REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 90 OF 2014

NJORO CANNING FACTORY (K) LTD.....APPELLANT

VERSUS

JOHN MICHAEL MBUGUA.....1ST RESPONDENT

SAM-CON LIMITED (UNDER RECEIVERSHIP).....2ND RESPONDENT

(Being an Appeal under Section 65(1b) of the Civil Procedure Act Cap 21 Laws of Kenya and order 42 rule 1 of the Civil Procedure Rules 2010 from the judgment and decree of Hon. S. Mungai, Chief Magistrate Nakuru delivered on 4th June 2014 in CMCC No.962 of 2006)

JUDGMENT

1. The background to this appeal is straight forward.

The Appellant Njoro Canning Factory Ltd paid a sum of Kshs.1,000,000/= to the 2nd Respondent being a deposit of purchase price of a motor vehicle Registration No. KAG 737S Isuzu CXZ. The purchase price was Kshs.3.5 Million. The balance was to be settled within three months. That was on the 29th November 2002.

2. The 2nd Respondent was an agent of the seller on commission basis. When the 1st Respondent went to clear the balance within the stipulated period, came to its knowledge that the 2nd Defendant had been placed under receivership. He could not get the vehicle nor the deposit back.

3. This prompted him (1st respondent) to file the primary suit on the 7th June 2006 against both the appellant and 2nd respondent seeking

a) ***Refund of the Kshs.1,000,000/=***

b) ***General damages for breach of contract***

c) ***Interest on***

(a) At court rates from date of payment until payment in full.

(b) Any other relief as the court may deem fit to grant.

4. The defendants now the appellant and 2nd Respondents denied the claim in their defence dated the 19th June 2006.

Upon hearing the suit inter parties, the trial magistrate found in favour of the 1st Respondent and entered judgment against both Appellant and 2nd Respondent in the said sum of Kshs.1 Million plus interest at court rates and costs.

5. The appellant **Njoro Canning Factory (K) Ltd** was aggrieved necessitating filing this appeal. The 2nd Respondent did not appeal.

The grounds of appeal may be summaried into three all on liability.

(1) That the trial court erred in law and fact when it held that both the appellant and the 1st respondent were jointly liable to the 1st Respondent in the sum of Kshs. 1 Million.

(2) That the trial court erred in law and fact when it failed to hold the 2nd respondent had unequivocably admitted having received the sum of Kshs. 1 Million from the 1st Respondent, and therefore failed to hold the 2nd respondent wholly liable for refund f the said money.

(3) That the trial court failed in law and fact in failing to appreciate the important of placement of the 2nd respondent in receivership vis-a-vis the rights of 3rd parties including the 1st Respondent who had on going fractions.

(4) That the trial court's findings are against the weight of evidence and submissions as submitted by the appellant.

6. Parties filed written submissions

Issues For Determination

From the pleadings, evidence and submissions, three main issues arise for determination

1. Whether the 1st Respondent established a case against the appellant and the 2nd defendant as agent of the 1st respondent to the required standard of proof.

2. Whether the trial court's findings on liability were founded on proper legal principles as pertains to agent – principal relationship.

3. Whether the trial court failed to appreciate the import of place the 2nd Respondent under receivership and ranking the 1st Respondent as an unsecured creditor.

7. **Undisputed and Admitted facts**

(1) The 2nd Respondent by its letter 5th March 2003-PExt 6-admitted that the 1st Respondent paid the deposit of Kshs.1 Million to the - the 2nd defendant – for purchase of motor vehicle Reg. No. KAG 737S Isuzu CXZ on the 29th November 2002, (DW2 evidence).

(2) That the Appellant was taking its vehicles to the 2nd respondent to sell on its behalf on Commission basis – (PExt 9, Par. 5 defence, DW1 evidence).

(3) That leave to sue the 2nd respondent was obtained in vide High Court Misc. Civil Appl. No. 255/2006 as it was under receivership.

(4) That the deposit paid by the 1st Respondent was received and appropriated by the 2nd respondent(DW2) evidence).

8. As mandated of a first appellate court, I have re-considered and re-evaluated the totality of evidence adduced before the trial court. I am not bound to agree with the trial court's findings of fact unless such findings are not based on the evidence on record – **Gudka -vs- Dodhia (1982) KLR 376, Civil Appeal No. 169 of 2016 KPLC Ltd -vs- E K O** and Another (2018) e KLR, among others.

9. The degree of proof in a civil suit is well settled.

It is upon a balance or preponderance of probabilities.

Palace Investments Ltd -vs- Geoffrey Kariuki Mwenda Another NRB CA Civil Appeal No. 127 of 2007(2007) e KLR cited in **Miller -vs- Minister of Pensions (1947) 2 All EA 372 and Kanyungu Njogu -vs- Daniel Kimani Maingi (2000) e KLR.**

10. The 2nd Respondent admitted having received the deposit from the 1st Respondent and issued a payment receipt dated 29th November 2002. It is stated that the Kshs.1 Million deposit was in respect of purchase of the motor vehicle KAG 737S.

11. By a letter dated 5th March 2003 to the 1st Respondents advocates, it is also admitted by the 2nd respondent that the Kshs.1 Million deposit was paid to the 2nd defendant.

Clearly it is evident that the money was received by the 2nd respondent whether through the agent the 1st respondent or otherwise, it was duly received.

12. Taking into account the above admitted facts it would in my view be unconscionable and fraudulent to allow the 2nd respondent to keep both the money and the vehicle as it would be an unjust enrichment that the law abhores. It is frowned upon by the court as unreasonal and illegal – **Civil Appeal No 5 of 2014 Caltex Oil (Kenya) -vs- Evanson Njiiri Wanjihia (2017) e KLR**

13. Given the above circumstances, was the trial court right when it held the Appellant and the 2nd respondent jointly liable?

Parties are bound by their pleadings, and the court can only make findings on the pleaded matters only and cannot digress into extrinsic or unpleaded issues, no is a party proper to adduce evidence that does not support its pleadings. In **IEBC and Another -vs- Stephen Mutinda Mule & 3 Others (2014) e KLR, the Court of Appeal** reiterated that important legal principle.

14. Looking at the Respondent's evidence, it contradicts the averments in their statements of defence.

While defying knowledge of the transaction between the parties the 2nd Respondent's evidence talks of nothing but admissions.

It is trite that an agent within the scope of its actual or apparent authority does not cease to bind his principal. **- Karanja -vs- Phoenix EA Assurance Co. Ltd Civil Case No. 56 of 1987 – 1991) e KLR.**

It is further an undisputed fact that while admitting the appellants claim, the 2nd Respondent admits too to having stated that the appellant would be ranked as an unsecured creditor. **Section 112 Evidence Act** states

"that when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

15. The 2nd Respondent was prompted to but failed to avail the necessary bank and other documents to prove whether or not it was proper to rank the 1st respondent as an unsecured creditor.

Having failed to do so, I agree with both the 1st Respondents as well as the Appellant's submissions that it ought to pay the sums deposited into its account by the 1st respondent.

16. I agree with the Appellant that an agent ought to account to the principal of all the money received on behalf of the principal. There is enough evidence that the agent released the deposit to the 2nd respondent – See the admission and the payment cheques, and letters all acknowledging receipt of the deposit.

17. It is not disputed that the 2nd Respondent was placed under receivership. The trial court was not told when this happened.

It is trite that when a receiver is appointed, the company assets are taken over by the receiver manager and the company ceases to have control or right to deal with the assets. That receiver is however under a duty to account for the assets, in this case the appellants deposit.

18. It is also its duty to get realise and pay all outstanding debts to creditors. Having admitted that the deposit was appropriated as an asset of the company, and the receiver having failed to account for the same by production of the necessary documents, then the official receiver must be held liable.

Surya Holdings Ltd & 2 Others -vs- CFC Stanbic Bank Ltd (2015) e KLR.

19. The matter of the deposit having been received and converted into an asset of the company was not pleaded in the 2nd defendant's defence. I therefore find that the trial magistrate's finding that the Defendant's (1st and 2nd Respondents) were blaming each other and avoided taking serious responsibility for each role each played in the deposit not sufficient to hold both liable as evidence was sufficient to find the 2nd respondent wholly liable.

20. The 2nd respondent having explained its role very clearly as concerns the whole transaction cannot be found jointly liable with the appellant who also explained itself sufficiently to persuade the court of its innocence in the transaction.

21. For the above reasons, I find that the trial magistrate misdirected himself and assumed powers it did not have to determine unpleaded matters. I am also satisfied that the trial court failed to analyse sufficiently the evidence adduced thus at the wrong findings on culpability – **Okeno -vs- Republic (1972) EA 32 and Gudka Case** (**Supra**).

22. The appellant was able to remove itself from culpability by its evidence. From the circumstances, I find that the agent, now the 2nd Respondent to be wholly liable for the 1st Respondents claim. The said sum of Kshs.1 Million ought to be paid and/or refunded to the 1st Respondent by the 2nd respondent, the official receiver of the company, now under receivership as it failed to satisfy the court of the 2nd respondents status as an unsecured creditor to the standard of proof required of a civil suit, upon a balance of probabilities.

23. Consequently, the appellants appeal succeeds partially. The trial courts judgment delivered on the 4th June 2014 is set aside and substituted with one that the **2nd respondent Sam-Con Limited** (under receivership) is wholly liable to the the 1st Respondent's (John Michael Mbugua) claim of Kshs.1 Million-together with interest at court rates from the date of filing of the primary suit.

Costs of the Appeal shall be paid by the 2nd Respondent to the Appellant.

Dated, signed and delivered this 13th day of December 2018.

J.N. MULWA

JUDGE