



REPUBLIC OF KENYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 136 OF 2011

SECUREX LIMITED.....APPELLANT

VERSUS

PRIME CARTONS LIMITED.....RESPONDENT

**JUDGMENT**

1. This is an appeal arising from the judgment and decree of the Senior **Resident Magistrate Honourable P.Nditika (Mr) delivered on 23<sup>rd</sup> February 2011 in CMCC No. 3411 of 2008, Milimani Commercial Courts, Nairobi.** The plaintiff in the lower court was **Securex (K) Ltd.** It sued the defendant **Prime Cartons Ltd** seeking for recovery of a sum of kshs **582,257.80** plus interest being alleged dues for security services rendered to the defendant by the plaintiff in respect of three contracts signed between the parties for provision of security services at Falcon Road and Spring Valley Premises.

2. The defendant/now respondent filed a statement of defence admitting that it received services from the plaintiff/appellant but denied owing the sums claimed in the plaint. The respondent contended that it had settled all sums due prior to the institution of the suit in the lower court. The respondent further counterclaimed for the goods stolen from its Falcon Road Premises during the appellant's watch but did not prosecute the counterclaim.

3. The suit was heard interpartes and in his judgment delivered on 23<sup>rd</sup> February 2011, the trial magistrate found that the plaintiff/appellant had not proved its case against the respondent/defendant on a balance of probabilities and dismissed the suit with costs. It is that dismissal order that provoked this appeal, challenging the decision of the trial magistrate.

4. The Memorandum of Appeal dated 22nd March 2011 raises ten grounds of appeal namely:-

*1. The learned magistrate misapprehended and misunderstood the extent to which a party is bound by its pleadings.*

*2. The learned magistrate erred by failing to consider the testimony of the witness regarding the security services provided at Mombasa Road.*

*3. The learned magistrate erred by failing to consider the evidence adduced such as invoices, receipts and the ledger summary in support of the security services provided at Mombasa Road.*

4. *The learned magistrate erred by failing to take into account that the respondent expressly admitted in its pleadings that it received security services from the appellant.*

5. *The learned magistrate erred by acting on assumptions and or experience instead of the evidence adduced before him.*

6. *The learned magistrate made a false assumption that the respondent paid the appellant Kshs 197,304.40 yet the respondent neither adduced oral or documentary evidence in support nor was the alleged payment pleaded.*

7. *The learned magistrate made a false assumption that kshs 582,257.80 was only for security services provided at Mombasa Road thereby failing to take into account the other security services provided at Falcon Road and Spring Valley Lane.*

8. *The learned magistrate erred in holding that the respondent did not owe the appellant any money.*

9. *The learned magistrate erred in holding that the appellant had not proved its claim on a balance of probabilities.*

10. *The learned magistrate failed to exercise its discretion fairly and judiciously.*

5. The appellant therefore prayed that the appeal be allowed with costs. In support of this appeal, the appellant's counsel filed submissions dated 23<sup>rd</sup> April 2015 wherein they abandoned grounds number 1,2,3, and 6 of the Memorandum of Appeal.

6. On grounds 4 and 5, the appellant submitted that the trial magistrate acted on wrong principles of law in that: he failed to take into account the respondent's express admission of the claim in its pleadings that it received security services from the appellant as per paragraphs 2 and 3 of its statement of defence; That having admitted receipt of the security services, by implication it conceded that the appellant was entitled to charge for services rendered. They relied on **Abok James Odera t/a Odera and Associates V John Patrick Machira t/a Machira & Company Advocate [2013] e KLR** . It was further contended by the appellant that the trial magistrate never acknowledged the admission by the respondent hence he failed to address all issues arising in the suit.

7. Secondly, that the invoices produced by the appellant proved that the respondent had not settled the account. That the respondent never adduced evidence that it paid for the services rendered as pleaded in its defence. Reliance was placed on **Magundo General Stores t/a Pepco Distributors** where it was held that mere denial in a debt recovery matter is not sufficient; there must be some reason why the defendant did not owe money. In this case it was contended that no reasons were advanced why the respondent did not owe the money; Third , that having found that the appellant could not claim in respect of services rendered to the respondent at their premises along Mombasa Road, the trial court should have proceeded to total up all the other chargeable items not relating to Mombasa Road and award the value to the appellant which he did not, and neither did he give any reasons for failing to do so, yet the claim was clearly discernible from the voices.

8. On ground 7, it was submitted that the trial magistrate made false assumptions that the sum of Kshs 582,257.80 demanded by the appellant was only for security services rendered at Mombasa Road and failed to take into account that other services were provided at Falcon Road and Spring Valley Lane, yet the appellant had averred that it rendered services to the respondent at Falcon Road and Spring Valley Lane respectively. It was contended that the trial magistrate failed to scrutinize the evidence adduced before him and address his mind on the invoices produced by the appellant and that had he done so he would have found that some of the services rendered were in respect of Falcon Road and Spring Valley Lane, and that he therefore misapprehended the evidence before him.

9. On ground 8, it was submitted that the trial magistrate erred in finding that shs 197,300.40 had not

been discounted in the claim yet there was no denial by the respondent and that this was what the appellant pleaded and not what the respondent said they had paid. That it was an error of fact to state that nothing remained due to the appellant after payment of shs 197,300.40 .

10. On grounds 9 and 10, it was submitted that the court exercised its jurisdiction unfairly and injudiciously. Reliance was placed on **Morabo Ltd V Sino hydro Corporation Limited [2014] e KRL, Storm Chemicals Industries Ltd V Moses Maina & Others [2009] e KLR.**

11. The appellant reiterated that the trial magistrate misapprehended facts of the appellant's case and that he acted on wrong principles in dismissing the appellant's suit with costs. The appellant prayed that this appeal be allowed with costs.

12. In opposition to the appeal, the respondent filed its submissions on 19<sup>th</sup> October 2015. The respondent contended that the three contracts dated 8<sup>th</sup> February 2006, 28<sup>th</sup> March 2006 and 13<sup>th</sup> February 2006 as pleaded in pages 1-17 of the supplementary record of appeal formed the basis of the first two contracts which were for Radio Alarm Services at Falcon Road Spring Valley premises while the contract dated 13<sup>th</sup> March 2006 was for Guarding Services at Falcon Road premises.

13. According to the respondent, there was no pleading touching on security services for Mombasa Road premises yet exhibits 1(a) (b) and (c) are invoices for shs 309,297.00 relating to Mombasa Road. That a judgment in favour of the appellant on unpleaded facts would have robbed the respondent of an opportunity to defend the claim. On the principle that a party is bound by its pleadings, reliance was placed on the **Petition No. 3/2013** where it was held that:

***“It is trite law that each party is bound to its own pleadings and that the pleadings do accord with evidence.”***

14. Further, that it is pleadings which in turn limits the issues upon which a trial court may pronounce. On the contention that the trial magistrate should have entered judgment in favour of the appellant for the amount outside the Mombasa Road claim, it was resisted on the grounds that:

1. No evidence was led at the trial to show that the respondent owed the sums claimed and that PW1 was unable to explain how much of the claimed Kshs 582,257.80 was for Falcon Road and Spring Valley accounts.

2. The plaintiff admitted that Kshs 197,304.40 had been received from the defendant/respondent prior to the filing of the suit. That the pleadings and statements of accounts were at variance.

3. That the accounts ledger submitted was a combined one for all transactions in respect of the respondent's accounts for Mombasa Road, Falcon Road and Spring Valley. It was therefore contended that it was upon the appellants and not the court to distinguish the entries on the statement of account which was not done .

15. Further, that it was upon the appellant to distinguish which invoices were settled by what payments ; which invoices related to the pleaded contracts; and which invoices were for Mombasa Road; which invoices remained unpaid and for what premises; and not merely place material before the court which did not amount to proving a case.

16. It was submitted that in view of the foregoing, the appellant's evidence did not reach the threshold required and that the appellant failed to discharge the burden of proof as espoused in Section 107 of the Evidence Act to prove its claim hence the appeal herein should be dismissed with costs to the respondent.

17. This being a first appeal, this court is obliged to exercise its powers under Section 78 of the Civil Procedure Act and in doing so, do any of the following acts the following:

- a. Determine a case finally;
- b. Remand a case;
- c. Frame issues and refer them for trial.
- d. Take additional evidence or require the evidence to be taken
- e. Order a new trial.

18. In exercising the above power, an appellate court is cautioned not to interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the trial court is shown to demonstrably to have acted on wrong principles in reaching his conclusion. See **Mkube V Nyamuro [1983] KLR**.

19. The provisions of Section 78 of the Civil Procedure Act have been variously interpreted by courts based on the decision in **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where the Court of Appeal was clear that the court on appeal is obliged to examine and evaluate the evidence of the trial court and come to its own independent findings and conclusions but in doing so, give an allowance to the fact that it neither heard nor saw the witnesses testify.

20. Applying the above principles, and reexamining the evidence in the lower court, the appellant testified and called 2 witnesses. PW1 Baryl Asavedo, an accountant with the appellant testified on oath that he had worked with the appellant for 12 years. That the respondent was their client. That the appellant provided the respondent with security guards and radio alarm backup. He produced three agreements dated 13th February 2006, 8<sup>th</sup> February 2006 and 28th March 2006. He testified that the services were provided and the defendant/respondent was paying. That they started with Falcon, and Mombasa Road. He sought for shs 582,257.80 for 2007 to February 2008. He also produced invoices and statements, and demand notice. He was aware of allegations of theft, which he stated was insubstantial.

21. In cross examination by Mr Okello advocate for the respondent, PW1 stated that the services were to be offered to Falcon and Spring Valley. He also stated that Mombasa Road was not included in the 3 agreements although he had an invoice for Mombasa Road. He confirmed that the plaint stated Spring Valley. He stated that the amount stated in the invoices is not all that was contracted for and that what was owed as at February is what was claimed.

22. In re-examination, PW1 stated that they relied on good faith that the defendant would pay. Further, that there were credit notes that the defendants paid. He denied receiving a letter from the defendant that the appellants had overcharged the respondents.

23. The appellant also called PW2 John Ogutu who testified that he was an Operations Manager with the appellant security Company. He stated that he was familiar with the subject contracts. That in early 2008 they received a report concerning theft of machine parts at the respondent's go down. They visited the scene and police also visited the scene but that nobody was charged. He produced incident report presented to the police as well as a follow up report. He stated that there was no evidence of breakage albeit it was alleged that the machine parts lost were worth 4.5 million. He stated that their guards still worked for the appellant.

24. In cross examination, PW2 stated that he was not aware of any other case. He also stated that they provided security services along Mombasa Road go Downs. He also stated that he did not visit the scene personally and that Corporal Mutisya received the report and arranged for the guards to go to police and record a statement. He stated that nobody was charged and that there were no particulars indicated in the set off or counter claim.

25. The defendants closed their case without calling any witness.

26. In a brief 1 ½ page judgment, the learned trial magistrate framed only one sole issue for determination and that is whether there was breach of any contract and therefore whether there was money owing by the respondent to the appellant herein. The trial magistrate found that the appellant had not discharged the burden of proving its case against the respondent on a balance of probabilities for reasons that its pleadings did not mention Mombasa Road. Further, that the invoices raised touched on Mombasa Road which was devoid of an amended plaint; and that the alleged admission by the appellant did not cure the fatal defect. Relying on the **Magundo General Stores V Pepco Distributors**, the trial court found that there must be some reason why the defendant did not owe the money:- either there was no contract or if it was carried out, it could be that payment had been made and could be proved; and that it was not sufficient to deny liability without some reason given. The trial magistrate found that in the absence of a contract for Mombasa Road, the claim on Mombasa Road must fail. He also stated that the statement showed that the appellant did not credit kshs 197,300.80 which had been paid by the respondent and that if that credit was given, nothing was owing. Further, that the fact that the respondent did not call any evidence to controvert the appellant's case did not mean that the appellant's case had to succeed. He therefore dismissed the appellant's suit against the respondent with costs. It is that decision that provoked this appeal.

27. I have carefully and consciously considered the appeal herein, in line with the pleadings, the evidence adduced in the lower court by the appellant, both oral and documentary, the submissions by both parties advocates on record and the authorities relied on. In my view, considering the grounds of appeal as submitted by the appellant's counsel, the main issues for determination are:

1. *Whether there was an admission of the appellant's claim by the respondents.*
2. *Whether the trial magistrate acted on wrong principles and therefore misapprehended the law and facts vis avis the evidence adduced by the appellant.*
3. *Whether the trial magistrate failed to take into account the fact that other security services were provided at Falcon and Spring Valley Lane.*
4. *Whether the trial magistrate erred in finding that the appellant had not given credit for Kshs 197,300.80 and that no money was outstanding.*
5. *Whether the trial magistrate erred in the manner in which he exercised his discretion.*
6. *What orders should this court make*
7. *Who should bear the costs of the appeal.*

28. On the first issue of whether there was an admission of the appellant's claim, this court must relook at the pleadings by both parties. In paragraphs 3,4, and 5 of the plaint, the appellant pleaded as follows:-

*"3. By agreements in writing dated 8<sup>th</sup> February 2006, 28<sup>th</sup> March 2006 and 13<sup>th</sup> February 2006, the plaintiff agreed to provide the defendant with a day and night security services together with installation of a radio alarm transmitter at the defendant's premises located at Falcon Road and Spring Valley Lane respectively. In turn, the defendant agreed to pay the plaintiff the charges set out in the various invoices raised by the plaintiff, which charges as agreed, were based on the plaintiff operating cost at the time of raising the invoices to the defendant.*

*4. Pursuant to the above mentioned agreements the plaintiff duly deployed its security guards to the defendant's premises at Falcon Road and installed the radio alarm transmitter at the defendant's premises at Spring Valley Lane.*

*5. As agreed, the plaintiff from time to time sent to the defendant invoices for the services*

rendered. As at 1<sup>st</sup> March 2008, the plaintiff had raised invoices amounting to kshs 779,562.20 out of which the defendant paid kshs 197,304.40.

Consequently there is now due outstanding and payable by the defendant to the plaintiff, a sum of kshs 582,257.80 and the plaintiff claims the said sum of kshs 582,257.80.”

29. In the defendant’s statement of defence and counterclaim filed on 17<sup>th</sup> September 2008, the defendant stated as follows:

“1. not material

2. The defendant admits that it has guarding and alarm services from the plaintiff but denied owing the sum of kshs 582,257.80. The defendant particularly denies being indebted to the plaintiff in the sum of the kshs 582,257.80 or any other sums and puts the plaintiff to strict proof thereof.

3. While the defendant admits using the security services from the plaintiff it denies that it owes the sum of kshs 582,257.80 or any other sum and also denies that the services were provided unto 1<sup>st</sup> March 2008 as alleged in paragraph 3 of the plaint and puts the plaintiff to strict proof thereof.

4. In the alternative and without prejudice to the foregoing the defendant avers that it paid all sums rightfully owing to the plaintiff prior to the filing of this suit.”

30. According to the appellant, the trial magistrate erred in law by failing to take into account that the respondent expressly admitted in its defence that it had received security services from the appellant and that having admitted using the appellant’s services, the respondent by implication conceded that the appellant was entitled to charge for services rendered.

31. My careful perusal of the plaint and relevant parts relating to “admission” by the defendant indeed show that there was an admission that the appellant did provide security services to the respondent. The plaintiff also produced three contracts the subject of its claim as pleaded in paragraph 3 of the plaint. The said contracts undoubtedly concerned provision of the security services at Falcon Road and Spring Valley Lane and **NOT** Mombasa Road. The contracts were very specific on the premises where security guards or installation of radio alarm was to be situated and Mombasa Road was not one of them. It follows, therefore, that albeit there was an express admission by the respondent that the plaintiff/appellant provided it with security services, such admission could only be with regard to provision of such services at the contracted premises which were expressly pleaded in the plaint namely Falcon Road and Spring Valley Lane as particularized in paragraph 3 of the plaint and as per the three contracts produced as exhibits and not an admission of security services at Mombasa Road or at any other place which was not pleaded.

32. In the instant case, therefore, albeit the trial magistrate did not acknowledge such admission, failure to make such an acknowledgment of admission cannot on its own form a basis of a ground of appeal as there was indeed no issue regarding provision of security services at the pleaded premises. Further, I find that there was no denial or issue that with provision of security services, the appellant was entitled to charge a fee since the fees chargeable was as per the 3 contracts produced in evidence.

33. Accordingly, I find the grounds 4 and 5 of appeal as argued by the appellant regarding admission of the claim by the respondent wanting in merit and I reject it for the reasons given above.

34. Having found that there was no dispute that the appellant provided the respondent with security services as pleaded and as per the three contracts produced in evidence, the next question would be whether the appellant discharged the evidential burden of proving that having rendered security services/installed radio alarms at the respondents premises at Falcon Road, and Spring Valley Lane, it was owed the sums claimed in the plaint and as per the 3 contracts produced in evidence?

35. In support of its claim, the appellant produced 3 contracts EX1(A) is dated 8<sup>th</sup> February 2006 for installation of a radio alarm system agreement at plot 209/9531/2 Falcon Nairobi. Payment was to be in accordance with clause 4 of the agreement which provides:

- a. Rental charges on demand and in advance -based on the company's operating costs at the time of quotation to the client,*
- b. Reasonable extra charge for duties performed on a public holiday*
- c. Additional charges where in its opinion the appellant is prevented from performing its services by an act or omission on the part of the client/respondent.*
- d. Installation fee in signing of the agreement*
- e. Annual communication commission of Kenya radio license fee.*

36. It is worth noting that no specific amount of money due on signing of that agreement was provided. The same applied to the agreement dated 28<sup>th</sup> March 2006 produced as P EX 1(B) for installation of radio alarm system at Spring Valley Lane off Spring Valley Road, on plot L.R. 7158/272. The invoices issued by the appellant for security alarm system/back up services are the ones dated:

- a. 1<sup>st</sup> February 2008 vide invoice No. INA 79433 for kshs 5742.00 inclusive of tax*
- b. 1<sup>st</sup> February 2008 invoice No. INA 79432 for shs 6206.00 inclusive of tax.*
- c. 1<sup>st</sup> February 2008 invoice No. INA 79431 for shs 6902.00 inclusive of tax*
- d. 1<sup>st</sup> January 2008 invoice INA 77735 for shs 5742.00 inclusive of tax.*
- e. 1<sup>st</sup> January 2008 INA 77734 for shs 6206 inclusive of tax*
- f. 1<sup>st</sup> January 2008 invoice INA 77733 for shs 6902.00 inclusive tax*
- g. 1<sup>st</sup> January 2008 invoice INA 003053 for shs 1,450.00 being annual CCK license fee.*
- h. 1<sup>st</sup> January 2008 INA 003052 for shs 1450.00 annual CCK license fee.*
- i. 1<sup>st</sup> October 2007 INA 73098 for 5742 Ns*
- j. 1<sup>st</sup> October 2007 INA 73097 for 6206 Ns*
- k. 1<sup>st</sup> October INA 73096 for 6902 Ns*
- l. 1<sup>st</sup> December 2007 INA 76084 for 6902 Ns*
- m. 1<sup>st</sup> December 2007 INA 76085 for 6206 Ns*
- n. 1<sup>st</sup> December 2007 INA 76086 for 5742 Ns*
- o. 1<sup>st</sup> November 2007 INA 74580 for shs 6902 Ns*
- p. 1<sup>st</sup> November 2007 INA 74581 for shs 6206 Ns*

q. 1<sup>st</sup> November 2007 INA 74582 for shs 5742 Ns

r. All the above invoices related to either automatic or manual radio alarm backup services.

37. The 3<sup>rd</sup> contract relating to guards services is the one dated 13<sup>th</sup> February 2006 – P Ex 1(c). Payment would be as per "the schedule" on demand. The invoices relating to provision of guards services are for both Falcon Road Premises and Mombasa Road Premises as follows:

a. 1<sup>st</sup> February 2008 ING 17983 for

i. One day security guards for the month-19,350

ii. One dog with handler for the month at Mombasa Road Premises 32,850

Total 60,552.00

b. 1<sup>st</sup> February 2008 ING 18258

i. One day security guard for the month

ii. One month right security guard – she 19350 for the month at Falcon Road shs 19,350

Total 44,892.00

c. 1<sup>st</sup> January 2008 ING 17780

i. One day security guard 19,350

ii. One night security for the month at Falcon Road 19.350

iii. Four extra public holidays in December 2007 – 17<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup> and 31<sup>st</sup> -5600

Tax 7088

Total 51,388.00

d. 1<sup>st</sup> January 2008 ING 17510

i. One day security guard for the month 19.350

ii. One dog with handler for the month @ Mombasa Road Premises 32,850

iii. 4 extra public holidays 5600

Tax 9248.00

Total 67,048.00

e. 1<sup>st</sup> December 2007 ING 17020

i. One day security guard for the month 19,350

ii. One dog with handler for month at Mombasa road 32,850

Tax 8352

Total 60 552.00

f. 1<sup>st</sup> February 2007 ING 17292

i. One day security for the month 19350

ii. One night security guard for the month at Falcon road 19,350

Tax 6192

Total 44,892.00

g. 1<sup>st</sup> November 2007 ING 16876

i. One day security guard for the month 19,350.00

ii. One night security guard for the month at Falcon road 19,350.00

Tax 6192.00

Total 44892

h. 1<sup>st</sup> November 2007 ING 16184

i. One night security guard for the month 19,350

ii. One day security for the month 19,350

iii. One dog with handler for the month at Mombasa road premises 32850

Tax 11448

Total 82,998.00

i. 1<sup>st</sup> November 2007 ING 16602

i. One day security guard for the month 19,350

ii. One day with handler for the month at Mombasa Road premises 32850

Tax 8352

Total 60552

j. 26<sup>th</sup> February 2008 CNG 01220

i. One day security guard withdrawn from 22<sup>nd</sup> February 2008 5160

ii. One night security guard withdrawn from 22<sup>nd</sup> February 2008 from Falcon Road Premises 5160

*Tax 1651.20*

*Total 11,971.20*

*k. 26<sup>th</sup> February CNG 01219*

*i. One day security guard withdrawn from 22<sup>nd</sup> February 2008 5160*

*ii. One dog with handler withdrawn from 22<sup>nd</sup> February 2008 from Mombasa Road premises 8760*

*Total 2227.20*

*Total 16,147.20*

38. The statements of account showing the customer's ledger and produced as P Ex 3 show that as at 31<sup>st</sup> December 2007 the amount due and owing was Kshs **582,257.80**.

39. It is the above sums of money which the appellant demanded from the respondents by their advocates letter dated 10<sup>th</sup> March 2008. In the defence filed on 17<sup>th</sup> September 2008 the defendant admitted that it had guarding and alarm services from the plaintiff but denied owing the sum of shs 582,257.80. It also denied owing the said sums as at 1<sup>st</sup> March 2008 and in the alternative pleaded that it paid all sums rightfully owing to the plaintiff prior to the filing of the suit. The defendant/respondent also counterclaimed for the loss of or full value of the stolen goods but whose particulars were never provided in the pleadings. Neither did it give any evidence to controvert the plaintiff/appellant's claim and witness testimonies.

40. In dismissing the appellant's suit, the trial magistrate found that there was no contract relating to security services at Mombasa Road Premises and that the appellant did not give credit to shs 197,300.40 which had been paid by the respondent and that if that credit was given, nothing was owing.

41. Whereas it is true that there was no contract relating to provision of security services for Mombasa Road Premises and neither was there any pleading specifically mentioning such services, I am in agreement with the appellant's counsel's submissions that indeed, there was a contract for provision of such services at Falcon Road and Spring Valley Premises which were specifically pleaded in paragraph 3 of the plaint. It was therefore, in my view clearly an error on the part of the trial magistrate to dismiss the plaintiff/appellant's suit on the basis that there was no contract for Mombasa Road, without examining the contract and invoices for the services rendered at the Falcon Road and Spring Valley Lane Premises which disclosed the services rendered and invoices and statements prepared for the amounts due.

42. Further, I find that the finding that the sum of shs 197,300.40 was not credited was in error as there was no such evidence before him to the effect that such sums of money was ever paid and or received by the appellant from the respondent.

43. I have also meticulously examined the invoices produced, and the statements of account for the services rendered before the trial court. In my humble view, if the trial magistrate had calculated the total amount due as per the invoices produced and credited the sums received as per the statements and deducted the amount due on the Mombasa Road Premises, he could have come to a definite figure which he could have found due to the appellant.

44. Out of the above sums of money, the statements of accounts show that some invoices were settled as per the credit entries shown on the statements whereas some invoices are not reflected in the debit entries albeit there is no evidence that they were settled such as the invoice ING 17780 for

shs 51,3380.

45. Nonetheless, looking at the manner in which the appellant prosecuted its case, I agree with the respondent's counsel's submissions that documents and figures were thrown at the trial magistrate. No attempt was made to explain the details in the invoices compared with the statements of accounts and how they balanced out. Had that been done, then the trial magistrate's duty would have been easy, that of establishing whether the sum claimed was not only due but whether it was owing by the respondent to the appellant.

46. From the contract documents, invoices and statements of accounts produced, there is no doubt that there is a possibility that some monies were owed. However, as the trial magistrate concluded that there was no contract for Mombasa Road and proceeded to dismiss the suit for want of proof without examining the invoices and statements of accounts which revealed that there were monies owing respecting the contracted premises, I find that he was in error which error, in my view, led to a mistrial and misjustice.

47. For that reason alone, I would allow this appeal and set aside the order of the trial court dismissing the appellant's suit and substitute it with an order that the suit shall be remitted back to the Chief Magistrate's Court at Milimani for a new trial. The new trial shall be heard before another magistrate of competent jurisdiction since this court has learnt that the trial magistrate Mr P. Nditika has since passed on.

48. And owing to a mistrial, I order that each party bear their own costs of this appeal and of the dismissed suit.

Dated, signed and delivered in open court at Nairobi this 13th day of April 2016.

**R.E. ABURILI**

**JUDGE**

**In the presence of :**

Miss Mwasau h/b for Mr Nyaburi for the appellant

N/A for Respondent (Angelo-clerk from the respondent's counsel's office states that she will give the pronouncement to Ms Okulo as there was no other advocate in court to hold their brief).

Henry: Court Assistant