT

(Appeal from the judgment/Decree of Hon. S.K Onjoro, SRM dated 14th June, 2019,

in the original KISII CMCC NO 377 OF 2012)

JUDGEMENT

BACKGROUND

1. The background to the appeal albeit in a summary form is that the appellant filed a plaint before the subordinate court claiming that he was engaged by the respondent as a distributor and was required to supply assorted quantities of soft drinks and sodas. The appellant also claimed to have paid Kshs 207,700/- to the respondent for the purchase of 300 and 200 small and big sodas respectively. Despite acknowledging receipt of payment, the respondent failed to supply and deliver the sodas. However on 31st January 2011 the respondent refunded the appellant the said amount by drawing a cheque in his favor. The appellant's claim was that because of the respondent's failure to supply him with soft drinks he was deprived of profits as a result of loss of business for a total of 384 days thus losing Kshs 5,185,200/-. The appellant also claimed for 3months rent. The appellant in hi plaint before the subordinate court thus sought the following reliefs:

- a) *Payment and/or refund of the sum of Kshs. 5,203,200/= only, on account of loss of profits and rental payments, attendant to the non delivery of the sodas.*
- b) *Interest at 14% (Court rates) per annum w.e.f 12th August 2008.*
- c) *Costs of the suit borne by the Defendant.*
- d) *Any such further and/or other relief as the honourable court may deem fit and expedient to grant.*

2. The respondent filed a statement of defence before the trial court alleging that the appellant's contract of distributorship had been determined as it had notified the appellant of said termination. The respondent alleged that despite the said notification of termination having been issued to the appellant, he proceeded to pay Kshs 207,700/- into the respondent's account. It was averred that the appellant was refunded the said sum. The respondent denied that the appellant suffered any loss.

3. The trial court dismissed the claim in its entirety.

THE APPEAL

4. The applicant now dissatisfied with the finding of the trial magistrate has filed this instant appeal on the following grounds:

1. *The Learned Trial Magistrate erred in law and fact in dismissing the Appellant's case when the same was proved on a balance of probabilities.*
2. *The Learned Trial Magistrate erred in law by failing to make a finding that the Appellant's evidence was uncontroverted by the Respondent.*

3. *The Learned Trial Magistrate erred in law by failing to make a finding that in the absence of the defence evidence to controvert the Appellant's evidence, the defendant's defence remained mere allegations and/or denials which could not substitute the place of oral evidence.*

4. *The Learned Trial Magistrate erred in law and fact in relying on and agreeing with the respondent's submissions, which submissions were never supported by any evidence adduced by the Respondent.*

5. *The Learned Trial Magistrate having made a finding that the Respondent was in breach of the terms of the contract between the Appellant and the Respondent, erred in law and in fact in dismissing the Appellant's case.*

6. *The Learned Trial Magistrate erred in law in failing to apply & appreciate the provisions of Section 107 & 108 of the Evidence Act.*

7. *The Learned Trial Magistrate erred in law in failing to apply the doctrine of averages which, in any case, favoured the Appellant.*

8. *The judgment is against the weight of the totality of evidence as adduced by the Appellant, which evidence was uncontroverted by the Respondent.*

9. *The Learned Trial Magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit thus arriving at an entirely erroneous conclusion.*

5. When the appeal came for hearing, I directed that it be heard by way of written submissions and both parties have complied.

THE APPELLANT'S CASE

6. The appellant submitted that there was no dispute that the respondent was in breach of the contract and pointed out that the trial court also arrived at the same finding. The appellant also submitted that he ought to have been awarded the sum claimed in his plaint and the costs of the suit. He advanced that despite proving that the respondent was in breach of contract, the respondents were awarded costs of the suit.

7. According to the appellant the suit was dismissed without the trial court considering their prayer (d) '*Any such further and/or other relief as the honourable court may deem fit and expedient to grant*'. He submitted that the court ought to have considered that the respondent had been paid Kshs 207,700/- but failed to supply the appellant with goods, thus it retained the appellant's money for 894 days and the appellant in the circumstance ought to have been awarded damages for conversion.

THE RESPONDENT'S CASE

8. The respondent advanced that the appellant's claim was basically a claim in special damages and the loss was quantifiable. They cited *Municipal Council of Eldoret v Titus Gitau Njau [2020] eKLR* and *Simon Ndungu Mungai & Pastor Vincent Mungai t/a Overcomers Christian Centre & Another [2019] eKLR* in support of its case.

9. It was also submitted that the evidence tendered by the appellant's two witnesses conflicted with the material particulars of the appellant's suit. Whereas the appellant made a case of loss, his witness on the contrary testified of profits. The respondent submitted that even where, the trial court found that the respondent was in breach of contract for failure to give value for the amount it received from the appellant, that alone is not a guarantee that compensation will ensue. It relied on the case of **Abson Motors Limited v Dominic B. Onyango Konditi [2018] eKLR**.

10. The respondent urged the court to consider that the fact that it did not call any witness at trial does not vitiate the evidentiary threshold placed on the appellant, which is, proving his case on a balance of probabilities. It was submitted that the appellant also failed to prove the principal prayer for damages and to further demonstrate that there is any particular relief consequential to the principal relief for damages. They also pointed out that the appellant's plea to be awarded interest for conversion of Kshs 207,000/- is a departure from the pleadings which formed the basis of trial. The respondent cited the case of **Global Vehicles Kenya Limited v Lenana Road Motors [2015] eKLR** in support of its case.

ANALYSIS AND DETERMINATION

11. This being a first appellate court, I will remind myself of the duty of this court which is to analyze the evidence afresh and reach its own conclusion bearing in mind that this court did not have the benefit of seeing the witnesses testify. (See *Selle v Associated Motor Boat Company Ltd. [1968] EA 123*).

12. Richard Oyugi Odiango (Pw1) testified that he started distributorship in 2004 distributing sodas for Kisii Bottlers in Oyugis, Ringa, Kadongo and Chabera. He testified that he made payment to the respondent but was not supplied with the sodas he had ordered. He explained that ordinarily, it would take no more than 3 days to be supplied with sodas. He testified that after realizing that the respondent failed to deliver the sodas he remained in the shop for 3 months and paid rent of Kshs 18,000/-. He testified that he was never informed that his contract was terminated.

13. Ayieko Onkoba Oswald (Pw2) testified that he is a certified accountant qualified to carry audits. He told court that he trades in the name Benson and Associates. He recalled that in 2011 he was instructed to prepare the appellant's profits from 2008-2011. Pw2 testified that the total loss for the period in question was Kshs 2,160,673/-. On cross examination he testified that there were no bank statements before 12th

August 2008. He testified that he did not include the record of sales and expenses in his report. He testified that the rent paid by the appellant was Kshs 3,000/- per month. He testified that he prepared the report based on the records that he was given by the proprietor. He also testified that it was not true that the projected loss was Kshs 5,200,000/-.

14. At the close of the appellant's case before the subordinate court the respondent elected not to call any witness

15. The burden of proof in civil cases is on a balance of probability. In **William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526** the court stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

16. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J.** stated as follows;

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

17. Although the respondent's failed to call any witnesses the appellant was nevertheless required to establish his case on a balance of probabilities. This duty imposed on the appellant (plaintiff) cannot simply be discharged on account that the respondent failed to call any witness.

18. It is trite law that even where no appearance or no defence is filed, the plaintiff is still under an obligation to prove his case on a balance of probabilities. In **Karugi and others v Kabiya** the court stated;

“ The burden on a plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended. The burden of proof is in no way lessened because this is heard by way of formal proof”

19. I now turn to consider whether the appellant proved that it suffered loss of profits which I opine are in the nature of special damages. It is trite law that the proper damages for breach of contract is an award of special damages. Special damages must be strictly pleaded and proved. The appellant pleaded that as a result of the respondent's breach, it suffered loss of profits to a tune of Kshs 5,185,200/-. The appellant was expected to table evidence showing how this amount was arrived.

20. In **Cheshire, Fifoot and Furmston's Law of Contract, 13th Edition at Page 609** the authors observe as follows:-

“The question of what exactly it is that the plaintiff has lost is often a subtle one and for this purpose it is useful to use the terminology popularized by a famous American article and distinguish between expectation loss and reliance loss. Expectation loss is the loss that which the Plaintiff would have received if the contract had been properly performed. Of course, in a sense, the plaintiff has not lost this because he never had it but he expected to have it and the reports are full of statements that the plaintiff is entitled to be put into the position he would have been in if the contract had been performed. The most obvious expectation loss is the profit the plaintiff would have made on the contract. But the contract may be so speculative that it is unclear what, if any, profit it would have made. This does not mean that the plaintiff has suffered no loss, since he may have relied upon the defendant honouring his contract and incurred expenditure which was wasted as a result.”

21. In **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** the Court of Appeal observed as follows;

“The learned Judge went on to find that the respondent “suffered huge fundamental loss and an opportunity to complete and operate its intended business after completion.” He was, however, confronted by a difficulty of the respondents' own making which he captured in his analysis as follows and is worthy of reproduction in extenso;

“111. However, the only problem this Court has is how to measure the said damages. The plaintiff has claimed special damages of Kshs. 421,760.00. This is not a small sum of money. Moreover, the requirement of the law is that special damages must be specifically pleaded and strictly proved.

.....

113. The second limb is the loss of business profits from 1999 to 2003 at 128,604,000/=. This figure is not to be found anywhere in the report of PW1. However, at page 81 of the joint list of documents PW1 estimated loss of revenue from 1998 to 2003 at Kshs. 29,940,494. It is not in doubt that the projections used in arriving at the said figure were derived from the feasibility study of J.P.N. Karara & Co. The said report is not credible as it turns out that the projections therein were based on a four star hotel and not a two star hotel.

114. Pursuant to the foregoing paragraphs of this judgment I find absolutely no proof for the said special damages that were suffered. As I have stated at paragraphs 100, 101 and 102 of this judgment, the said damages as based on the conflicting feasibility study report which even though formed part of the agreed bundle of documents herein, was conflicting and in contradiction.

115. A claim as big as this cannot be based on guess work or on inconclusive or conflicting reports. Such a claim must be based on an authentic report whose makers must be called to confirm or justify the claim if the sum is not agreed on. The report must be clear on issues it is addressing. In the instance case, the report is based on the rate of a four star hotel while the hotel under construction was a two star hotel. This is not a matter of guesswork. I am therefore unable to know the exact amount of loss in terms of special damages, for the plaintiff has failed to prove it. This limb of the claim must fail.”

We think that the learned Judge was correct to approach the sums claimed as quantified special damages properly pleaded. The problem, however, lay in the fact that the evidence tendered, such as there was, either failed to touch on the specific sums pleaded or was contradictory, inconclusive or speculative. This fell way short of the requirement not only of specific pleading but, also, indeed the more, strict proof.”

22. Although the appellant claimed that it would have earned Kshs 5,185,200/- for the period between 12th August 2008 to 31st January 2013, on the other hand the report titled, ‘Expected Financial Statements for the Periods 2008, 2009, 2010 & 2011’, projected the profits at Kshs 2,160,673/- only. Pw2 on cross examination testified that he did not consider the record of sales and expenses in computing the profit estimates. In my view these were crucial books to be considered by Pw2 considering that the appellant’s business had no bank statements. From the report it was unascertainable which documents were used by Pw2 in making the report. The evidence of Pw1 and Pw2 were contradictory and the said estimates presented were speculated figures and in that regard I find that the report was not credible. The appellant therefore did not prove that he was entitled to the sum of Kshs 5, 185,200/- as claimed in the plaint.

23. I have also considered that Pw1 testified that he closed the shop 3 months after the respondent failed to deliver to it goods and in my view therefore by November 2008 the appellant’s business was not a going concern as his premises were closed and the business no longer operational

24. Although the respondent further claimed for 3 months rent, the evidence by Pw1 and Pw2 were contradictory in the sense that Pw1 testified that he paid Kshs 6,000/- for rent while Pw2 claimed that the rent paid was only Kshs 3,000/-. There was also no evidence such as a receipt that would have shed light on the rent that was paid by the appellant. In that regard therefore, I find that the appellant failed to prove on a balance of probabilities that it was entitled to an award of Kshs 18,000/- in respect for 3 months’ rent.

25. The argument that the court failed to award damages based on the prayer for any other or further relief the court may deem to grant as particularized in prayer (d) of the plaint is an idle one. The making of such a prayer in the plaint is not a *carte blanche* for a party to obtain what they have not pleaded. Such a prayer in my view is only applicable as an auxiliary relief once what is pleaded is proved.

26. The appellant is also seeking damages for conversion despite not ventilating it in his pleadings before the trial court. It is trite law that parties are bound by their pleadings and in this regard the appellant is not entitled to such damages.

CONCLUSION

27. The appeal has no merit and is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF JULY 2021.

A.K. NDUNG’U

JUDGE