



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 114 OF 2017

ROY HAULIERS LIMITED.....APPELLANT

VERSUS

AKIB-GLO LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon D.O. Mbeja (MR) Senior Resident Magistrate (SRM)

at the Chief Magistrate's Court at Milimani Commercial Courts in Civil Case No 7350 of 2013

delivered 19th February 2017)

JUDGMENT

INTRODUCTION

1. In his decision of 17th February 2017, the Learned Trial Magistrate, Hon D O Mbeja (Mr) Senior Resident Magistrate, allowed the Respondent's case as was prayed for in the Plaint together with costs and interest at court rates.
2. Being dissatisfied with the said decision, the Appellant herein filed the Memorandum of Appeal dated 15th March 2017 on even date. He relied on ten (10) grounds of appeal.
3. The Appellant's Written Submissions and List of Authorities were both dated 20th February 2019 and filed on 21st February 2019. Its Supplementary List of Authorities was dated 8th March 2019 and filed on 12th March 2019. The Respondent's Written Submissions were dated and filed on 7th March 2019.
4. Parties requested the court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. Having considered the Appellant's Grounds of Appeal and its Written Submissions together with those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were:-

1. Was there a valid and binding contract between the parties?

2. Was there a breach of contract and if so, by whom?

3. If the breach of contract was by the Appellant, what were the remedies to the Respondent?

8. This court therefore considered the aforesaid issues under the following distinct and separate heads.

I. VALIDITY OF THE CONTRACT

9. The Appellant submitted that there was no valid and binding contract between it and the Respondent or any legal relationship as the Learned Trial Magistrate had erroneously held. It was its submission that there was no meeting of minds since it cancelled the Local Purchase Order (LPO) it had issued the Respondent.

10. It stated that the previous contract between it and the Respondent was terminated when the Respondent lowered its price for the goods because this amounted to a counter-offer but that in any event, it refused to accept the lower price and asked the Respondent to collect its goods. It was its argument that the Respondent would be estopped from making a claim on the original LPO.

11. It also argued that the goods did not conform to the order and were overpriced which was confirmed by the Respondent lowering the price of the goods. It placed reliance on the provision of Section 15 of Sale of Good Act Cap 31 (Laws of Kenya) that provides that if it was a contract for sale of goods by description, there was an implied condition that the goods had to correspond with the description. It added that it ought to have been given an opportunity to inspect the goods as provided for in Section 35(1) of the Sale of Goods Act.

12. On the other hand, the Respondent submitted that the Appellant initiated the contract by raising an LPO for it (the Respondent) to supply it (the Appellant) certain goods at a certain price. It stated that the Appellant took delivery of the goods. It averred that after the Appellant accepted the goods, the contract was consummated as it had fully performed its part of the contract.

13. For a contract to be valid, there must be a firm and definite offer and an unconditional acceptance of the offer. A consideration must be paid by the offeree to make the contract binding between the offeror and the offeree. To be legally bound, the offeror and offeree must have entered into the contract voluntarily and must have a meeting of minds on what they are contracting about.

14. A contract can be vitiated if there was a mistake, undue influence, misrepresentation or duress. According to Black's Law Dictionary Tenth Edition, it has been stated that:-

“A valid contract is, of course, simply a contract of full force and effect, not vitiated in any way”

15. A perusal of the proceedings from the lower court show that a Director/Operations Manager of the Appellant, Joseph Onuka Omukaya (hereinafter referred to as “PW1”) adopted his Witness Statement that was dated 21st November 2013 and filed on 25th November 2013 as his evidence-in-chief. His evidence was that on 27th May 2013, the Appellant raised an LPO requesting that he supplies it with sixty (60) Respiratory masks, fifty (50) safety goggles and fifty (50) reflective (**sic**) (hereinafter referred to as “the goods”) at an all inclusive cost of Kshs 92,800/=.

16. He stated that on 30th May 2013, he supplied the Appellant with the said goods and raised an invoice of the said sum which the Appellant refused and/or failed to pay.

17. He adduced in evidence the LPO dated 27th May 2013 for the sum of Kshs 92,800/=, which was the same amount in the Delivery Note.

18. Patrick Kyalo (hereinafter referred to as “DW2”) testified on behalf of the Respondent. He also adopted his Witness Statement dated 4th March 2014 and filed on 5th March 2014 as his evidence-in-chief. His testimony was that the Respondent ordered some goods from the Plaintiff but it rejected them for not having conformed to the quality that had been ordered.

19. This court perused the Appellant's LPO that was dated 27th May 2013 and noted that it was addressed to the Respondent and that the same was for a supply of the goods at an all inclusive sum of Kshs 92,800/=. The Respondent raised an invoice for the said sum on 30th May 2013. On 17th June, year was not given, PW1 emailed a certain Gad asking for payment of the said sum.

20. On 18th June 2019, a certain Shemir Yakub emailed to PW1 and said thus:-

“We have revoked the LPO a fact communicated to you by myself.”

On 19th June 2019, the said Shemir Yakub emailed PW1 stating that:-

“Our position remains unchanged.”

PW1 emailed the said Shemir Yakub on 24th June 2013 asking him to accept a reduction of the prices on the goods. On 24th June 2013, the said Shemir Yakub emailed PW1 and stated as follows:-

“Take the supply back period.”

21. There were no documentation showing why the Respondent rejected the goods and demanded a reduction of their price.

22. This court therefore determined that because there was a LPO that was issued by the Appellant to the Respondent who supplied the goods at a certain consideration, there was an offer and acceptance creating a valid and binding contract. The Appellant could not purport to terminate the contract by rejecting the goods having accepted the same unconditionally.

II. TERMINATION OF THE CONTRACT AND/OR BREACH OF CONTRACT

23. It was the Respondent’s argument that the Appellant could not purport to demand a reduction of the price of goods that had been procured based on its own LPO because by doing so, it breached the contract. Further, it stated that the Appellant did not raise the issue of the quality of the goods on its own order.

24. It was emphatic that the Appellant could not unilaterally terminate the contract that it (the Respondent) had fully performed its part and that what the Appellant conveniently called termination, was actually a breach of contract.

25. A perusal of the documents that was adduced by the Respondent does not show why the Appellant rejected the goods as has been pointed hereinabove. The said Shemir Yakur merely gave PW1 an ultimatum to collect the goods. The Learned Trial Magistrate arrived at a correct conclusion that upon delivery, the Appellant had the option of returning the goods to the Respondent and not merely demand that the Respondent collect the goods.

26. The issue of inspection of the goods did not arise as there was no documentary evidence to demonstrate that the goods were to conform to certain specifications. The moment the Appellant accepted the goods, it gave the Respondent legitimate expectation that its goods would be paid for and the Appellant could not purport to terminate the contract.

27. This court therefore agreed with the Respondent that the Appellant could not unilaterally reject the goods after delivery and without giving any reason that was satisfactory to the court, this court found and held that the Appellant had breached the contract between it and the Respondent. Indeed the circumstances of this case pointed to a clear breach of contract by the Appellant.

III. RELIEFS

28. It was the Appellant’s further submission that the Respondent ought to have mitigated the losses it would suffer out of the termination of the contract. It was categorical that it was under no obligation to return the goods to the Respondent’s premises and that it was sufficient if it notified the Respondent that it had rejected the goods as provided for in Section 37 of the Sales of Goods Act.

29. In this regard, it relied on the case of **African Highlands produce Ltd vs Kisorio [2001] 172** where the Court of Appeal held that it was the duty of the plaintiff therein to have taken all reasonable steps to mitigate the loss he had suffered in respect of which he had sued an also paced reliance on the case of **Kenya Power & Lighting Co Ltd vs Henry Wafula Masibayi [2013] eKLR** where Gikonyo J also held that:-

“ . . . The claimant must mitigate his losses by taking such reasonable steps as are appropriate in the circumstances of each case. . . ”

30. On its part, the Respondent submitted that it sued for the agreed value of the goods supplied, costs of the suit and interest and because there was no claim for general damages, loss of user, loss of value of the goods of the current market price of the goods and that it was not therefore possible to see what it could have mitigated as had been contended by the Appellant.

31. This court agreed with the Respondent that the issue of mitigating its losses did not arise as its claim was for a specific sum of Ksh 92,800/=. Indeed, the cases that were relied upon by the Appellant and its arguments that the Respondent ought to have mitigated its losses would have been pertinent had the Respondent claimed general damages for loss of business, for instance.

32. Accordingly, having considered the Written Submissions and the case law that was relied upon by each of the parties, this court came to the firm conclusion that the Learned Trial Magistrate did not misdirect himself on the fact of the case herein but actually arrived at the correct conclusion based on the evidence that was adduced during the trial.

DISPOSITION

33. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 15th March 2017 was not merited and the same was dismissed with costs to the Respondents.

34. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of June 2019.

J. KAMAU

JUDGE