



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 168 OF 2016

TAPIOCA LIMITED.....APPELLANT

VERSUS

PLAMINARY AGENCIES LIMITED.....RESPONDENT

(An appeal from the judgment delivered by the Hon V. J. Yator, Resident Magistrate at Mombasa on 28th October, 2016).

JUDGMENT

1. The Appellant, TAPIOCA LIMITED filed a suit against the Respondent claiming for KSH 196,305/= interest on the sum at court rates from time of filing the suit until the date of determination of this suit and costs in Civil suit No 152 of 2014.
2. According to the appellant the claim is on account of balance of goods supplied by the Respondent at its request and instance between 2011 and 2014.
3. The Respondent filed a defence to the amended plaint dated 14th November, 2014 on 24th March, 2015 together with its list of witnesses statement and documents. The Respondent averred that as at 20th May, 2014 the Plaintiff was claiming Kenya Shillings Thirty Thousand Six hundred and Fifty Five (Kshs 30,655/=) which sum had been paid to the Appellant's representative, on Serah Wughana vide and M-Pesa transaction in the sum of Kenya Shillings Forty Five Thousand (Kshs 45,000/=).
4. The case was heard and the court found that the Appellant failed to prove its case on a balance of probabilities that it owned the claimed sum and consequently dismissed the suit with costs.
5. The Appellant was aggrieved by the decision of the lower court and preferred this appeal. By filing a memorandum of appeal dated 25th November, 2016 in which he raised three (3) grounds of appeal challenging the said decision the grounds are:
 - (a) That the learned trial magistrate erred in law and in fact in failing to take into consideration the evidence on record as tendered by both parties at trial thus arriving at wrong findings in her judgment;
 - (b) That learned trial magistrate erred in law and fact in failing to take into consideration the submissions of the plaintiff.
 - (c) That the learned trial magistrate misdirected herself on the applicable principle of law by failing to take into consideration and appreciate the authorities submitted to the court by the Appellant.
6. The matter had been fixed for mention on 13.11.2018 to confirm the availability of the original file. However, the counsel for the appellant confirmed that both parties had filed their submissions. The appeal was admitted for hearing since both parties had filed their submissions.

THE APPELLANT'S SUBMISSIONS.

7. According to Mr Omwenga, counsel for the appellate, Dw1 averred that the money due to the Appellant was paid to its account at Prima Bank and some through the appellants former employee, Serah and Mr. Henry was not supported by documentary evidence such as MPESA statements and evidence by the said employees. He stated that the Respondents case was insufficient as the claim was unsubstantiated.
8. It was Mr Omwenga's contention that the burden of proving the existence of a fact which one desires a court to believe in lies with the party alleging the existence of the same. He relied on the provision of section 109 and 112 of the Evidence Act together with the holdings in the court of Appeal case of **JENNIPHER NYAMBURA KAMAU VRS HUMPHREY MBAKA NANDA (2013) eKLR and STEPHEN WASIDKE WAKHU AND ANOTHER VRS SECURITY EXPRESS LIMITED (2006) eKLR** which captured the

above-mentioned proceedings.

RESPONDENT'S SUBMISSION.

9. According to Mr Mugallo, counsel for the Respondent, the Appellant failed to adduce evidence in support of its case by making reference to an audit report that was not filed in court and the auditor was never called as a witness to confirm that piece of evidence Mr Mugallo submitted that the Appellants' witnesses admitted that both conflicting statements relating to their dispute originated from the appellant and on cross examination, the appellants' both witnesses dismissed their own documents.

10. Mr Mugallo also submitted that he who alleges must prove and with the changing of the sum claimed and absence of an audit report, the appellant's evidence on record fell short of proving its case on a balance of probabilities. Further, the Respondent contended that the appellant was totally unable to demonstrate to the trial court how it had discharged its burden of proof and that the same would not have been achieved by shifting the burden of proof to the Respondent.

11. The Respondent relied on the following authorities: civil appeal no 229 of 2012, **MUMBI M'NABEA VRS DAVID M WACHIRA, MARIACIABAITARU M'MAIRANYI & OTHERS VRS BLUE SHIELD INSURANCE COMPANY LTD, CIVIL APPEAL NO 101 OF 2000 (2005) IEA 280: IGNATIUS MAKAU MUTISYA VRS REUBEN MUSYOKI MUILI (2015) E KLR.**

ANALYSIS AND DETERMINATION

12. As a first appellate court in these cases, I am guided by the decision in SELLE VRS ASSOCIATED MOTORS BOAT COMPANY (1968) E.A 123, to evaluate the trial court's evidence, analyse it and come to my own conclusion. However, in doing so, I must give allowance to the fact that I neither saw nor heard the witnesses testify, that the trial court did.

13. I am also aware that this court is not bound to follow the trial court's findings of fact if it appears that which it failed to take into account particular circumstance in probabilities. I have analyzed the record of appeal in terms of the grounds the appellant has raised in the appeal, the trial court's proceedings, submissions by both counsel on record, cited authorities and the law. I am of the view that the main issue that confronted the trial magistrate and now, in this appeal, is whether the plaintiff proved its case against the defendant on a balance of probability.

14. In considering this ground, the proceedings and evidence on record have shown that an audit report was never produced in court as evidence nor was the auditor called to testify on how he arrived at the challenged invoices and as a result the fluctuating figure by the appellant could not be justified, hence the same proved suspicious (stay)

15. In his testimony in chief, Pw1 MOHAMED RALZAKA admitted that the Respondent was to pay before the goods were to be supplied. As a result, the parties did not have a buy on credit relationship. On cross examination, Pw1 admitted that DW1, Miss Nauma Anyango, had raised the issues of other payments having been made via M-pesa to madam SARAH, who was their accounts Assistant. He also admitted that the audit report relied on coming up with the claimed figures was purely based on the bank statements since at that particular time the company did not have a registered M-pesa line and he admitted that the documents furnished by the Appellant to the defendant and the one presented to the trial court, were at variance even though they originated from the Appellant.

16. Further, when Mr Murago cross examined Pw1 and he dismissed the statements and the Appellants' documents that had been produced.

In cross examining Dw1, it was stated that HENRY LEWA and MADAM SARAH were the face of the Appellants' company and at no point did the Respondent ever communicate with the appellant in person. Her testimony was uncontroverted. It also came out from the testimony of Dw1 that they used to call HENRY LEWA SARAH and that it is them who suggested the mode of payment in this case to be by M-pesa before the goods were delivered.

17. And as I was going through the bundle of documents of record, I happened to have come across an e-mail dated 19th August, 2014 from the Respondent to the Appellant. The same was responding to a demand of Kshs 30,665/= and it was stated that the M-Pesa payments were of necessity since it was after hours and banks had closed. This is when the said Sarah's name was brought to the Appellant's attention.

Section 107 (1) of the Evidence Act provides that:

“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”.

And Section 108 of the Evidence Act is clear that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

18. Consequently, the burden of proof under section 107 the Evidence Act lies with the Appellants to prove that the Respondent was liable. Section 109 provides for “proof of a particular fact” and it states as follows;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

19. In this present appeal, I find no situation that has shifted the burden of proof to the Respondent. For example, the Appellant cannot sue the Respondent and expect him to prove him with evidence which would enable the Appellant to prove their case against the Respondent. In the case of JOHN KANYUNGO VRS DANIEL KIMANI MAINGI (2000) e KLR, Ringera J as he then was had this to say:

“Without the advantage of divine omniscience, I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one on the other probability without supporting evidence. I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, I must, not without a little anguish, dismiss the plaintiff’s suit on the ground that fault has not been established against the defendant”.

20. Therefore, with the complicating statement of accounts from the Appellant, Pw1 disowning the appellant’s evidence and failure by the Appellant to produce the audit report as evidence, I find that the appellant failed to prove its case on a balance of probabilities, as a result of which it is impossible to find fault with the trial court’s analyses and determination. I thus dismiss the Appellant’s appeal with costs to the Respondent.

It is so ordered.

Judgment delivered, signed and dated this 3rd April, 2019.

D. O. CHEPKWONY

JUDGE