



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 104 OF 2013

PETER OTIENO NYAREGA

T/A RACHUONYO ELECTRICALS & ELECTRONIC WORKS APPELLANT

VERSUS

GULF FABRICATORS LTD. RESPONDENT

[Being an appeal from the Judgment of the Resident Magistrate's Court at Kisumu of

Hon. J. Sala delivered on the 16th October 2013 in Kisumu CMCC No. 548 of 2012]

JUDGMENT

The Appellant sued the Respondent for a sum of Kshs.111,875/= for goods sold and delivered at the latter's request and which were never paid for. In its statement of defence the Respondent denied all the averments in the Plaintiff save for the description of the parties and the jurisdiction of the Court.

After hearing and considering evidence from both sides the Trial Magistrate found the suit was not proved on a balance of probabilities and dismissed it with costs to the Respondent. Being aggrieved the Appellant filed this appeal on grounds that:-

- “1. THAT the learned trial magistrate erred in law in ignoring the documentary evidence tendered in preference for oral evidence;***
- 2. THAT the learned magistrate erred in law and fact in dismissing the appellant's case with costs to the respondent when the circumstances demanded liability on the part of the respondent;***
- 3. THAT the learned magistrate failed to appreciate the law and submissions made on behalf of the appellant thus reaching a conclusion that was contrary to the law;***
- 4. THAT the judgment ought to be set aside ex debiti justitiae on the basis that the magistrate considered and gave undue weight to irrelevant issues and totally failed to consider the relevant issues;***
- 5. THAT the judgment was against the evidence, reason and logic and is incapable of explanation in law;***
- 6. THAT dismissing the appellant's case amounted to a serious error in principle and a miscarriage of justice.***

The Appellant's case was that he is the proprietor of Rachuonyo Electricals situate at Kisumu Bus Park. He begun supplying goods to the Respondent (electrical cables, conduits, pipes, switches and other electrical accessories) when he was introduced to its director, one Kaoko, by a friend. The Respondent would make orders by sending people to the shop to collect goods but he would always confirm those orders by telephone. The goods supplied would always be accompanied by an invoice and delivery note. The Respondent would pay for the goods either by cheque, M-Pesa or in cash and the payment was a confirmation that they had ordered the goods. He stated that he transacted with the Respondent for a long time and when they defaulted he visited their offices twice only to be ignored. He then resorted to telephone calls but Kaoko denied that they owed him. He therefore instructed his Advocate to sue. In his testimony he referred to invoices which were not paid as:-

- **Invoice No.0153 dated 2/7/2011 for Kshs.5,150/=**
- **Invoice No.0178 dated 2/6/2011 for Kshs.19,500/=**
- **Invoice No.0395 dated 2/6/2011 for Kshs. 7,200/=**
- **Invoice No.1229 dated 28/1/2011 for Kshs.2,610/=**
- **Invoice No.0439 dated 27/1/2011 for Kshs.14,270/=**
- **Invoice No.2162 dated 26/1/2011 for Kshs.14,400/=**
- **Invoice No.1333 dated 9/1/2010 for Kshs.226,140/=**
- **Invoice No.2263 – partly paid (balance) Kshs.8,915/=**

On their part the defendant conceded that they indeed had a business relationship with the appellant and that they purchased goods from the him but stated that all their orders were through Local Purchase Orders (LPO) and that as the Appellant did not produce **Local Purchase Orders** for the goods he claims were never paid for then he had not proved he supplied those goods to them. The Respondent also testified that since the Appellant never issued them with ETR receipts it was difficult to tell how much they had paid him and if indeed they owed him.

In his submissions Mr. Yogo, Advocate for the appellant however discounted this saying that the invoices produced in Court were signed by an employee of the Respondent and were proof that the goods were supplied. He also submitted that there was proof that part payment was made. He contended that going by the testimony of the Respondent's witness their position was that they refused to pay because ETR receipts were not issued but not because goods were not supplied. He urged this Court to find that a sum of Kshs.111,875/= remained unpaid and therefore allow this appeal.

Mr. Omondi for the Respondent however submitted that the appellant himself admitted that some of the payments made by the Respondent were not reflected and that only his accountant could say what was paid and what was not. He also referred to the appellant's testimony where he stated that **“the Court cannot tell who owes who. I was paid in excess.”** He submitted that the delivery notes were hotly contested as they did not have Local Purchase Orders. He stated that evidence of those invoices was not challenged even by way of cross-examination and it may be safely concluded the appellant supported it. Turning to the invoices that were produced he submitted that they give a total of 666,750/= yet the claim is for 111,875/=. He stated that in the face of this glaring inconsistency and disparity the appellant did not prove his case and the judgment of the Lower Court should be left to stand.

In reply Mr. Yogo submitted that 666,750/= was the total of what was supplied and that the appellant had shown how the figure of 111,875 arose; that the appellant had singled out the invoices that had not been paid and that even the respondent had

failed to prove the errors and omissions they referred to. He submitted that the

appellant had proved his case to the standard required and the judgment of the Lower

Court ought to be set aside.

As required of me, as a first appellate Court, I have reconsidered and evaluated the evidence adduced in the Lower Court.

I am satisfied from the evidence that the Appellant in fact supplied goods to the Defendant. The testimonies of the respondent's witnesses attest to that. I am also not persuaded that the omission to issue ETR receipts would be a good reason for failure to pay for goods supplied because as the Appellant explained receipts are issued only upon payment. The invoices produced by the appellant also attest to the fact that the respondent paid for invoices even where there were no Local Purchase Orders (LPO) quoted examples of such invoices being No. 1871, 1872, 1873, 1768 which were paid by way of a cheque No.500193 for Kshs.300,000/=. That too would therefore not be a good reason for not paying for the goods. Be that as it may I find, as the trial Magistrate did that the Appellant did not prove his case on a balance of probabilities. Earlier in this judgment I set out the invoices which the appellant claimed were not paid. The sum total of those invoices is Kshs.298,185/= yet the appellant's claim was for Kshs.111,875/-. That disparity was not explained. It was the duty of the appellant to prove on a balance of probabilities that 111,875/= was left outstanding when all else was paid. He did not do so. In his testimony he admitted that the Respondent had paid much more than was reflected in invoices he produced in evidence. He told the Court that only his accountant could tell how much was paid. Perhaps he should have called that accountant to prove how the sum claimed was arrived at as his own testimony fell short of proving the case to the standard required. Indeed he conceded that the Court could not tell who owed what between him and the Respondent.

Accordingly I find no merit in this appeal and it is dismissed with costs to the Respondent. It is so ordered.

Signed, dated and delivered at Kisumu this 9th day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Yogo for the Appellant

Miss Adwar for the Respondent H/B for Omondi M.M.

C/A: Serah Sidera