REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 156 OF 2018

DR. CHRISTOPHER KYALO MUSAU …….…..…… APPELLANT

VERSUS

YANGGUANG PROPERTY DESIGN &

MANUFACTURING ……..……..…… RESPONDENT

(Being an appeal from the judgment & decree of Hon. P. Gesora (CM) delivered on 15th August 2017 in Milimani CMCC NO. 5441 of 2015)

JUDGMENT

1. The appellant, *Dr. Christopher Kyalo Musau* filed suit in the chief magistrate's court against the respondent, *Yangguang Property Design & Manufacturing Limited* seeking general damages for breach of contract and special damages in the sum of KShs.571,410 together with costs of the suit and interest.

2. The basis of the appellant's claim as stated in his plaint dated 11th September 2015 is that on or about 17th October 2014, the appellant in the company of his architect, *Mr. Eliud Liku* of *Heritage Associations Limited* visited the respondent's company showroom for purposes of sourcing for doors and necessary fittings for his building project in Nairobi South B; that the respondent's salesmen showed them the products on display and confirmed to them that the respondent manufactures, sells and delivers to its customers the same standard and quality of doors as the ones on that were on display.

3. The appellant further pleaded that relying on the respondent's agent's above representation, he made the following order:

i. 24 laminated $1^1/_2$ standard size timber doors with side glass valued at KShs.216,000

ii. 123 standard size timber doors at a cost of KShs.676,500

iii. 171 pairs of hinges at a cost of KShs.59,850

The entire order was to cost KShs.952,350. He paid KShs.571,410 as deposit leaving a balance of KShs.380,940 which was to be paid on 1st November 2014 when the items ordered were supposed to be delivered.

4. According to the appellant, on 1st November 2014, the respondent delivered 24 doors which were fully wrapped; that in the middle of December 2014, David, the respondent's salesman informed him through his architect that the remaining doors were ready for delivery; that upon visiting the respondent's premises on or about 17th January 2015 and inspecting the said doors, his architect discovered that the doors had different specifications and were of lower quality from those the appellant had ordered; the appellant consequently rejected the doors and directed the respondent to deliver the goods according to the terms of his order or make a full refund of the deposit paid; that the respondent failed or refused to deliver the doors as ordered or to refund the deposit occasioning him loss and damage.

5. In its statement of defence and counterclaim dated 2nd June 2016, the respondent denied the appellant's claim *in toto*. The respondent averred that the appellant did not visit its showroom with his architect as alleged; that it is the appellant's architect who went to its showroom alone and specifically identified and ordered the goods stated in the order; that the doors ordered were coded "mahogany #1010" which are the same doors that were manufactured and delivered to the appellant.

6. In paragraphs 6 and 7 of the defence, the respondent denied the description and specifications of the doors and hinges the appellant claimed he had ordered as shown in the plaint but admitted their stated cost. The respondent further asserted that the appellant was not privy to the contract but in the same vein claimed that whereas it had honoured its obligations under the contract, the appellant had breached the

contract by refusing to accept delivery of the finished goods.

7. In its counterclaim, the respondent accused the appellant of breach of contract and claimed general and special damages in the sum of KShs.380,940 being the outstanding balance of the purchase price of the goods. The respondent also prayed for costs of the counterclaim.

8. In his reply and defence to the counterclaim, the appellant asserted that the architect was his duly authorized agent and denied that he was not privy to the contract executed by the parties. He denied all the allegations made in the counterclaim and put the respondent to strict proof thereof.

9. After a full trial, the learned trial magistrate in a judgment delivered on 15th April 2017 dismissed the appellant's suit with costs and entered judgment in favour of the respondent in the sum of KShs.380,940 together with costs of the counterclaim.

10. The appellant, aggrieved by the trial court's decision proffered this appeal relying on two main grounds which were expounded in about fifteen paragraphs.

11. In his grounds of appeal, the appellant principally complained that the learned trial magistrate erred in law and fact in his finding that the appellant unreservedly and impliedly accepted delivery of the goods comprised of the order; that the finding was contrary to the *Sale of Goods Act*, the pleadings and the unchallenged evidence on record which he proceeded to set out in paragraphs (a) to (g) in the memorandum of appeal.

12. In the second ground of appeal, the appellant claimed that the learned trial magistrate erred in making findings in a vacuum to the effect that the appellant was obligated to immediately inspect the 24 doors upon delivery and inspect the process of manufacturing of the remaining doors and that the respondent had suffered loss in implementing the order which findings were not supported by the evidence on record.

13. By consent of the parties, the appeal was prosecuted by way of written submissions which were briefly highlighted before me on 3rd December 2019 by learned counsel *Mr. Odhiambo* who represented the appellant and learned counsel *Mr. Ireri* who appeared for the respondent.

14. This being an appeal to the High Court, it is an appeal on both facts and the law. The duty of a first appellate court is well settled. As stated by the Court of Appeal in ***Selle & Another V Associated Motor Boat Company & Others, [1968] EA 123***, the appellate court is required to:

> ***"… reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…''***

15. On the mandate of an appellate court, the court proceeded to state as follows:

> ***"… In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."***

16. I have carefully considered the grounds of appeal, all the evidence on record, the written and oral rival submissions made on behalf of the parties and the authorities cited. I have also read the judgment of the learned trial magistrate.

17. The court record shows that in support of their respective cases, each of the parties called two witnesses. The appellant testified as PW 1 while his consultant architect testified as PW 2.

In their evidence, PW 1 and PW 2 basically duplicated and reiterated the pleadings in the plaint and emphasized that the 24 doors delivered on 1st November 2014 were fully wrapped and they did not inspect them till the time they visited the respondent's showroom in January 2015 to inspect the second batch of doors only to discover that all the doors manufactured by the respondent did not meet the specifications made in the order in terms of quality and design.

18. In his evidence, PW 1 produced as Exhibit 1 the official order placed with the respondent and the invoice/delivery note and photographs of sample doors which formed the basis of the order as Exhibit 2.

19. In his evidence under cross examination, PW 1 claimed that the doors he had ordered had two vinyl covers and roll around the edge smoothly but the ones which were delivered had four surface vinyl which was glued and could come off with time.

20. PW 2 on his part stated under cross examination that they had ordered for door No. 6 which had vinyl finish which was continuous and not compressed but what was delivered were doors with veneer finish which was of inferior quality; that the order was for standard doors and a standard door was supposed to be 45mm thick but what was delivered was 40mm thick.

21. In contradiction to the pleadings in the plaint and their evidence in chief, PW 2 claimed in cross examination that no door was delivered on 1st November 2014 and that delivery was made in January 2015; that the doors initially delivered were unwrapped.

22. To counter the appellant's case, the respondent through its Managing Director *Chan Lejia* (DW 1) and sales agent *David Maingi* admitted that the appellant and PW 2 made an order for 24 doors of $1\frac{1}{2}$ mahogany 1010; 110 pieces of single mahogany 1010 and 171 hinges for

which he paid a deposit of KShs.571,410 leaving a balance of KShs.380,940; that the initial delivery of 24 doors on 1st November 2014 was well received by the appellant without any complaints; that it is only after the whole order was processed and made ready for delivery that PW 1 complained that the same did not match the specifications and design of the doors earlier ordered.

23. In their evidence, DW 1 and DW2 reiterated that the appellant breached the contract by rejecting the second batch of doors which had been manufactured in accordance with the specifications indicated in the contract; that the appellant's rejection and failure to pay the outstanding balance subjected the respondent to loss since the doors could not be offered for sale to any other customer as the same had been made to suit the appellant's unique specifications; that the respondent did not therefore have any option but to destroy them about an year after the appellant's rejection in a bid to mitigate its losses in the form of storage charges.

24. Having evaluated the evidence on record as summarized hereinabove and the parties' rival submissions, I find that it is not disputed that the appellant either directly or through his agent (PW 2) made an order for an assortment of doors and hinges all valued at KShs.952,350; that the doors the appellant undertook to buy from the respondent were selected from a variety displayed in the respondent's showroom which were a type coded "mahogany #1010''; that the appellant paid a sum of KShs.571,410 leaving a balance of KShs.380,940 which was to be paid on delivery of the goods ordered.

25. It is also not contested that out of the 147 ordered doors, only 24 were delivered on 1st November 2014 but when the remainder of the doors were ready and due for delivery, PW 1 and PW 2 rejected them on grounds that they failed to meet the standards, design and specifications of the doors they had ordered.

26. What is in dispute and what fell for determination by the trial court was whether the 24 doors that were delivered to the appellant and the second batch of doors that were placed in a deliverable state in the respondent's workshop matched the design and specifications of the sample doors that had been ordered by the appellant and secondly, who among the parties if any, breached the terms of the sale contract.

27. Though in his judgment the learned trial magistrate did not address his mind to the issue of whether the doors ordered actually matched the description of the doors that were delivered or offered for delivery, he found that since the appellant had received the initial 24 doors delivered on 1st November 2014 and kept them without raising any objection regarding their standard or quality, he had by conduct accepted them as the goods he had ordered and he could not thus run away from meeting his contractual obligations after the respondent had manufactured the second batch of the doors.

28. The trial court's judgment read as a whole clearly shows that the learned trial magistrate held that it was the appellant who had breached the contract entered into by the parties by rejecting the second batch of doors and refusing to pay the balance of the purchase price hence the dismissal of his suit and success of the respondent's counter claim.

29. From my analysis of the evidence on record, I have no doubt in my mind that the contract evidenced by the official order produced as Exhibit 1 was a sale by sample. *Section 17* of the *Sale of Goods Act* defines a sale by sample in the following terms:

> ***"(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.***
>
> ***(2) In the case of a contract for sale by sample there is—***
>
> ***(a) an implied condition that the bulk shall correspond with the sample in quality;***
>
> ***b) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;***
>
> ***(c) an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of sample."***

30. In this appeal, the appellant has argued that the learned trial magistrate erred in law and in fact in dismissing his claim and upholding the respondent's counterclaim while the evidence on record revealed that it was the respondent who had breached the sales contract by delivering doors which were different from those which had been ordered and in delivering only 24 doors on the due date, that is, on 1st November 2014 instead of all the 147 doors.

31. It is a cardinal principle of the law of evidence as encapsulated in *Sections 107* to *109* of the *Evidence Act* that he who alleges must prove. Having alleged that the initial and subsequent delivery of doors by the respondent had doors which were of inferior quality and which did not meet the specifications and design described in the official order, the appellant had the burden of proving those allegations as facts to the standard required by the law before he could succeed in his suit.

32. In his pleadings and in his evidence, the appellant claimed that he had ordered 24 No. $1^1/_2$ laminated standard timber doors with side glass; 123 No. standard size timber doors and 171 pairs of hinges. PW 2 in his evidence went further to claim that they had ordered door No. 6 which had a vinyl continuous finish while they were supplied with door No. 9 which had a brittle veneer finish; that the doors had a thickness of 40mm instead of the standard 45mm.

33. A look at the official order (exhibit 1) which formed the basis of the contract tells a different story. It totally contradicts the evidence adduced by the appellant. It shows that the appellant had ordered the following items; 24 $1^1/_2$ standard laminated doors, laminated 123 doors and 171 hinges.

34. The order does not support the appellant's claim that the parties had contracted for the sale and purchase of timber doors with side glass

and vinyl finish and having 45mm thickness. It was a plain order of laminated doors, the only specification being that 24 of them had to be $1^1/_{2\ \text{inches}}$ in size.

35. Both the appellant and the respondent were in agreement that what was ordered was door No. 6 in the photographs produced in evidence by the respondent (those produced by the appellant were not legible) and whereas the respondent insisted that this is the same door that was delivered, the appellant contested this claim and asserted that it was door No. 9 which was delivered not door No. 6.

36. The appellant did not however back or substantiate this claim with any tangible evidence by for instance producing in court one of the doors that were ordered and those that were delivered for comparison by the trial court or by producing clear photographic evidence of the sample door and the ones that were delivered.

37. It is important to note that the respondent's claim that door No. 9 reflected the side view of door No. 6 which parties agreed represented the sample that was ordered was not challenged or controverted by any evidence to the contrary.

38. A look at the photograph labeled No. 9 shows that there is a cancellation and overwriting by hand changing its description from "*doors delivered (side view)"* to *"doors delivered (front view)"* by cancelling the word "side" and replacing it with the word "front". The cancellation is not dated or countersigned and it is impossible to tell who made the cancellation, when and why. Suffice it to say that the initial description of the photograph lends credibility to the respondent's assertion that the photograph showed a side view of door number 6.

39. By introducing in his pleadings and in his evidence specifications and design of the doors subject of the sale which were not in their original contract (exhibit 1) without offering evidence to show that the parties subsequently entered into another written or oral contract which varied the specifications of the goods earlier ordered, the appellant was inviting the trial court to rewrite or read into the contract terms which had not been agreed upon by the parties which is not permissible in law.

40. The law is that unless a contrary intention is demonstrated, parties are bound by the terms of their contract unless coercion, fraud or undue influence is pleaded and proved which is not pleaded or proved in this case. See: ***National Bank of Kenya Limited V Pipeplastic Samkolit (K) Ltd, [2002] 2 EA 503***; ***Pius Kimaiyo Langat V Co-Operative Bank of Kenya Limited, [2017] eKLR***.

41. In view of the foregoing findings, I am satisfied that the appellant failed to discharge his burden of proving on a balance of probabilities that the goods delivered did not match the specifications, quality and design of the sample doors he had ordered.

42. Regarding the claim that the respondent breached the contract by not delivering the goods on the date specified in the contract, a cursory look at the official order shows that apart from the initial 24 doors, the delivery of the rest of the goods did not have a specific timeline. The last column of the order shows that the 24 $1^1/_2$ size laminated doors were to be delivered on 1st November 2014. The column for the rest of the items is blank. The appellant admitted in his evidence that the respondent met its contractual obligation by delivering the 24 doors on the scheduled date while the rest of the items were ready for the appellant's inspection and collection from mid December 2014. Nothing therefore turns on the appellant's claim that the respondent breached the terms of the contract by failing to deliver the ordered goods on time.

43. In his memorandum of appeal, the appellant not only denied delivery of the doors but also delivery of the 171 pairs of hinges ordered alongside the doors. It is important to note that in his pleadings and in his evidence, the appellant did not complain of non-delivery of the 171 hinges. He only introduced this aspect of the case on appeal. In the circumstances, since the matter was not placed before the trial court, it cannot be a subject of adjudication on appeal.

44. As stated earlier, the appellant admitted delivery of the initial 24 doors. He also admitted delivery of the rest of the doors in paragraphs 8, 9 and 10 of the plaint by admitting that the respondent had manufactured the second batch of doors and had placed them in a deliverable state. There is undisputed evidence that the respondent had notified the appellant that the remaining doors were ready and that he was required to pay the balance of the purchase price when he went to inspect the doors in its premises.

45. Given the foregoing and considering that there was no specific place of delivery stipulated in the contract, it is my finding that Section *30 (1)* of the *Sale of Goods Act* applied in this case. The section provides as follows:

> ***"(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties; and apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and if not, his residence:***
>
> ***Provided that if the contract is for the sale of specific goods which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery."***

46. The fact that the respondent availed the doors for delivery but the appellant declined the said delivery for reasons that did not have any basis in the contract proves that the respondent had fulfilled its obligation under the contract and it is the appellant who breached the terms of the agreement by rejecting the goods and refusing to pay the balance of the purchase price.

47. In the absence of proof that the doors sought to be delivered did not match the sample ordered, I find that the appellant has failed to prove any basis to demonstrate that his rejection of the doors was reasonable and justified in the circumstances of this case.

48. The appellant also claimed in his submissions that after rejecting the remainder of the doors, the respondent carted away the other 24 doors and proceeded to destroy all them without notice to him; that it would be unjust to compel him to pay for what the respondent had destroyed.

49. A perusal of the court record shows that the appellant did not adduce any evidence to prove its claim that in fact, the respondent carted away to its premises the 24 doors it had initially delivered to the appellant. The respondent only admitted having destroyed the second batch of doors which were inspected and rejected by the appellant.

50. Another ground of appeal advanced by the appellant is that the trial magistrate made findings which were not supported by the evidence on record. One of those findings is the holding that the respondent had suffered loss by implementing the order after the appellant changed his mind about the items ordered on the advise of his architect.

51. After my analysis, i am unable to find any merit in the above complaint because the appellant admitted that the respondent had manufactured the remainder of the doors and notified him of this fact through PW2. It is common knowledge that the manufacturing of the said doors must have come at a cost. They were valued at KShs.676,500 as shown on the official order though this must have been the sale price not the actual cost of manufacture.

52. Since the appellant persisted in his rejection of the doors and did not dispute the respondent's claim that the same could not be sold to any other customer since they had been customized to suit the appellant's needs, the respondent had an obligation to mitigate its losses in the form of storage charges.

53. In my view, the trial magistrate's finding that the respondent had suffered loss due to the appellants action of rejecting the doors was supported by the evidence adduced by DW 1 and DW 2. The claim that the finding was made in a vacuum is with respect, totally without foundation.

54. Regarding the claim that the loss was not pleaded or proved, it is my finding that the loss was pleaded in the statement of defence and counter claim filed on 4th November 2015 and the same was proved by the evidence tendered by the respondent. Besides, *Section 38* of the *Sale of Goods Act* squarely applied in favour of the respondent. The provision states thus:

> ***"When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after the request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods……''***

55. Lastly, I wish to observe that though the appellant claimed that the learned trial magistrate failed to abide by the law and principles enunciated under the *Sale of Goods Act*, he did not specify which law or principle the trial court flouted in its judgment.

56. For all the foregoing reasons and findings, I have come to the same conclusion as the learned trial magistrate that the appellant failed to prove his case against the respondent to the required legal standard albeit for different reasons.

57. Finally, from my evaluation of the evidence, I am unable to fault the trial court's finding that the respondent was entitled to the amount claimed in the counterclaim. It is my finding that the respondent proved its counterclaim on a balance of probabilities.

58. Consequently, I am satisfied that this appeal lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of May 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Odhiambo for the appellant

No appearance for the respondent

Ms Carol: Court Assistant