



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 160 OF 2017

ZINGO INVESTMENT LIMITEDAPPELLANT

VERSUS

BAHATI SLAUGHTERHOUSE LIMITED.....RESPONDENT

(Being an appeal from the judgment & decree of Hon. I. Gichobi (SRM) in CMCC NO. 4464 OF 2012 delivered on 31st March, 2017)

JUDGMENT

1. This appeal challenges the decision of the lower court in Milimani CMCC No. 4464 of 2012 in which the trial court dismissed the appellant's suit with no orders as to costs
2. In its plaint dated 8th August 2012, the appellant (then the plaintiff) sought KShs.700,000 together with costs and interests from the respondent (then the defendant) being monies allegedly paid to the respondent for the purchase of hides and skins which the respondent failed to deliver in October 2011. The appellant averred that the full facts and particulars of the transaction were within the respondent's knowledge.
3. In its statement of defence dated 7th August 2013, the respondent while conceding that it used to supply to the appellant hides and skins denied owing the appellant KShs.700,000 as alleged or at all. The respondent asserted that the business model agreed upon by the parties was that of payment after delivery and that in fact, the sum claimed was a payment for hides and skins that had already been delivered to the appellant. The respondent further claimed that the suit was an afterthought and prayed that the same be dismissed with costs.
4. After a full hearing, the learned trial magistrate Hon. Gichobi (SRM) rendered her decision on 31st March 2017 and held that the appellant had failed to prove its claim against the respondent to the required standard and consequently dismissed its case with costs. The appellant was aggrieved by the trial court's decision hence this appeal.
5. In the grounds encapsulated in its memorandum of appeal dated 12th April 2017, the appellant advanced six grounds of appeal in which it principally complained that the learned trial magistrate erred in law and fact in dismissing the appellant's suit on grounds that there was no written agreement for the payment of KShs.500,000 and KShs.200,000 by cheque numbers 000156 and 000185 contrary to the evidence on record; in dismissing the appellant's suit on procedural technicalities thus denying the appellant justice and by disregarding the evidence and submissions made in favour of the appellant and arriving at a decision which was against the weight of the evidence.
6. At the hearing, both parties agreed to have the appeal prosecuted by way of written submissions which both parties duly filed. The submissions were highlighted before me on 11th March 2020 by learned counsel Mr. Mureithi who represented the appellant and learned counsel Ms Chepeno for the respondent.
7. In its submissions, the appellant invited the court to find that the learned trial magistrate fell into error when she failed to appreciate the evidence adduced by the parties regarding the nature of their business relationship; that the parties used to operate a running account where the respondent would not be paid the full value of the hides and skins upon delivery but would be given an advance payment and later a final payment after the hides and skins were sorted, weighed and graded.
8. The appellant further submitted that in the course of their relationship, the appellant advanced the respondent KShs.700,000 which was given in two instalments of KShs.500,000 and KShs.200,000 vide cheque numbers 000156 and 000185 which sum was reflected in the final statement of accounts prepared by the appellant after their business relationship terminated; that in any event, the respondent had admitted owing the appellant KShs.630,000 and the trial court should have entered judgment for the appellant in the said sum instead of dismissing the suit.
9. In addition, the appellant submitted that it had proved its case to the required standard by documentary evidence in the form of cheques, statement of account, ledger account and purchase notes and that the trial court erred in holding otherwise.

10. On its part, the respondent supported the trial court's decision and submitted that the suit was properly dismissed as the appellant had failed to prove his claim to the standard required by the law. The respondent maintained that the KShs.700,000 claimed by the appellant was money paid into the running account as payment for hides and skins which had already been delivered and was not a loan as alleged; that if the amount was a loan, then the same would have been deducted in the monies paid subsequently which were in millions of shillings as shown in the bank statement produced in evidence by the respondent.
11. The respondent further submitted that the indication in its witness statement that it was denying owing the appellant KShs.70,000 instead KShs.700,000 was a typographical error which was corrected by the court in the course of the proceedings; that the suit was dismissed on merit and not on technicalities.
12. The record of the trial court shows that during the hearing, each of the parties called one witness in support of their respective cases. The appellant's managing director testified as PW1. He adopted his witness statement which he expounded on in his evidence. He testified that the appellant which was in the leather tanning business started a business relationship with the respondent sometime in the year 2012. The respondent would supply it with hides and skins and payment was on delivery. However, in the month of October 2012, upon request by Mr. Mburu, the respondent's director, the respondent was given an advance payment of KShs.700,000 which was paid in two instalments of KShs.500,000 and KShs.200,000; that the amount would be recovered from future deliveries of hides and skins. It was PW 1's testimony that though the respondent made several subsequent deliveries which were paid for upto January 2012, the amount advanced remained outstanding.
13. In support of his case, PW 1 produced a statement of account and a ledger generated by his company as exhibits 4 and 5 and a bundle of purchase notes as exhibit 6 showing the deliveries made by the respondent before their business relationship terminated.
14. In his evidence in cross-examination, PW 1 clarified that the KShs.700,000 was not a loan but was an advance payment for future supply; that the last delivery was on 7th January 2012 for goods worth KShs.1,027,444.
15. To counter the appellant's case, the respondent's director Mr. Mburu testified in support of the defence case. He denied that the respondent owed the appellant KShs.700,000 and claimed that this was money paid to the respondent for delivery of hides and skins previously supplied to the appellant.
16. It was DW 1's testimony that given the nature of the commodity they were trading in, it was impossible for the appellant to make advance payments since once the goods were supplied, the appellant had to select, grade and weigh them before making any payment. He denied having approached the appellant for any loan or advance payment and maintained that by the time the parties were parting ways, no one owed the other any money.
17. In his evidence under cross examination, DW 1 denied that the appellant used to issue him with any document to acknowledge delivery of goods or that the two parties ever reconciled their accounts. He testified that the prices of goods supplied would be negotiated after the same were graded and weighed and that payment would be made at a later date mainly through cheques.
18. As the first appellate court, I am fully conscious of my duty which is to re-evaluate and to consider afresh the evidence presented to the trial court and thereafter arrive at my own independent conclusions. See: *Selle & Another V Associated Motor Boat Company & Others*, [1968] EA 123. With this duty in mind, I have carefully considered the grounds of appeal, the evidence on record as well as the rival submissions made by the parties. I have also read the judgment of the trial court.
19. Having done so, I find that in her judgment, the learned trial magistrate restated and analysed all the evidence that was placed before her by the parties before arriving at her conclusion that the appellant had failed to prove its claim against the respondent. In her judgment, the learned trial magistrate stated inter alia as follows:
- “That amount of KShs.700,000 is captured in the defendants statement of account with the plaintiff, which statement was stated to be a running account making it difficult to ascertain whether the same was advanced for the purpose as stated by the plaintiff or not. This is so because, there are several other entries in the statement of account that do not have corresponding purchase note to single out the two payments as ‘loan’ and or ‘advance’ payments for skins and hides that were never delivered.”
20. In my view, the learned trial magistrate fully appreciated the manner in which the two parties conducted their business. She specifically noted that the parties used to operate a running account into which payment was made without corresponding purchase notes or an indication of the purpose for which the various payments had been made.
21. It is a cardinal principle of the law of evidence as stipulated in Sections 107 to 109 of the Evidence Act that he who alleges must prove. The appellant having alleged that it had made an advance payment of KShs.700,000 to the respondent for supply of goods which the respondent failed or refused to deliver had a duty of proving that claim by credible evidence to the standard required by the law.
22. The learned trial magistrate found as a fact that the appellant had not tendered any evidence to prove its claim that the KShs.700,000 reflected in the respondent's bank statement was in fact an advance payment for future supply of goods which the respondent failed to supply and to disprove the respondent's claim that it was a payment for goods which had already been delivered.
23. It is pertinent to note that the bundle of purchase notes the appellant produced in evidence clearly show that between November 2011 and 7th January 2012 which was after October 2011 when the Kshs. 700,000 was allegedly advanced, the respondent supplied the appellant with goods worth a total of KShs.6,023,079 which far exceeded the amount claimed by the appellant.
24. In my view, the learned trial magistrate properly and thoroughly interrogated the evidence on record and correctly concluded that the

evidence adduced by the appellant fell short of establishing its case against the respondent on a balance of probabilities.

25. Regarding the submission that the respondent had admitted being indebted to the appellant in the sum of KShs.630,000 as only KShs.70,000 was disputed in DW 1's written statement, my analysis of the evidence shows that the respondent disputed the entire sum of KShs.700,000. In his evidence under cross examination, DW 1 clarified that the indication of KShs.70,000 in his witness statement was a mistake which he corrected to read KShs.700,000 and the correction was noted by the trial court. The submission that the trial court erred in not awarding the appellant an alleged undisputed sum of KShs.630,000 is with all due respect, baseless. The trial court's decision was based on a consideration of the entire case on its merits and was not based on technicalities as alleged by the appellant.

26. In view of the foregoing, 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. Muriithi for the appellant

No appearance for the respondent

Ms Carol: Court Assistant