REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 189 OF 2010

ANTHONY MBUTHI KABUI……. APPELLANT

VERSUS

MAISHA FLOUR MILLS LTD……...……RESPONDENT

(Being an appeal from the judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 39 of 2010 delivered on 13th October, 2010)

JUDGMENT

The respondent sued the appellant in the magistrates' court for the sum of **Kshs 3,241,800.00** being the price goods delivered but not paid for. According to the amended plaint filed in Court on 9th May, 2007 the respondent delivered to the appellant wheat flour worth Kshs **3,752,950.00;** of this sum, so it was averred, the appellant paid Kshs **511,150.00** only.

The appellant denied the respondent's claim and contended that all the goods supplied by the respondent were fully paid for either in cash or by way of cheques. If the respondent failed to bank any of the cheques, so the appellant contended, it thereby waived its rights and had no cause of action against the appellant. The appellant also denied that any of its cheques were dishonoured.

Despite his denial, the appellant subsequently admitted owing the respondent the sum of Kshs **520,000.00** for which judgement against him was entered by consent; the claim for the remainder of **Kshs 2,721,800.00** went to full trial.

The trial court upheld the respondent's claim and awarded him costs and interest too. Being dissatisfied with the subordinate court's decision the appellant appealed against it and raised the following grounds:

1. The trial magistrate erred in law and in fact in entering judgement against the appellant for payment of Kshs 2,720,900/= against the weight of evidence adduced;

2. The trial magistrate erred in law and in fact in failing to appreciate that the plaintiff's claim was founded on specific invoices and that the defendant had settled each of those specified invoices;

3. The trial magistrate erred in law and in fact in dismissing the defendant's evidence that he had replaced all the dishonoured cheques;

4. The trial magistrate erred in entering a hefty judgement against the defendant without analysing

each of the invoices against the cheques produced;

5. The trial magistrate erred in law and in fact in accepting the plaintiff's allegation that he accounted for all the cash paid by the defendant in replacement of the dishonoured cheques without any evidence of such accounting.

On 14th July, 2015 both counsel for the appellant and the respondent took directions to the effect that the appeal be disposed of by way of written submissions; they were to file those submissions and exchange them within 21 days of that particular date. When the matter was mentioned before me on 28th September, 2015 neither the appellant nor his counsel appeared but Ms. Njoki who held brief for Mr. Karweru for the respondent informed the court that both parties had filed their written submissions and thereby complied with the directions of the court with respect to the hearing of this appeal. However, when I retired in my chambers to write the judgement I scoured through the entire record for these submissions but I could not find any; it would appear that neither of the parties complied with the court's directions after all.

If the appellant did not file his submissions in accordance with the court's directions on the manner of disposal of his appeal, then I may as well conclude that the appeal was not prosecuted and for that reason alone, it is fit for dismissal for want of prosecution. However, if I have to give the counsel for the respondent the benefit of doubt and assume that the submissions were filed though they are not on record, I would still be compelled to evaluate the evidence afresh and come to my own conclusions this being the first appellate court in which the appellant has lodged his appeal. In undertaking this exercise, I am conscious that the trial court had the benefit of hearing and seeing the witnesses who testified. I draw this position from **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court of Appeal for East Africa (per Sir Clement Lestang, V.P) said:-

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

Only two witnesses testified, the appellant and the respondent's agent. From their evidence, it is obvious the appellant and the respondent were traders in wheat flour; the respondent manufactured and supplied this product in bulk to the appellant at an agreed price. The appellant would pay, or rather it was agreed he would pay, for the goods supplied upon delivery. Payment was not always immediate and more often than not the goods were supplied on credit.

Between December 2000 and July 2002, the deliveries were made to the appellant and the latter made some payments in settlement of the purchase price of the goods delivered. The respondent's case against the appellant was that not all the goods delivered were paid for. On the other hand, as I understand the appellant's case, he paid for all the goods except those that had not been delivered and those whose invoices were pending his reconciliation of the accounts. Inevitably, the evidence of the appellant and the respondent turned on nothing else other than accounting.

As far as I can gather from the record, the respondent produced 23 invoices of the goods supplied to the appellant; these invoices were numbered as **3484, 3843, 4707, 4748, 4844, 4899, 5228, 5254, 5362, 5395, 5564, 5728, 5946, 5981, 6048, 6133, 6225, 6517, 6563, 6591, 6597, 6665** and **6699**. The value of the goods delivered and against which these invoices were raised was **Kshs 3,752,950.00**; corresponding delivery notes in which the appellant acknowledged the deliveries were attached to each of the invoices.

Up to this point, it shouldn't have been in dispute whether the respondent delivered the goods; however, the appellant disputed invoices **no. 6517** and **6597.** As far as invoice **no. 6517** is concerned, he could not recall it. It was his evidence that he did not receive invoice **no. 6597**. He concluded that the goods in respect of these two invoices were never delivered.

He testified that five invoices were pending reconciliation and perhaps for this reason he had not settled them; he specified these invoices as numbers **6563, 6665, 6699** and **4758**; it was not clear from his evidence which was the 5th invoice. According to the appellant the reconciliation was done after the case had been filed and the amount that was established to be outstanding was **Kshs 520,900.00** which he settled and for which a consent judgment was entered; as far as he was concerned, he did not owe the respondent anything after he made this payment.

It is true, and the record bears this out, that on 1st April, 2009, both counsel for the appellant and the respondent entered a consent in court to the effect that judgement on admission be entered against the appellant for the sum of Kshs 520,000.00 but the rest of the claim proceed to full trial. Thus the consent did not in any way suggest that the payment of this sum was in full and final settlement of the respondent's claim against the appellant; the appellant's suggestion to the contrary is clear indication that he misapprehended the gist of the consent judgment.

The delivery notes in dispute show that the goods were received on behalf of the appellant by two persons; one Japheth who was indicated as the driver of motor vehicle registration number **KAM, 464 V** and one Wahome, the driver of motor vehicle registration number **KAE 928 D.** None of these people testified to deny receiving the goods; neither did the appellant himself deny knowing them or the motor vehicles that delivered the goods. Incidentally, these are the same people that are indicated in the rest of the delivery notes, and which are not in dispute, as having received the goods in their capacity as drivers of the stated vehicles. It would appear to me therefore there was no basis to deny the authenticity of these delivery notes. Again, the appellant could not **be** heard to say, that he could not pay merely because he was either he was unaware of the relevant invoices or that he had not reconciled them. In the absence of any agreement to the contrary, all that the respondent needed to prove to demonstrate its claim against him, was that the goods had been delivered but had not been paid for. This, he did to a satisfactory level.

The appellant indicated in his evidence that he was issued with the receipts for the payments he had made; he produced four of these receipts each acknowledging receipt of Kshs 163,000.00 cash payments. I cannot find anywhere in the record where the respondent denied having issued these receipts. The total sum therefore paid by the appellant, if these receipts are anything to go by, would be **Kshs 652,000.00**. My appreciation of the evidence on record is that this is the sum that ought to have been deducted from the original claim of Kshs, 3,752,950.00 and if that was done the balance due to the respondent before the institution of the claim against him was **Kshs 3,100,950.00.** Out of this sum, the appellant paid a further sum of **Kshs 520,000.00** thereby bringing the net balance to **Kshs 2,580,950.00**; this, in my view, was the amount due to the respondent.

I would allow the appellant's appeal in part and substitute the learned magistrate's judgement against the appellant with a judgement for **Kshs 2,580,950.00** together with costs and interest to be calculated at court rates from the date of judgement in the magistrate's court. Since the appeal has partially succeeded, each party will bear their respective costs of the appeal.

Signed, dated and delivered in open court this 2nd December, 2016

Ngaah Jairus

JUDGE