REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NUMBER 9 OF 2013.

DAKIANGA DISTRIBUTORS LIMITED.....APPELLANT

VERSUS

NICHOLAS BURI ONKEO.....RESPONDENT

(An appeal from the Judgment and Decree of the Chief Magistrates Court at Kisii by Hon. Kibet Sambu, Principal Magistrate in Kisii CMCC 411 of 2007 delivered on 12th December, 2012).

JUDGMENT

Introduction

1. The respondent herein **Nicholas Buri Onkeo** was charged before Rongo SRM Court Criminal Case No. 1119 of 2004 with the offence of stealing by servant contrary to section 281 of the Penal Code. The particulars of the charge were that on the 26th day of September 2004 at Dakianga Distibutors in Kisii Township, he stole Kshs. 702, 966.20 from the said Dakianga Distributors which came into his possession by virtue of his employment. The appellant was tried, convicted and sentenced to a fine of Kshs. 50,000/= in default two years imprisonment. Aggrieved by the said conviction and sentence, the respondent preferred an appeal in Kisii HCCA No. 21 of 2008 which appeal was subsequently dismissed. The appellant herein, having been the complainant in the criminal trial, then filed a civil suit against the respondent in the Kisii Chief Magistrates Court Civil Case NO. 411 of 2007 the outcome of which is the subject of the instant appeal.

Pleadings

2. In its plaint filed before the lower court on 14th August 2007, the plaintiff (the appellant herein) who described itself as a Limited Liability Company incorporated in Kenya under the Company's Act (Cap 486 laws of Kenya) having its registered office in Kisii Town, sued the defendant (the respondent herein) seeking the following reliefs:

a. The wrongfully converted and/ or stolen sum of money

b. Interest thereof from the 25th September 2004 until the date of judgment or sooner payment.

c. Costs of the suit.

3. The plaintiff's case against the defendant was that on the 25th September, 2004 the defendant, in his capacity as the plaintiff's agent/servant, was entrusted with the sum of Kshs. 702,966/= for purposes of banking the same at the Co-operative Bank(K) Limited Kisii Branch but that the defendant instead stole

or deceitfully converted the said money to his own use thereby precipitating his arrest, trial and conviction at Rongo Law Courts for the offence of stealing by servant contrary to section 281 of the Penal Code after which he was sentenced to a fine of Kshs. 50,000/= and in default to serve two(2) years imprisonment.

4. The defendant entered appearance and filed a written statement of defence on 27th August 2007 in which he denied the plaintiff's claim in its entirety. The defendant also denied that he was an employee of the plaintiff company and on without prejudice basis further stated that if there was any conviction against the defendant as claimed, which he denied, then the said conviction in the criminal case was not a sufficient ground for a claim of payment/damages as the same lacks legal basis and contravenes the rules of natural justice. He contended that the plaintiff's claim was an abuse of the due process of court.

Oral Evidence

5. The plaintiff presented the evidence of one of its directors Charles Mageto who testified that the defendant was one of its employees and that on 25th September, 2004, the defendant was entrusted with the sum of Kshs. 702, 966/= to deposit in the plaintiff's bank account but that the defendant did not bank the money as instructed thereby leading to his arraignment in court for criminal charges that culminated in his conviction and sentence. He produced the proceedings in the criminal case as Pexhibit1. He further stated that the defendant's appeal against his conviction and sentence was not successful as the said appeal was dismissed. He thus prayed for a refund of the stolen money together with accrued interest.

6. On cross examination he maintained that he was one of the directors of the plaintiff's company even though he had no documentary evidence to that effect. He also stated that he did not have any minutes or resolution made by his fellow directors allowing him to testify in the matter on behalf of the plaintiff company. He conceded that he did not have the plaintiff's company seal before the court or a document showing that the defendant was the plaintiff's employee during the material time. He denied the allegation that the defendant was an employee of Unilever at the material time.

7. On being shown copies of the cash register dated 24h September, 2004 he conceded that some of the entries were made by other employees other than the defendant namely Michael Kangimbo and Evans Ntabo which documents he further stated were gutted down by fire in the course of time. He further maintained that the plaintiff's company is entitled to the claim of Kshs. 702,966/= although the same has not been specifically pleaded in the filed plaint. He however could not confirm if the lost money was compensated by their insurers M/s Kenindia Assurance Company.

8. On re-examination, he reiterated that the plaintiff company was entitled to the claimed sum of Kshs. 702,966 as specifically pleaded at paragraph (6) of the filed plaint. This marked the close of the plaintiff's case.

9. DW1 was the defendant herein Nicholas Buri Onkeo. He admitted that he had been employed as a debt collector and a banking clerk by the plaintiff company at the material time. He further stated that his role entailed travelling far and wide collecting money from the plaintiff's company's creditors and banking the same. He further explained that on 25th September, 2004, he was given the sum of Kshs. 503, 834/= by one Lydia Momanyi, a director of the plaintiff's company for banking. To support his evidence, he produced a copy of the cash register which he had duly signed in acknowledgment thereof as Dexhibit 2. He further stated that the rest of the entries made in the cash register were made by his colleagues and that the sum of Kshs. 702,966.20 reflected in the cash register was in fact doctored. He further explained that his fellow cashiers at the time had allegedly entered the sum of Kshs. 266,636/-- to make a total sum of Kshs. 702,966.20 which monies to the best of his knowledge were never banked as the bank slip was never shown to him.

10. On cross-examination, he maintained that he had been employed by the plaintiff company as a casual clerk at the material time, that he was arraigned in court and convicted following the loss of Kshs. 702,966.20 allegedly entrusted to him for banking by the plaintiff's company and that he lodged an appeal against conviction and sentence which was dismissed. He however maintained that the only money

entrusted to him at the material time was Kshs. 503,845/=which money admittedly was stolen/got stolen in his hands. This marked the close of the defendant's case.

11. After evaluating the evidence tendered by both parties, the trial court dismissed the plaintiff's company's case on the grounds that the plaintiff's witness did not produce the company's seal or any resolutions made by the plaintiff company authorizing him to file the suit and testify in the matter on behalf of the company. The trial court observed that verifying affidavit accompanying the plaint did not disclose under whose authority or in what capacity he was swearing the affidavit as is required by the mandatory provisions of the Companies Act. According to the trial magistrate, this omission rendered the verifying affidavit defective and incompetent, and by extension ultimately rendered the entire suit incurably defective. The trial court cited the decision in **Nairobi HCCC No. 474 Of 2007-Elite Earth Movers Limited V S Krishna Bekal & Sons Nairobi.**

12. The trial court also found that the plaintiff did not plead or prove the liquidated claim as is required by the law. It was also the trial court's finding that the production of criminal case proceedings did not *per se* constitute proof of civil liability against the defendant.

13. The plaintiff company was dissatisfied with the said judgment and decree of the trial court and filed the instant appeal in which it listed the following grounds of appeal:-

> **1. The learned trial magistrate erred in law and misdirected himself fundamentally in dismissing the Appellants claim by giving undue regard to procedural technicalities.**
>
> **2. The learned trail magistrate erred in law and in fact in holding that in the Appellant failed to strictly prove it's liquidated claim when there was ample evidence placed before him to proof the claim.**
>
> **3. The learned trial magistrate erred in law in not holding that in the face of the court proceedings and judgments alluded to at the trial the appellants claim was strictly proved.**
>
> **4. The learned trial magistrate erred in law and in fact in holding that the Appellant did not prove his case on a balance of probabilities.**
>
> **5. The learned trial magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence adduced.**

14. The Appellant prayed that the appeal be allowed and the judgment of the trial court be set aside. The plaintiff also sought the costs of the appeal and those of the lower court.

15. When the appeal came up for hearing before me on 5th October, 2016 this court directed that the same be heard by way of written submissions.

16. Mr. Bosire for the appellant submitted that the date of filing of the appeal did not vitiate the appeal as it is a technicality capable of being amended. He further submitted that the same does not affect the merits of the appeal and it does not prejudice the respondent in any manner. He thus termed the same as a procedural technicality that does not go to the root of the merits of the case.

17. In reference to lack of the minute/board resolutions authorising the filing of the suit, he submitted that it was an issue that could only arise if there was a dispute among the directors of the company. He thus contended that the respondent lacked *locus standi* to raise the same and prayed that the appeal be allowed.

18. Mr. Nyagesoa for the respondent submitted that there was no valid appeal on record because the judgement was delivered on 13/12/2013 and no leave was sought to file an appeal out of time. He further submitted that as a limited company, the defendant ought to have given the minutes/resolution of Board of Directors to Charles Mageto to swear an affidavit. He also contended that the special damages were

neither specifically pleaded in the plaint nor proved at the hearing and prayed that the appeal be dismissed.

Analysis and determination

19. The duty of the first appellate court is to first re-evaluate the entire evidence tendered before the trial court with a view to arriving at its own independent findings while bearing in mind the fact that it neither saw nor heard the witnesses. See **Selle v Associated Motor Boat Company [1968] E.A 123.** Upon evaluating the record of appeal and the written submissions of the parties herein, I note that the issues for determination in this case are:-

> **1. Whether the appeal was filed out of time and therefore invalid.**
>
> **2. Whether the fact that PW1 (the appellant's witness in the lower court) did not obtain a resolution from the plaintiff's board of directors to swear a verifying affidavit invalidates the plaintiff's suit.**
>
> **3. Whether the appellant proved its claim against the respondent to the required standards.**

20. With regard to the first issue, it was not disputed that judgment was delivered in the trial court on 13/12/2012 and the appeal herein filed on 24/01/2013 which date was technically outside the 30 days period stipulated for filing of appeals in civil matters. It was also not disputed that the appellant did not obtain the leave of the court to file the appeal out of time. The respondent sought the dismissal of the appeal on this ground. I however find that by dint of the provisions of order 50 Rule 4 of the Civil Procedure Rules, the appeal was not filed late and further that even assuming that the appeal may have been filed out of time without leave that is not sufficient ground for dismissing the entire appeal. I am guided by the decision of the Court of Appeal in **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others (2011) eKLR** wherein a Notice of Appeal was served on the respondent out of time and without leave of the court and on an application seeking the striking out of the said notice the court observed:

> ***"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.....***
>
> ***In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2) (d) of the Constitution of Kenya 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice that is likely to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."***

21. In **Bruce Mutie Mutuku T/A Diani Tour and Travel Centre v Equity Bank Limited[2014**] eKLR Kasango J, commenting on the above case observed:

> ***"Although the case dealt with the striking out of the notice of appeal on the basis that it was served on the respondent out of time and without leave of the court, the jurisprudence it laid is that the court, in exercising its discretion to strike out a document, or like in this case, an appeal, has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if the court strikes out the appeal."***

22. The present appeal was ideally meant to be filed by the 13th of January 2013. The appellant filed the same on 23rd January 2013, ten days after the stipulated 30 days deadline to appeal in civil matters. This appeal was admitted by this court for hearing 3 years later and yet the respondent did not raise the issue of time then, but waited until the appeal was admitted and directions taken only to raise the issue during submissions. In my humble view, the prejudice that the appellant is likely to suffer if the appeal is dismissed on the grounds that it was filed late is more than the prejudice that the respondent would suffer if the appeal is determined on its merits. I think it would be appropriate, in the wider interests of justice to overlook the appellant's delay and proceed to consider appeal on its merits.

23. The overriding objective policy notwithstanding, I also find that the appellant's appeal was not filed outside the stipulated 30 day period because Order 50, rule 4 of the Civil Procedure Rules freezes time for amending, delivering or filing of pleadings. That said rule provides as follows -

> **"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December, in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleadings or the doing of any other act.**
>
> **Provided that this rule shall not apply to any application in respect of a temporary injunction."**

24. With regard the respondent's argument that PW1 did not tender a resolution by the plaintiff's Board of Directors authorizing him to swear the verifying affidavit and to testify at the hearing, I find that it is now settled law that there is no mandatory requirement that a resolution of the board of directors of the company be obtained before filing a suit on behalf of the company. Courts have held that a director who is authorized to act on behalf of the company may act in cases on behalf of the company without the board's resolution unless the contrary is proved. In the Ugandan case of **United Assurance Co. Ltd V Attorney General : SCCA NO. 1 of 1998** the Supreme Court of Uganda held that it was now settled, as the law, that it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the company. Any director, who is authorized to act on behalf of that company, unless the contrary is shown, has the powers of the board to act on behalf of that company.

25. In **Fubeco China Fushun v Naiposha Company Limited & 11 Others[2014]**eKLR Gikonyo J. held:-

> ***''In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the advocates on record to commence this Application. The plaintiff has also not presented any material or affidavit from the other directors denying the authority of Carolyne Wairimu Kimemia as a director in the defendant company. As such, I do not think the Court is in any position to dispute the authority of Caroline Wairimu Kimemia or the instructions to the advocate on record to defend the interest of the company. Therefore, in the absence of evidence to the contrary, I find the affidavits filed to be in order and the advocate herein to be properly on record for the defendant.''***

26. Applying the decision in **Fubeco case** (supra), I similarly find that the respondent did not present any evidence before the court to show that PW1 did not have the authority of the appellant to swear an affidavit or present evidence in court on its behalf.

27. Lastly, on the issue of whether the appellant pleaded and proved his claim, it is trite law that he burden of proof in civil cases is on a balance of probabilities. The term balance of probability was defined in **Kanyungu Njogu v Daniel Kimani Maingi [2000]**eKLR wherein it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

28. In the instant case, I respectfully disagree with the learned trial court's holding that the appellant did not plead the claimed sum of Kshs. 702,966.20 because a perusal of the plaint reveals at paragraph 4 thereof that the aforesaid amount was specifically pleaded. I am of the view that perhaps the plaintiff's advocate did not plead this amount in the prayers section of the plaint so as to avoid paying court filing fees but this does not wash away the fact that the said amount was pleaded in the body of the plaint. It is also my considered view that Article 159 (2) (d) of the Constitution comes to the Appellant's rescue in view of the fact that it stipulates that justice shall be rendered without undue regard to procedural technicalities. In this case, the respondent did not deny that the claim that he received money from the appellant for purposes of banking the same. Under the above circumstances, I find that the trial magistrate had no basis for holding that the appellant did not prove its claim to the required standard. The appellant relied on the evidence adduced in the criminal case wherein the respondent was convicted for stealing the sum of Kshs. 702,966.20. This brings me to question if conviction in criminal case is sufficient proof of respondent's liability in the civil claim. This court notes that apart from the certified copies of criminal case proceedings, the respondent himself admitted to the fact that he was actually given Kshs. 503,845/=by one Lydia Momanyi a director of the appellant's company. Needless to say, the burden of proof in criminal cases is higher than that of civil cases in which case, both the trial court and the High Court found that it was proved, beyond reasonable doubt, that the respondent stole the money entrusted to him by the appellant.

29. In the Court of Appeal case of **Chemwolo & another vs Kubende [1986] KLR** one of the issues that arose during the appeal was whether a conviction in a traffic case was conclusive evidence of carelessness and of liability in a subsequent civil case in which the same accused became the defendant. The Appeal Court stated as follows at page 498:-

> ***"Now, it was correct for the learned Judge to refer to Mr. Chemwolo's conviction because Section 47A of the Evidence Act (Cap 80) declares that where a final judgement of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in the civil proceedings which are contemplated, Mr. Chemwolo's conviction will be conclusive evidence that he was guilty of carelessness…."***

30. From the holding in the above cited case it is clear that a conviction in a criminal case by a competent court makes the judgement receivable in a civil claim as a conclusive finding of general liability against him in civil proceedings filed against him after the expiry of the appeal period.

31. In my humble view and taking a que from the decision in Chemwolo case (supra) I similarly find that the respondent's conviction by the lower court, which conviction was upheld by the High Court on appeal, conclusively determines his liability to refund the appellant the stolen sum of money. Furthermore, I note that at the hearing, the respondent admitted having received Kshs. 503.845/= from the appellant through one Lydia Momanyi and therefore, coupled with the proof tendered through the proceedings in the criminal case, I find that the claim against him was proved on a balance of probabilities.

32. In conclusion and for the above reasons the appellant's appeal herein is allowed in the following terms:

> **a. Judgment is hereby entered in favour of the appellant for Kshs. 702,966.20 together with interest at court rates from the date of filing the suit at the lower court.**
>
> **b. The payment of Kshs. 702,966.20 to the appellant will be subject to the appellant paying the requisite further court filing fees.**
>
> **c. The appellant shall have costs of this appeal and those of the lower court.**

It is so ordered.

Dated, signed and delivered in open court this 3rd day of April, 2017.

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Momanyi for the Appellant
- Mr. Ochwangi for the Respondent
- Omwoyo court clerk