



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 88 OF 2014**

**CATHERINE MATHENGE t/a**

**CATHERINE MATHENGE SUPPLIERS .....APPELLANT**

**VERSUS**

**LTI KISII SAFARI INNS t/a KASKAZI BEACH HOTEL.....RESPONDENT**

**J U D G M E N T**

1. On 9/6/2015, by a plaint dated 8/6/2015, the plaintiff sued the defendant and made a liquidated demand in the sum of Kshs.441,761.00 on an account of goods sold and delivered at the defendants own request and instance during the year 2014. In that plaint the plaintiff pleaded that in an attempt at part payment the defendant did issue to the plaintiff four(4) cheques all totaling to Kshs.216,711.00 which cheques when presented for payment on due date were all returned unpaid and dishonoured by the bank and the plaintiff incurred bank charges in the sum of Kshs.7,500/=. The plaint therefore sought that judgment be entered for her against the defendant for the sum together with interests and costs.
2. On the 15/7/2015 the plaintiff requested for judgment and did obtain a default judgment which was set aside on the 7<sup>th</sup> October 2015 on certain terms but still the defendant did not file a statement of defence. When the plaintiff once again requested for judgment. On the 30/11/2017 the judgment was not entitled as there is a comment on the request that the matter be fixed for hearing. The plaintiff counsel seem to have been content with that direction and therefore appeared before the trial court and took a date for hearing. I will comment on this aspect at a later stage in this judgment.
3. On the date set for hearing the parties were duly represented by counsel and after giving his evidence in chief the plaintiff was duly cross examined by Mr. Mogaka for the Respondent, then the defendant.
4. During that trial the plaintiff produced not only the invoice book shown to have been duly signed by the receiving party, cheques all totaling to Kshs.218,216/= but also email communication exchanged between the parties and said that the cheques when presented were dishonoured and that she was charged Kshs.7,500.00 for the dishonor.
5. On cross-examination, the Appellant said that she had transacted with the Respondent for a period spanning four(4) years before the dispute and that there was no written instructions. She reiterated that the value of the invoices when added to the value of the cheques and dishonor charges make the aggregate claimed sum of Kshs.441,761.00. She denied that her claim had been exaggerated.
6. In a reserved judgment the trial court having analysed the evidence, found that there was no defence

filed to the plaintiff, that the plaintiff did supply the goods which were duly received, then surprisingly held that there was no invoice to support supply and delivery and that there was a possibility that the cheques were issued for the deliveries made. He therefore entered judgment for the value of the dishonoured cheques and the bank charges for dishonor and disallowed the claim in the sum of Kshs.218,216.00

7. It may make the reasoning of the trial court clearer if I reproduced a

portion of it here. The court said:-

**“However there is no invoices to support supply and delivery. It is noted the cheques were issued between 1<sup>st</sup> August,2014 and 3<sup>rd</sup> October 2014. Is there possibility that the same was payment for good supplied as shown in the invoices? Yes there is possibility. The rule in special damages is that the same must be specifically pleaded and strictly proved.**

**It was for the cheques which were dishonoured the same was specifically pleaded but non strictly proved that it ws for goods earlier supplied and delivered. The off shot of this is that the plaintiff claims succeeds to the tune of Kshs.216,045 being goods supplied and delivered and not paid for by the defendant and bank charges of Kshs.7,500 making a total of Kshs.223,545”.**

8. Incoming to the determination it did, the trial court did isolate three issues for determination as follows:-

**i) Whether the plaintiff supplied goods to the defendant as alleged.**

**ii) Whether any payment was made.**

**iii) Costs of the suit.**

### **Analysis and determination**

9. From the analysis, the court found, and I hold the view, very soundly so, that supply was proved as well as an aborted attempt at payment resulting in bank charges.

10. In law, the rendition of a court must flow from the evidence produced in support of the claim. Since the court had only isolated the issues for determination and having resolved those issues in favour of the plaintiff it is difficult to understand how the final determination had to depart from the answers to the issues as framed.

11. I say the framed issues, i & ii, were determined in favour of the plaintiff because at page 23 of the judgment (page 175 of the Record of Appeal) the court said:-

**“The period under reference is 15<sup>th</sup> July, 2014 and 12<sup>th</sup> November, 2014. The plaintiff produced invoice book covering the period in question. It clearly shows that goods were duly supplied and received by the defendant. Each of the invoice is duly signed by the receiving party. It runs from 76,77,78,79,48,82,83,86,87,88,A90,90,91,92,93,94,95,B90,050,007,29,30,41,42,43 and 002.**

**The whole outstanding amount according to invoices is Kshs.216,045. This is based on calculations done. The plaintiff is also claiming payment allegedly supplied and cheques issued bounced. The plaintiff produced the cheques as folio Nos.3636 for Kshs.46,841, No. 3692 for Kshs.34,449, No. 3692 for Kshs.62,629, No. 3444 for Kshs.55,544 and No. 3460 for Kshs.52,697.**

12. I read the trial court to say that the supplies were made but payment not effected. That to me should have ended the discourse by the trial court on the framed issues. It should have been followed by a

judgment for the proved supplies, the value of the cheques and the dishonor penalty meted out to the plaintiff. That to me was the sum the plaintiff was justly entitled to.

13. The trial court however departed from that path it did chart for itself and based on a possibility not proved or alluded to in the cross examination and held that cheques could have been for the previous supplies. It is the duty of the court to reappraise the evidence and finding by the trial court to see if such a finding is justifiable or supportable by the evidence adduced.

14. I have undertaken that task and I find it difficult to agree with the trial court. It is difficult to agree with him even based on his analysis alone. His analysis of evidence reveals that the supplies spanned 15<sup>th</sup> July to 12<sup>th</sup> November 2014. The cheques were issued between 1<sup>st</sup> August and 3<sup>rd</sup> October 2014.

15. For the court to justify the possibility of the cheques being for the supplies, it needed to have undertaken a calculation to correlate the two. It did not and my own calculations also reveal that the cheques as issued do not suffice to pay supplies upto 3<sup>rd</sup> October 2014 only. It is however important to say that having found that supplies were made and not paid for, it was inappropriate in fact strange for the court to base its determination on a mere possibility. To the extent that the finding is wholly on own drawn possibilities, the trial court erred and must be corrected on that error.

16. But, I think, the court in this matter did more than just run away from its factual findings. It even ran away from the dictates of the law.

17. As drawn the claim was for liquidated sum. Once there was failure to file a defence and the plaintiff made a request for judgment the law obligated the court to enter judgment and save itself the agony and deployment of judicial resources in taking evidence.

18. There is the request for judgment dated 16/11/2015 and filed in court on 30/11/2015. That request was undoubtedly received by the registry, court fees assessed and court fees paid the same day.

19. My understanding of the 5 and 7(1) b vii is that once the request was so received, it was the duty of the Executive Officer to have the judgment entered for the court, judicial officer to endorse. It was not so entered as expected but instead there is a note that **“Mr. Mutai to deal”**.

20. Following that note, is yet another note, I believe by the trial court that **“Let the matter be fixed for hearing”**. I find it disturbing that the matter was dealt with in the said fashion. At worst if the court formed the view that the request was not merited then it was upon the court, to minute it as an order of the court and give its reasons rather than making an informal note.

21. The law under **Order 10 Rule 4(i)** is worded in those terms:

**(I) “Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs”**.

22. I see no reason, other than outright error why the trial court proceeded the way it did. The law is expressed in mandatory terms and it was not offer for the trial court to do so as did. That error must equally be corrected by a pronouncement that the court was wrong in declining to enter the requested judgment without assigning any reason.

23. The upshot is that this appeal succeeds and the judgment of the lower court is hereby set aside and in its place substituted an order allowing the plaintiffs claim in the sum of Kshs.441,761 with interest thereon from the 1<sup>st</sup> of December 2014 till payment in full.

24. I also award to the Appellant the costs of this appeal with interests on such costs from the date the same shall have been taxed till date of payment.

25. It is so ordered.

Dated and delivered at **Mombasa** this **14<sup>th</sup>** day of **June 2017**.

**HON. P.J.O. OTIENO**

**JUDGE**