REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 158 OF 2013

BETWEEN

ALI JUMA OKUMU...APPELLANT

AND

EQUATOR BOTTLERS LIMITED......................................RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Gitari, CM dated 14th December 2012 at the Chief Magistrates Court at Kisumu in Civil Case No. 716 of 2003)

JUDGMENT

1. By a plaint dated 1st August 2003, the appellant, Ali Juma Okumu, filed suit against respondent for breach of contract and consequent damages. The suit was dismissed thus precipitating this appeal.

2. As this is a first appeal from the magistrate's court, I am guided by principle that the duty of the first appellate court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that it neither heard or saw the witnesses (see ***Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123****). In order to proceed with this task it is necessary to set out the case presented by the parties in order to deal with appeal.*

3. The appellant's (PW 1) testimony largely mirrored what was in his pleadings. He averred that he applied for and was licenced by the respondent to operate a Small Strategic Depot Kiosk (''SSD'') selling its products at Shibale, Mumias by a letter dated 17th March 1999. In order to start operations, he paid a Kshs. 300,000/- deposit refundable upon termination of the contract. In the course of trading, the appellant testified that the respondent offered its SSD Operators an incentive for the period 22nd May 2000 to 30th June 2000. Under the incentive, the SSD operator was to get 4 crates of 300ml soda for every 100 crates of Coca-Cola brand purchased from the respondent. The appellant told the court that he made sufficient purchases entitling him to 101.28 crates of 300ml liquid free soda which the respondent failed to supply. The appellant therefore claimed, '*Specific performance and delivery of 101.28 crates of soda,'* in the plaint.

4. The appellant also averred that he was entitled to enjoy supply monopoly at Shibale but the respondent authorised its distributor to trade as an SSD stockist thereby interfering with his business resulting in decreased sales. He further testified that by a letter dated 21st May 2001, the respondent issued notice to terminate its licence for failure to meet sales targets and on 20th June 2001 the respondent terminated without giving him one year's notice.

5. The appellant prayed for refund of the deposit of Kshs. 300,000/- and Kshs. 394,968/- loss of profits

for one year as a result of failure to give him one-year notice of termination. In support of his claim for loss of profits, the appellant called Francis Okello (PW 2) who testified that the appellant's average profit per month was Kshs. 32,914 and as a result of the termination of license, he suffered Kshs. 394,948/- loss for the year.

6. The respondent filed a defence denying the appellant's claim. Gabriel Lubanga (DW 1), its General Sales Manager, confirmed that the appellant was its licencee and was allowed to operate the SSD at Shibale on terms of an SSD/Kiosk placement agreement dated 17th March 1999 and also upon purchasing stock worth Kshs. 300,000/- and obtaining a license from the local authority. DW 1 testified that under agreement, the appellant was required to keep adequate products of Coca-Cola to last 4 days and that either party was entitled to terminate it by giving one month's notice.

7. DW 1 testified that the appellant operated the SSD until sometime in 2001 when his stock levels began to drop to an extent that he was unable to meet the contractual requirements. After warning the appellant, the respondent issued a notice citing the drop in stock as the reason for termination. DW 1 denied that the Kshs. 300,000/- paid by the appellant was a refundable deposit. He told the court that it was a payment for supply of soda and that in fact the appellant was supplied with soda worth Kshs. 229,178.88 and Kshs. 120,360/- was a deposit for bottles and crates. He also denied that the appellant was given a monopoly.

8. DW 1 confirmed that there was a promotion but that the appellant was not amongst the participants as he had not met the required targets. He produced a list of names for the participants who had been given targets to meet over and above their usual targets which did not include the appellant as a participant as he had not met his targets.

9. The trial magistrate dismissed the appellant's suit on the ground that he had failed to prove the allegations in the plaint on a balance of probabilities. In the memorandum of appeal dated 14th December 2012, the appellant put forward the following grounds of appeal;

> *1. The learned Chief Magistrate erred in fact in believing the respondent's evidence against the appellant's in connection with the plaintiff's entitlement to 101 crates of soda.*
>
> *2. The learned Chief Magistrate erred in failing to properly scrutinize the appellant's documents before her to see that the purchase dates were all within the promotion period and that he was qualified as a participant and that is why the respondent awarded him a certificate of appreciation for the year 2000.*
>
> *3. The learned Chief Magistrate erred in believing the respondent and holding that the Kshs. 300,000/-was not refundable to the appellant as it was meant for purchase of the products.*
>
> *4. The learned Chief Magistrate erred in failing to properly evaluate the appellant's evidence and the documents before her thereby failing to reach the conclusion that the appellant purchased all his products in cash and as at the time dealership was terminated, he owed no money to the respondent.*
>
> *5. The learned Chief Magistrate erred in failing to note that the appellant having purchased all his products in cash, the Kshs. 300,000/- deposit remained unutilised and was due for refund to the appellant.*
>
> *6. The learned Chief Magistrate's judgment is against the weight of the evidence.*

10. Apart from reiterating the grounds of appeal, counsel for the appellant, Mr Kasamani, argued that the appellant was a SSD operator and the incentive was addressed to SSD operators including the appellant who had met the set targets hence he was entitled to the 101.28 crates of soda and he produced records to demonstrate that he had attained the targets and was in fact awarded a certificate of appreciation.

11. Counsel submitted further that from the evidence, it was clear that the appellant was supplied with

products worth Kshs. 229,000/- however the respondent did not explain what happed to the balance from Kshs. 300,000/-. Counsel submitted that the signature on the SSD agreement was forged and as such it was not applicable.

12. Counsel for the respondent, Mr. K'Ouko, submitted that the appellant failed to prove that he was a beneficiary of the incentive as the incentive was addressed to specific individuals as demonstrated by the list produced by DW 1. On the issue of refund of Kshs. 300,000/-, counsel submitted it was not refundable as it was for supply of products. He observed that the appellant did not produce any receipt to show that he made a cash purchase for the products. Counsel concluded that the agreement between the parties provided for a month's notice before termination of the contract and not one year notice as alleged by the appellant. On the issue of the appellant's signature on the SSD agreement, counsel submitted that the issue did not arise during trial and the documents relied on in the judgment were all admitted in evidence.

13. From the grounds of appeal set out in the memorandum of appeal and arguments by counsel two issues fall for consideration. First, whether the appellant was entitled to 101 crates of soda arising from the incentive promotion. Second, whether the appellant was entitled to a refund of Kshs. 300,000/- paid at the inception of the relationship. Before I consider with these issue, I will deal with the issue of whether there was an agreement between the parties as this would form the basis of the relationship between the appellant and respondent.

14. The respondent produced the agreement between it and the appellant dated 17th March 1999. It was implied by counsel for the appellant that the appellant's signature was a forgery. I agree with counsel for the respondent that this issue is being raised for the first time on appeal as nothing of the sort was suggested to DW 1 in cross-examination and the document was produced without objection. The agreement provides that either party may terminate it by giving one month's notice. It is not in dispute that the respondent issued one month's notice. As the termination was within the provisions of the contract, there was no breach and the claim for loss of profit for one year could not be sustained.

15. The appellant's case on the incentive was grounded on a letter addressed by the respondent to its SSD Operators as follows;

> *SPECIAL INCENTIVE ON COCA-COLA*
>
> *Starting today, 22nd May 2000 and ending 30th June 2000, if you buy 50% coke on every purchase and meet your month's coke target.*
>
> *Provided that you will also meet your overall target on both packages i.e 300ml and 500ml.*
>
> *You will then be entitled to four liquid-free cases of 300ml coca-cola, on every purchase of 100 cases from the plant.*
>
> *For example*
>
> *You sell 1000 cases, you will get 40 cases 300ml liquid free,*
>
> *What are you waiting for …… Usizubae, Let's get started.*
>
> *On receipt of this letter please acknowledge by your signature and official rubber stamp endorsement.*

16. When the appellant attempted to prove the document, the respondent objected to the document on the ground that it was a photocopy and a forgery. The learned magistrate allowed the production of the document and marked it as Exhibit No. 6 on the ground that the allegation of forgery by the respondent was one of fact and could be dealt with at the trial. In the judgment, learned magistrate held that the document was inadmissible as **section 69** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** had not

been complied with. The provisions states that secondary evidence shall not be given unless the party proposing to give secondary evidence had previously given to the party in whose possession or power of the document is or to his advocate, such notice to produce it as required by law or such notice as the Court considers reasonable in the circumstances of the case.

17. The learned magistrate erred in disallowing the document as it had already been admitted. It was also improper to disallow it in the judgment without the parties having an opportunity to address the issue of admissibility. That notwithstanding, DW 1 admitted that it issued the document but denied that it applied to the appellant and even if it did, the appellant did not meet the terms of the offer.

18. The question then is what were the terms of the offer contained in the incentive notice. It contained two conditions. First, the appellant had to purchase 50% coke on every purchase and meet the monthly coke target. Second, he had to meet the overall target for 300ml and 500ml sodas. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **section 107(1)** of the ***Evidence Act*** which provides:

> ***107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

19. On this issue, PW 1 stated in his testimony as follows;

> *Between 22.5.2000 and 30.06.2000 I bought more than 1000 and which entitled me to 101 crates. They were giving us the liquid only. I was given a certificate of appreciation for the year 2000.*

When cross-examined on the point, he stated;

> *I was given the incentive letter addressed to all SSD-Operators …….. I was to meet an overall target. It was not stated. I would sell 10 cases – 1000 cases and get 40 cases of 30ml sodas. I got a single receipt.*

20. It is therefore clear from the appellant's own testimony he was unable to demonstrate that he had met the two condition upon which he would benefit from the incentive. He did not provide the trial court with the targets required. Although Mr Kasamani complained that the learned magistrate did not evaluate the evidence of purchase of products, this would have been a futile exercise in the absence of establishing the two conditions precedent set out in the letter. Further, the appreciation certificate issued by the respondent to the appellant had nothing to the incentive and was merely to appreciate the business relationship. On the other hand, the respondent, through DW 1, exhibited a list of the SSD operators who had targets and was therefore entitled to incentives. I therefore find and hold that the appellant failed to prove that he was entitled to the incentive on the balance of probabilities.

21. The appellant's entitlement to the sum of Kshs. 300,000/- flows from the letter dated 17th March 1999 addressed to the appellant by the respondent setting out the operating requirements of the SSD Container. The letter is clear that the initial amount of Kshs. 300,000/- was for the product and that only money that was refundable was the deposit on empties which was to be claimed upon cancellation of business. The appellant claimed that he bought the initial stock by cash however he did not produce any receipts to show that he made the deposit of Kshs. 300,000/- and then separately paid for the products. According to the receipts issued by the respondent dated 17th March 1999 were payments made on account. I accept the explanation by DW 1 that the deposit was capital for the business and that it supplied products worth Kshs. 229,178.88 as evidenced by the dispatch advice dated 8th April 1999 and that Kshs. 120,360/- was for the empty soda bottles and crates. Moreover, had the letter intended that the sum of Kshs. 300,000/- be paid as refundable security nothing would have been easier than to so state in the letter. I find and hold that the said sum was not a refundable deposit and was intended for purchase of products.

22. For the reasons I have given, this appeal is for dismissal. It is hereby dismissed with costs.

DATED and **DELIVERED** at **KISUMU** this **6th day of October 2016.**

D.S. MAJANJA

JUDGE

Mr Kasamani instructed by Kasamani and Company Advocates for the appellant.

Mr K'ouko instructed by Odhiambo Owiti and Company Advocates for the respondent.