



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO 31 OF 2018**

**HIGHLANDS MINERAL WATER COMPANY LIMITED.....APPELLANT**

**VERSUS**

**OURU SUPERSTORES LIMITED.....RESPONDENT**

**(Being an appeal from the judgment, decision and decree in the Chief Magistrate's Court Civil Case No. 241 of 2016 – Kisii delivered on 6<sup>th</sup> April 2018 by the Hon. S.N.Makila – Senior Resident Magistrate)**

**JUDGMENT**

1. **Highlands Mineral Water Company Limited**, the respondent herein, filed plaint dated the 3<sup>rd</sup> of March 2016 in the Chief Magistrates Court at Kisii CMCC No. 241 of 2016 against the appellants, **Ouru Superstores Limited**. The respondent claimed that the appellant approached it, requesting for storage facilities to enable the appellant store its assorted products on interim basis pending distribution. The respondent conceded to the request and availed storage facilities where the appellant stored its assorted mineral products. It was mutually agreed by the parties that the appellant would only use the storage space pending the appellant's relocation to new space which the appellant undertook to procure within 30 days from the month of April 2013. The appellant however neglected to remove its products from the storage facility of the respondent thereby abandoning the goods contrary to their mutual agreement. The Respondent claimed that the appellant violated terms of their contract/memorandum of understanding and hence the respondent suffered loss.

2. The Respondent further pleaded that owing to the actions or omissions of the appellant the assorted goods stored in its premises degenerated into expiry and has caused nuisance to the respondent who was also using the storage facility for the storage of its own goods. On the other hand the respondent contends that failure by the appellant to remove its assorted goods deprived the respondent the use of the storage facility. The respondent sought orders to compel the appellant to vacate.

3. The respondent averred that other than entering the memorandum of understanding in regard to storage, the appellant also requested the respondent to allow the appellant's agents to take possession of the assorted goods already sold to the respondent and further allow the appellant's agents to help with the marketing, promotion and sales. It was agreed that the appellant's agents would, after the sale of the goods, pay the respondents the proceeds of sale. The appellant's agents failed to pay the respondent the said proceeds and consequently respondent claimed the appellant owed it Kshs 375,992.60/- generated from sales. The respondent in his plaint sought an order compelling the appellant to vacate/remove the assorted goods from its storage facility, payment of Kshs 375,920.60, general damages for deprivation of storage facilities and interest at courts rates with effect from December, 2013.

4. The appellant filed its statement of defence on 31<sup>st</sup> March 2017. It denied entering into any agreement with the respondent for storage of its goods. It further denied the allegation that the respondent suffered nuisance or that the respondent was deprived of usage of its storage facility. It denied the claim that its agents took assorted goods from the respondent and that it owed the respondent Kshs 375,920/-. In response to the entire plaint the appellant averred that any agreement between the appellant and a third party is normally executed by the Chief Executive Officer of the appellant or a senior management employee. The appellant averred that it has regional distribution centers across the country where its products are stored.

5. **Kennedy Nyakundi** (Pw1) testified that around 20<sup>th</sup> March 2013 there was an arrangement between the 2 companies to provide storage facilities for drinking water and fruit juices for sale within Kisii region. The respondent provided storage for the appellant for a period of 30 days but the appellants failed to collect after the 30 days lapsed. The appellant thereafter instructed its agents to collect some items for sale and promotion. He produced into evidence the respondent's documents in its list of documents. On cross examination he testified that there was no written agreement for storage space. He further testified that he did not have any proof that the agents of the appellant collected the items from the plaintiff's warehouse. He explained that the items stored by the plaintiff belonged to the defendant but some goods were sold to the plaintiff on credit.

6. **Esau Nderitu Nyamweya** (Dw1 a regional manager working for the appellant adopted his witness statement dated 28<sup>th</sup> July 2017 as his

evidence in chief. He testified that no goods were stored on behalf of the appellant by the respondent. That the appellant was the respondent's distributor and the respondent ordered goods from the appellant which were supplied to them on credit for 30 days. The appellant did not send any agent to collect goods from the respondent as the goods in the respondent's custody belonged to the respondent. If any of the goods were sold by agents it was done on behalf of the respondent and not the appellant. The appellant does not owe the respondent the sum of Kshs. 375,990/- as claimed.

7. The trial court found that the respondent failed to prove that there were any arrangements for storage of the defendant's goods and thus the respondent failed to prove that the appellant was in breach of contract for storage of its products. However on the second prayer (b) in the respondent's plaint the trial court made an award of Kshs 254,610.32/- based on the invoices produced by the respondent. It is this holding that caused the filing of the memorandum of appeal dated 4<sup>th</sup> May 2018.

8. The appeal was canvassed by way of written submissions. The appellant in its submissions dated 23<sup>rd</sup> April 2019 contends that the respondent was obligated to carry due diligence and not release its products to strangers and cited the case of **Pakatewa Investment Company Limited v Municipal Council of Malindi [2016] eKLR**. To ascertain authorship of the signatures it was submitted that the Respondent ought to have called the makers as witnesses and cited the case of **Bonham Carters Hyde Park Hotel [1948] 64 TR 177**. It was further submitted that the alleged oral contract by the parties was without any consideration and was thus not valid and cited the case of **RTS Flexible Systems Ltd b Molkerei Alois Muller GmbH [2010] 1WLR 753 AT [45], [2010] UKSC 14**. It was argued that acceptance on the part of the respondent was lacking, evidenced by their letter dated 27<sup>th</sup> May 2014. It was the obligation of the respondent to prove existence of a contract and breach thereof.

9. The respondents filed its submissions on 18th June 2019. They submitted that the invoices produced into evidence by the respondent indicated where the plaintiff's warehouse was situated and the mode of delivery and the invoices were not challenged. It was submitted that the respondent had proved and particularized the loss suffered as a result of the appellant's recklessness and relied on the cases of **Virani t/a Kisumu Beach Resort v Pheonix of East Africa Assurance Company Limited, Civil Appeal No 88 of 2002** and **David Bagine v Martin Bundi Civil Appeal No 283 of 1996**.

#### **DETERMINATION**

10. As the first appellate court I am required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see **Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126**). Having considered the grounds of appeal and the written submissions, in my view the issue for determination is whether the respondent proved to the required standard that it was entitled to the award of Kshs 254,610.32/-.

11. It was not in dispute that the respondent was the appellant's distributor and that the appellant had sold some of its goods to the respondent on credit. At the onset I must consider whether there was a contract between the respondent and the appellant for the appellant's agents to sell goods belonging to the respondent and thereafter remit the proceeds to the respondent. In this case no evidence of a written agreement was tendered by the respondent but it was alleged that there was existence of an oral contract. The respondent claimed that they had a mutual understanding with the appellant. Parties with common intention may enter into legal obligations expressly or impliedly. In the case of **Rose and Frank Co. vs. J R Crompton & Bros Ltd (1923) 2 KB 293, Atkin, LJ** stated that: -

'To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.'

12. I have to consider the evidence surrounding the alleged 'transaction' to make a determination on whether or not a contract was created by the parties. The respondent gave evidence that he issued invoices to the appellant. This was supported by both the oral testimony of Pw1 and the documentary evidence in form of the invoices. It is on this basis that the trial court found in favor of the respondent.

13. After a scrutiny of the invoices I note that invoices have been described as '**SALES INVOICE**'. The invoices produced by the respondent listed items sold to the appellant. There is no indication that the invoices for order numbers SO42076, SO12079, SO43338 and SO44032 were received by the agents of the appellant as there were neither stamped nor signed as proof of receipt. However, the invoices for order numbers SO44511, SO44495, SO44744, SO44835 and SO4508 1 have signatures of persons who received the invoices, who were not called to testify on the same. The fact that the invoices for order numbers SO44511, SO44495, SO44744, SO44835 and SO45081 were signed could only confirm that the said invoices were received by the "agents" of the appellants. **Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya** provides:

"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."

In **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & another Civil Appeal No. 345 of 2000 [2005] 1 EA 334**:

**"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."**

14. The respondent was obligated to prove that it delivered goods to agents of the appellant so that the agents could market and sell the goods. The invoices issued to the appellants do not prove delivery of goods as per their description they are '**sales invoices**' distinguishable from an **invoice** and **delivery note**. Invoices for order numbers SO44511, SO44495, SO44744, SO44835 and SO45081 do not demonstrate that good were delivered to the appellant's agent. During the cross examination of Pw1 he was taken to task on the identities of the regional

sales agents and he stated that he did not have anything to show that the agents who collected the items had been authorized by the appellant. Pw1 stated further that he did not have anything to show that the agents collected the items from the respondents' warehouse. There is no indication that a contract was created between the appellant and respondent as there was also no evidence of agreed consideration by parties. The respondent failed to prove a common intention of the parties to enter into legal obligations and I therefore find that the trial court erred in awarding the respondent Kshs 254,610.32/- solely based on the sales invoices. I find no error on the trial court's finding on the issue of the stored items.

15. In the result, I allow the appeal herein and set aside the judgment and decree of the lower court awarding the respondent Kshs 254,610.32/- and substitute that judgment with an order dismissing the respondent's suit in the lower court. I award the appellant the cost of this appeal.

**Dated, signed and delivered at Kisii this 5<sup>th</sup> day of February 2020.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Appellant Absent**

**Mr. Masese h/b Mr. Ogutu For the Respondent**

**Ms. Rael Court clerk**