



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 47 OF 2011

THARA ORCHADS LIMITED.....APPELLANT

VERSUS

G NORTH & SONS LIMITED.....RESPONDENT

JUDGMENT

(Being an appeal from the judgment delivered by Honourable

Mrs. L. Arika, Senior Magistrate, Milimani Commercial

Courts on 15th June, 2011

This appeal arises from the Judgment of the lower court dated 11th January, 2011. The appellant had been sued by the respondent for the recovery of Kshs. 502,073/= being the sum due and owing for goods sold and delivered. The appellant had denied the claim and raised a counter claim of Kshs. 275,335.50/=.

Both parties called one witness each and produced some documents to advance their respective cases. After the hearing the learned trial magistrate believed the evidence of the respondent and gave judgment in its favour as claimed in the plaint. The appellant's defence and counter claim were dismissed with costs to the respondent.

Aggrieved by the said judgment, the appellant lodged this appeal on the basis that the trial court erred in law and fact by allowing the plaintiff's suit and dismissing the defendant's counterclaim with costs. The lower court is also faulted for failing to put any or any due weight on the evidence adduced by the defendant while putting into consideration the evidence of the plaintiff.

On the whole, the appellant alleges, the decision appealed unjustly enriches the respondent and unfairly deprives the appellant of payment due from the respondent while compelling the appellant to make further payment to the respondent.

Finally, it is the appellant's case that the decision appealed is inconsistent with the pleadings and the evidence adduced by the parties, partial and unobtainable in law and in fact.

As the first appellate court I have gone through the record of the lower court and the submissions made by counsel in writing before me. This having been a commercial transaction, the evidence presented by the parties was documentary which the learned trial magistrate considered. Indeed the learned trial

magistrate said as follows,

“I have carefully evaluated the evidence on record and more particularly the exhibits. P.W. 1 was Joseph Maina Kariuki the plaintiff’s accountant who dealt with credit control issues. His testimony revealed that the goods ordered were specific with specific description. “

She then set out the LPOs and observed that P.W. 1 was clear the issue before the court was for orders for the year 2005 and not 2004. The orders in the LPOs tally with the orders in the delivery notes. The court then observed that,

“I am satisfied that the plaintiff supplied specific goods that the defendant ordered for and that all payments were acknowledged.”

The learned trial magistrate then analyzed the counter claim and gave reasons for finding that it must fail. Indeed, she even observed that the appellant’s witness corroborated the respondent’s case by confirming that he made the orders for the goods supplied by the respondent and that the claim was for the year 2005 orders and not 2004. That witness also confirmed the respondent’s delivery notes and receipt of invoices.

On my part, I have no hesitation in finding that the appellant is bent on avoiding its obligation to pay for goods sold and delivered as rightly claimed by the respondent. It is clear from the evidence of the appellant’s witness that he is the one who placed the orders and that they were for diverse dates in the year 2005. In his own words,

“They are different from the orders of 2004 they are for 2005 not 2004. I received the goods.”

It is also the same witness who said that the appellant’s counter claim was based on an earlier transaction in the year 2004. The witness therefore did not aid the appellant in establishing the counter claim. The invoices presented before the learned trial magistrate tallied with the delivery notes that had been presented. The respondent confirmed that the appellant paid by cheque towards liquidating the amount raised in the invoices following the appellant’s LPOs. The total amount was Kshs. 726,465/=

After the payment by two cheques of Kshs. 170,900/= and Kshs. 53,492/= respectively, the balance was Kshs. 502,073/=. This is what was claimed by the respondent. In the absence of any discounts or set offs the respondent proved its case against the appellant.

I find the judgment of the lower court was based on the evidence presented, sound reasoning and conclusions. There is no reason to disturb the same. This appeal is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 12th day of April, 2016.

A. MBOGHOLI MSAGHA

JUDGE