



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 409 OF 2011

SHADRACK KASYOKA T/A MWANGAZA HARDWARE.....APPELLANT

V E R S U S

THARA TRADING LIMITED.....PLAINTIFF/RESPONDENT

(Being an appeal from the judgment of Hon. K. L. Kandet (Mr) Senior Resident Magistrate, delivered at Nairobi on 26th July 2011 in Milimani CMCC No. 12854 of 2003)

JUDGEMENT

1. On 26th July 2011, Hon. K. L. Kandet, learned Senior Resident Magistrate delivered his ruling in which he entered summary judgment in favour of Thara Trading Ltd, the respondent herein in the sum of kshs.296,514/25 with costs and interest pursuant to the motion dated 31.10.2008. Being aggrieved by the aforesaid ruling, Shadrack Kasyoka T/A Mwangaza hardware, the appellant herein, preferred this appeal to challenge the decision.

2. On appeal, the appellant put forward the following grounds:

1. That the learned magistrate erred in law and in fact by allowing the application for summary judgment where us there were some contentious issues that could only be determined by way of oral evidence and cross examination.

2. That the learned magistrate erred in law and in fact by ruling that plaintiff was owed where us they and no records of invoices and delivery duly signed.

3. That the learned magistrate erred in law and in fact by denying the appellant a chance to adduce evidence and the right to be heard.

4. That the learned magistrate erred in law and in fact by misdirecting himself to the fact that the appellant had admitted to have owed the plaintiff and failed to consider that parties were negotiating on a without prejudice basis.

5. That the learned magistrate erred in law and in fact by ruling that the interest was to be paid from the date of filing suit.

6. That the learned magistrate erred in law and in fact by failing to put into consideration that the appellant had filed request for particulars from the respondent and the particulars were not availed.

7. That the learned magistrate erred in law and in fact by failing to consider that the appellant had requested to cross examine the deponent of the affidavit dated 30/12/2008 an opportunity that way denied to the appellant.

8. That the learned magistrate erred in law and in fact by being persuaded by matters which were on without prejudice basis during negotiation between the parties.

9. That the learned magistrate erred in law and in fact by being persuaded by extraneous matter.

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the arguments which were made before the trial court. I have also considered the written submissions filed by the parties. It is the submission of the appellant that the respondent relied in support of the application for summary judgment the affidavit of Mrs Martha Muchiri which affidavit had statements made both orally and in writing on a without prejudice cover. It is pointed out by the appellant that in good faith and in an attempt to have an out of court settlement he made statements to the respondent which statements the respondent used against him. It is argued that the learned Senior Resident Magistrate erred when he failed to take into account the appellant's objection to the court relying on statement made on a without prejudice cover.

4. The respondent opposed the appeal arguing that the decision of The learned trial magistrate cannot be impugned. The respondent pointed out that the learned Senior Resident Magistrate in his ruling considered the following facts *inter alia*:

First, that the appellant had issued a cheque for ksh.295,200/= which was dishonoured upon its presentation to the bank by the respondent.

Secondly, the various correspondences exchanged between the advocates and in particular the letter dated 13.10.2008 containing the appellant's offer to liquidate the debt by instalments. The aforesaid letter was not done on a without prejudice basis.

Thirdly, that the court noted the contents of the statement of accounts which were produced and admitted with no objection.

5. I have perused the material that was placed before the trial court in support and against the motion dated 31.10.2008. The aforesaid motion was supported by the affidavit of Mrs Martha Muchiri sworn on 30.10.2008. Attached to the affidavit of Martha Muchiri are statements of account showing that two cheques issued by the appellant each for ksh.295,200 were dishonoured upon being presented to the bank. The deponent further averred that the appellant visited the respondent's offices and made a verbal proposal to settle the outstanding debt by instalments.

6. The deponent further referred to the letter dated 13.10.2008 which was not on a without prejudice cover which was attached to the affidavit. The same shows that the appellant expressed his willingness to settle the outstanding debt by instalments.

7. The respondent also attached to the affidavit of Martha Muchiri a copy of the statement of accounts and various invoices showing the balance of the debt due to it from the appellant.

8. There was only one letter dated 17.10.2008 attached to the affidavit of support which was on a without prejudice cover. The record shows that the appellant filed a replying affidavit in which he denied being indebted to the respondent. He claimed that whatever documents were attached to the affidavit filed in support were correspondences done on a without prejudice cover.

9. I have on my part looked at the documents annexed to the affidavit of Martha Muchiri and I have noted that its only the letter dated 17.10.2008 which was on a without prejudice basis which was annexed to the supporting affidavit. The learned Senior Resident Magistrate carefully considered the material placed before him. He appreciated the argument that correspondences exchanged on a without prejudice basis

cannot be admitted in evidence. Though he did not order to be expunged from record the letter dated 17.10.2008 which was on a without prejudice basis, nevertheless he considered the other affidavit evidence which were not on a without prejudice cover and came to the conclusion that the motion had been established on a balance of probabilities.

10. On my part, I am satisfied that after considering the other affidavit evidence and leaving out the letter dated 17.10.2008 was sufficient to support an application for summary judgment.

11. In the end and on the basis of the above stated reasons the appeal is found to be without merit. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 2nd day of June 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent