REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 281 OF 2007

UNITY AUTO HARDWARES STORES (1972) LTD.....PLAINTIFF

VERSUS

DAYALAL BHANJI & SONS LTD…….....……DEFENDANT

JUDGMENT

The appeal herein arises from the whole judgment and Decree of the Senior Resident Magistrate Hon. Mr. Were delivered on 29th March 2007 in Milimani CMCC No. 13249 of 2004 at Milimani Chief Magistrate's Court, Nairobi.

The Memorandum of Appeal dated 20th April 2007 and filed in the High court on 20th April 2007 and filed in the Chief Magistrate's Court at Nairobi, which is an error on the face of it as an appeal could not be filed in the same court that passed the Decree appealed from. However, applying the spirit of Article 159 (2) (d) of the constitution, I disregard that error as a procedural technicality of form and proceed to determine the appeal as filed on the merits.

The appellant sets out 3 grounds of appeal namely:-

1. That the learned magistrate erred in law in failing to hold that the verifying affidavit to the plaint was incurably defective and hence the suit incompetent;
2. That the learned Magistrate erred in law in entering judgment with interest from the year 2001 against the tendered evidence by the Respondent's.
3. That the learned magistrate erred in law in failing to appreciate the gravity of the appellant's evidence and submissions.

The appellant therefore prayed that the appeal be allowed and judgment entered in Milimani CMCC No. 132 49 of 2004 on 29th March 2007 be substituted thereof with an order of dismissal of the Respondent /Defendant's suit.

This being the first appeal, this court is bound by the provisions of Section 78 of the Civil Procedure Act, to evaluate and consider the evidence and the law, and exercise as nearly as may be, the powers and duties of the court of the original jurisdiction. I am also guided by the principles set out in the case of **Selle Vs Associated Motor Boat Company (1968) EA 123,** to evaluate the trial court's evidence, analyse it and come to my own conclusion, but in doing so, give an allowance of the fact that I neither saw nor heard the witness testify.

In addition, as an appellant court, I can only interfere with the trial court's judgment if the same is founded on wrong principles of fact and or law as guided by the court of Appeal in the decision of **NKUBE VS NYAMORO (1983) KLR 403-413** that:-

> **"a court of appeal will not normally 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 judge is shown demonstrably to have acted on wrong principled in reaching his conclusion".** Per Kneller & Harrier Ag JJA.

Thus, this court is not bound to follow the trial courts findings of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the demeanor of a witness is inconsistent with the evidence generally.

It is for the above reasons that I shall proceed to briefly examine the facts as contained in the plaint defence, the evidence submissions and judgment of the court below before arising at my own conclusion on the merits or demerits of this appeal.

In the court below, the appellant herein was the Defendant whereas the Respondent herein was the plaintiff. The plaintiff had sued the defendant claiming for a liquidated sum of shs. 146,915.18 together with interest at 25% per annum from 1/9/2001 till payment in full, costs of the suit and any other relief the court may deem fair and just to grant. The plaint is dated 29/11/2014.

The claim was based on an alleged breach agreement/ understanding between the two parties that the plaintiff would supply an assortment of spare parts, appliances and accessories and the defendant would pay for the same upon delivery or receipt of invoice raised by the plaintiff.

It was alleged that between 1/9/2001 and 23/1/2004, the plaintiff supplied to the defendant goods worth shs. 146,915.18 which goods were received but that the above sum of money remained unpaid which the defendant had failed to honour despite promises to pay the same.

The defendant entered appearance and filed defence on 24/12/2004 denying the plaintiff's claim and further contending that even if any order was ever placed for the supply of the assorted goods, the same were never supplied/ delivered in the period stated. It also denied breach of any agreement and or loss as particularized in the prayers sought. A reply to defence joining the issues raised in the defence was filed on 19th January 2005 by the plaintiff.

Evidence

The plaintiff called 1 witness, a Mr. Jayant Kumar Vrajlal Shah, the Managing Director who testified that his company used to trade with the Defendant company, supplying the latter with spare parts. They (plaintiff) could get local purchase orders (LPOS) by fax and the defendants would collect the spares upon which delivery notes would be prepared and signed by the representatives for the defendants and an invoice would be sent. He stated that the debt covered the period from 18th March 2003 and the amount owed was kshs. 146,915. He produced Local Purchase Order (LPOs) and invoices and delivery notes totaling the claimed sum after giving credit of shs. 1,149/=.

He also produced deposit bank slips to show the payments received from the defendants. He claimed for interest at 25% as that is the rate which they had paid the bank.

In cross examination, he stated that the transactions were done in 2003 and maintained that the defendant's representatives signed the order. Further, that the deliveries needed to be signed at the bottom and stamped with an original stamp. He also stated that there was no agreement for payment of 25% interest on overdue accounts, although he asserted that it was the rate he was paying to the banks, with no evidence to show that the was paying such interest to the bank.

It also confirmed signing the verifying affidavit in 2004 in the presence of his lawyer Mr. Munyalo.

In re-examination the witness stated that the delivery notes were not stamped because the Defendants representatives did not carry the stamp and that since all Local Purchase Order (LPOs) were on the defendant's letter head, it was not necessary to have the stamp.

The defendant called one witness Joseph Mbera Kiswil, its accountant who denied that they owed any money to the plaintiff as none of the delivery notes and invoices were signed by an official of the Defendant company. He stated that they did not pay the demanded sum even with a credit given because they disputed the same.

The parties advocates argued this appeal by making oral submissions on 30/9/2014. The appellant's advocate Mr. Muli submitted, that there was no evidence of deliveries since the PW1 had admitted in his testimony that all deliveries would bear official rubber stamp of the defendant/appellant and in cross examination claimed knowing the person who signed for the deliveries. In addition, he submitted as there was no original rubberstamp signed on the delivery notes, there was no such delivery of the goods to the appellant proved.

He also attacked the evidence that the Local Purchase Order (LPOs) were sent to him by fax yet no document was shown to have been faxed hence, creating doubt as to when the goods were ordered for. He further, maintained that being a contract of supply, there must be an Local Purchase Order (LPOs) which was not produced and in the absence of an independent witness to corroborate PW1's evidence, there was no material upon which the lower court gave judgment in favour of the Respondent's.

He further contended that there was no agreement for the 25% interest levied on the amount and that there was no such basis as no demand was even ever made for the same.

He accused PW1 of not being truthful as he admitted that all transactions were done in 2003 yet his plaint stated that the transactions were done between 1/9/2001 and 23/1/2004. PW1 was further accused of changing his testimony in court concerning the swearing of an affidavit. Counsel maintained that the suit was materially defective and incompetent as the affidavit verifying the plaint was not sworn before a commissioner for oaths but signed in the presence of his advocate only, which is violation of the oaths and statutory Declaration Act Cap 15 Laws of Kenya and that in essence, there was no verifying affidavit accompanying the plaint.

In opposing the appeal and urging this court to uphold the subordinate court's judgment, Mr. Munyalo advocate for the Respondent submitted that the verifying affidavit on record clearly shows that it was commissioned by a commissioner for Oaths, and signed by the Managing Director of the Respondent company, and deemed that the same was signed before him as an advocate for the Respondent. He maintained that the court below was right in seeking to do substantive justice for the parties as the verifying affidavit was only supporting the contents of the plaint. He further took issue with the objection on the basis that the defence as filed never raised that issue of a defective verifying affidavit and that no notice was given to the adverse party, during trial, which issue would have been settled before the hearing/trial. He relied on 2 decisions **Abubakar A.H Mohamed Vs Ahmed and CA 219/2013** that unpleaded issues cannot be sprung up.

On the gravity or weight of the Appellants' evidence and submission, he maintained that pages 24-35, 36-37 of the record of appeal clearly show that the trial magistrate fully appreciated the pleadings, evidence, exhibits and written submissions by the parties before coming up with her findings and conclusions.

He contended that the appellant never denied that the signatures on the deliveries were theirs or that they had a business relationship with the Respondent and that the Local Purchase Order (LPOs) were on their letter heads on interest, it was submitted that all invoices produced showed that all amounts owing would be charged at the interest of 2% monthly. Further, that the court in any event, awarded interest at court rates, not as prayed in the plaint.

On the period of supply of the goods, he maintained that it was from 1/9/2001 and not when the suit was instituted because this was a running account from 1/9/2001 to 23/1/2004 when the default occurred.

Counsel urged this court to uphold the lower court decision and discuss this appeal with costs, as the defendant call one witness.

In response, Mr. Muli maintained that the issue of the verifying affidavit arise during cross examination and it therefore became binding on the witness. He dismissed the authorities cited as being inapplicable. Further that the Local Purchase Order (LPOs) produced in court were denied by DW1 as they did not originate from the appellant. In his view, the Respondent did not prove his case on a balance of probability and therefore the trial magistrate should have dismissed it, urging this court to substitute the lower court judgment with an order dismissing the said suit with costs.

From the pleadings in the lower court, the submissions judgment and appeal herein as proposed and opposed by counsels for the respective parties, the following issues emerge and flow for determination by this court.

Whether the verifying affidavit sworn by PW1 in support of the plaint is materially defective and therefore the suit as filed in the lower court was incompetent it is not in dispute that the issue of whether or not the verifying affidavit sworn by Jaya Kumar Vrajlal Shah on 29th November 2004 was sworn before a commissioner for oaths or signed in the presence of the deponents Advocate Mr.Munyalo only arose during cross examination of the plaintiff's PW1, the deponent thereof. From the record, of proceedings, I gather that although the affidavit was meant to verify the correctness of the averments in the plaint, during cross examination of PW1, it emerged that his testimony was not consistent with the pleadings in the plaint. For example, PW1 testified that the orders were for 2003 and made by fax whereas the pleadings stated that the orders covered the period from 2001 and no indication of tax.

The PW1's testimony being at variance with the pleadings is not an issue that could have been raised in the filed defence as it was not possible to detect as lie from the filed pleadings. Be ast it may, it was not necessary to have pleaded the defects in the defence as it was not obvious until the witness had testified and his testimony varying with the pleadings as filed and verified by the affidavit.

The purpose of the verifying affidavit as filed need not be over emphasized. It was to verifying the correctness of the averments in the plaint. The witness had also taken an oath when testifying in court that he would tell the truth, nothing but the truth, it however, turned out that the 'truth' as contained in the plaint was different from the 'truth' as testified in court. If that was the case, the court could have only discredited the witness and not necessarily strike out the plaint on the ground that the affidavit not sworn before a commissioner for Oaths. I say so because on examination of the said verifying affidavit does not tell that it was signed before Mr. Munyalo but sworn before a Commissioner of Oaths on 29th November 2004.

Although the deponent in cross examination stated that he signed it before Mr. Munyalo advocate alone, I am unable to find any evidence to that effect. Documents speak for themselves. It would have been appropriate to call the Commissioner for Oaths to verify whether he administered the oath upon the Deponents. Since Mr. Munyalo in his submissions has vehemently denied that the affidavit was signed before him. In any case, an affidavit is not a pleading and only supports the pleading in this case, the plaint in CMCC 13249 of 2004.

Even if the said verifying affidavit was defective, the courts have over time held that the defect in an affidavit would not entitle a court to strike out pleadings as filed especially where leave could be granted to the party to file another affidavit.

Furthermore, the power to strike out a verifying affidavit is discretionary under the old order 7 rule 3(2) of the Civil Procedure Rules. That discretion must not be exercised capriciously:-

The relevant provisions of the old order VII rule (1) and 1 (2) provided thus:

> "2. The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint',

(3) The court may of its own motion or on application of the defendant order to be struck out any plaint which does not comply with sub rule 2 of this rule".

In **Research International EA Ltd V Arisi & Others (2007) (1) EA 248**, the court of Appeal explained the purpose of sub rule (1) (2) thus:

> **"The Superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiff another opportunity to comply with rule 11"**

Thus, as the power to strike out the plaint which is not accompanied by a verifying affidavit is not mandatory but permissive.

The broad principle reiterated by the court of appeal in **D.T. Dobie & Company (K) Ltd Vs Muchina (1982) KLR** is in essence, that the discretion of the court to strike out pleadings for various reasons such as failure to disclose a reasonable cause of action should be used very sparingly and that the plaintiff should not be driven from the judgment seat unless the case is unarguable, apply with more force to discretion to strike out a plaint for want of a verifying affidavit. In **Kenya Oil Co Vs Jayantlal Dharamshi Gosrani (2014)eKLR.** The Court of Appeal held that the omission to file a complaint verifying affidavit to accompany a plaint does not go to the root of the claim"

In that case, like in the present case, there was admission by the respondent when he was cross examined by Mr. Esmail Advocate that he did not appear before a Commissioner of Oaths for attesting of the affidavit and Mr. Esmail therefore urged the court to strike out the plaint as the same was not accompanied by an affidavit as required. The court of appeal stated.

> **"That was a procedural error which the court could, in exercise of its discretion, correct at any time before this suit was heard".**

In other words, even if the trial magistrate in this case had struck out the plaint following the revelation that the verifying affidavit was not sworn before a Commissioner for Oaths, the Court of Appeal in the **Kenya Oil Co. Ltd (Supra)** is saying that that should not have happened as the defect was curable and did not go to the root of the claim hence, the court had the discretion not to strike out the suit in this case the respondents rights had matured and this court cannot allow itself to be used to defeat a party's matured rights.

In my view, I do not think that the intention of the Rules committee was to punish innocent litigants or deny them access to justice .

In my view, the defect as admitted by the respondent in cross examination is not apparent on the face of the affidavit in question and would constitute an irregularity but it is not such a serious irregularity as to prejudice the respondents case in any way. It is in my view, an innocuous irregularity which is not prejudicial to anyone and in respect of which appropriate steps could have been taken to rectify the anomaly. I think that the ends of justice were served by the trial magistrate in sustaining the proceedings by declining to strike out the suit as the courts should lean in favour of doing substantial justice to the parties, especially where it is not shown that the person objecting has suffered any prejudice, and as such procedural lapses, omissions and irregularities do not go to the jurisdiction of the court. Proceedings should not therefore be nullified on that ground.

In the end, I prefer to adopt the position as set out by Ringera J (as he then was in **Microsoft Corporation Vs Mitsumi Computer Garage Ltd (2001) 2 EA 460** that:- Rules of procedure are …… and not the mistress of justice", and that such proceedings as may be afflicted by procedural flaws but which do not go to jurisdiction should be saved in the interests of justice, as espoused in the express provisions of Section 3A of the Civil Procedure Act that:-

> "**Nothing in this Act shall limit or otherwise affect the inherent power of the court to make**

such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Accordingly, I disallow ground No.1 of the Memorandum of appeal.

The second issue for determination is premised on ground No.2: Whether the trial magistrate should have entered judgment with interest from the year 2001 against the tendered evidence by the Respondent.

I have carefully read the judgment as delivered by the subordinate court on 29th March 2007, entering judgment for the Plaintiff/Respondent herein against the Defendant/appellant herein "**for kshs. 146,915 together with costs and interest at court rates till payment in full".**

The trial magistrate found that "**from the exhibits produced, the total value of the goods produced was kshs. 148,064 a credit was given for shs. 1,149 leaving a balance of shs. 146,915. The amount has been sufficiently proved".**

I find nowhere in the judgment the trial magistrate entering judgment merely "**as prayed in the plaint".** She was very specific and categorical on the award and the interest. She did not mention that the interest ran from 2001 and or at the rate of 25% per annum. In fact, the trial magistrate found that although the plaintiff had claimed interest at 25% being the rate paid to the bank, he found that the claim was not supported by any documentary evidence.

Nonetheless, the plaint claimed for interest from 1/9/2001 till payment in full. However, in his evidence, PW1 testified that orders were for 2003. In his matter submissions before the lower court at page 18 of the record of appeal, counsel for the Respondent admitted that the claim for interest from 1/9/2001 was the genuine error and submitted that "**he is entitled to interest from the date of 1st Demand on 3/08/2014".**

It is worth noting that parties are bound by their pleadings and pleadings cannot be amended by way of a submission. There must be a specific plea or prayer for an amendment to take effect, whether by an oral application or a formal application.

As there was no application seeking to amend the plaint to correct what counsel for the Respondent called a genuine error, this court can only conclude that the claim for interest from 1/9/2001 was not abandoned and therefore the Respondent's evidence ought to have proved the claims. Regrettably, on appeal, counsel for the Respondent still maintained that his client was entitled to the interest as claimed stating that in any event the court awarded interest at court rates and that this was a running account from 1/9/01 to 23/1/2004 when the default occurred.

He further submitted that all invoices produced showed all amount would be charged at interest of 2% monthly.

With utmost respect, the above line of submission lacked any basis. First, is that there was no cross appeal against the trial magistrate's disallowing of the claim for interest at the rate of 25% from 1/9/2001 as claimed.

Secondly, there was no evidence that this was a running account and even if it was, then no evidence was tendered to prove the same and the trial magistrate was right in disallowing it. He was however, correct in allowing interest on the principal sum allowed, I find no error of principle committed by the trial magistrate.

In short, the submissions both by the appellant and Respondent on interest was superfluous.

I therefore find no merit in Ground no. 2 of the Memorandum of Appeal and I dismiss it accordingly.

The third issue for determination stems from the third ground of Appeal- whether the learned trial

magistrate erred in law in failing to appreciate the gravity of the appellant's evidence and submissions in support of this ground, Mr. Muli submitted that there was no evidence of delivery of the goods to the appellant as there was no original official rubber stamp of the Defendant/ appellant and that the Respondent's witness stated in cross examination that he did not know who signed for the deliveries. Further, that no independent witness corroborated the DW1's testimony.

In addition, that DW1 stated that Local Purchase Order (LPOs) were sent to him by tax yet documents produced did not appear to have been faxed.

However, in re-examination, the PW1 was clear that the deliveries were not rubber stamped because the appellant's representative did not carry the stamp in addition it was clear that all Local Purchase Order (LPOs) were in the Defendant/Appellant's letter head.

The defence witness admitted dealing with the Respondent company but denied that they owed any money for any deliveries as none of the invoices and delivery were signed by an official of the Defendant company.

He admitted that the deliveries were on the Defendant's letter head although he deemed that they ordered for the items and knowledge of what the said Local Purchase Order (LPOs) were for.

He further stated that "we did not pay the amount in the letter as it was in dispute.

There was no suggestion by the defendant appellant that the Local Purchase Order (LPOs) which were on their letter head were a forgery. Neither did they deny transacting with the Respondent. They admitted buying spares and paying for them.

For unknown reasons, the appellant herein did not include exhibits in the record of appeal filed on 18th February 2010 which contravenes the provisions of order 42 Rule 13 (4) of the Civil Procedure Rules.

I have nonetheless perused the lower court record and examined the Delivery notes, Local Purchase Order (LPOs) and invoices for the amounts claimed.

Looking at the orders of 16/7/2002, 10/4/2002, 15/11/2001, 13/11/2001, 23/7/2003, 25/6/2003, 23/5/2003, 15/5/2003, 27/3/2003, 18/3/2003, they are no doubt signed in the same hand. The appellant's witness never stated that they were forged, yet the ones for 2001 and 2002 were paid for.

I have also examined the corresponding Delivery notes and I am satisfied that they were all signed by the same person although no official rubber stamp is affixed to any of them.

In my view, it is not the official rubber stamp that would prove receipt and or delivery of the goods.

In the absence of any evidence to the contrary, I find that the trial magistrate who had the opportunity to observe the demeanor of the witness as they testified was right in finding that there were deliveries according to the orders for supplies issued by the appellant and I find no reason to interfere with his findings. The Defendants witness did not specify which specific official of the Defendant was authorized to receive the goods. He denied that they ordered for the items but failed to explain what the Local Purchase Order (LPOs) were for even when it was clear on the face of the said Local Purchase Order (LPOs) that they were for different spares. The witness in my view was evasive. There was no fraudulent intention pleaded or exhibited by the defendant appellant. The trial magistrate was right in believing the Respondent case.

The items delivered corresponded with the ones ordered for save that in some cases like PEX 19 they delivered 2 instead of 4 cabin mounting and invoiced for the 2 that were delivered not 4.

Similarly, in PEX 1C the order was for 4 sets wheel cylinders- Kifaru and one oil filter but only 4 wheel cylinders were delivered and invoiced for, not the oil filter. PW1 stated that at page 35 "**if we don't have**

all the orders we only do a partial delivery". In other words, although the orders were for more items, but deliveries could only be in accordance with what was in stock, and they in turn only charged for what was delivered.

The submissions by the defence that Local Purchase Order (LPOs) did not correspond with items in the delivery notes, implying that there was therefore no delivery of what was specified, in my view, is not grounded at all. Further, albeit the defence alleged that there was breach of a fundamental term of the agreement, no counterclaim was laid for such breach.

I further find that it was not necessary for the plaintiff/Respondent to call a manager to merely prove orders which were clearly made on the appellant's letter heads and deliveries duly signed for in the absence of any allegation or proof of fraud or forger on the part of the Respondent.

My examination of all the delivery notes subject of the claim were signed for, contrary to the submission by counsel for the appellant that they were not endorsed.

Further, there is no allegation that the signatory on the orders or deliveries were forged or fraudulently obtained, I gather the Plaintiff/ Respondent's witness to have stated that previously, the Respondent had paid for the ordered and delivered items although some deliveries had not been stamped with official rubber stamp an indication that this was relationship based on trust.

(see page 34 of the record of appeal). Even the paid deliveries is not stamped"……all the deliveries do not bear the official rubber stamp of the defendant.

The plaintiff's witness, in my view, did not have to identify the person who signed for the deliveries as it was not in evidence that he personally delivered the items.

I therefore find that the Respondent proved its case against the appellant on a balance of probability and uphold the trial magistrate's decision.

The upshot of all the above is that I dismiss the appeal herein with costs to the Respondents.

I award costs of the lower court to the Respondent too.

Dated, Signed, and Delivered at Nairobi this 3rd February 2015.

R.E. ABURILI

JUDGE

3/2/15

Coram before Aburili J.

CC: Kavata

Mr. Kouna holding brief for Munyalo for Respondent

N/A for appellant

The court notes that a gentleman who is a clerk in the firm of the advocate for the appellant, Mr. Munyalo (a Mr. Nzioka) was in court seeking to find an advocate to hold brief on their behalf in vain.

Court- Judgment read and pronounced in open court at 4.07 pm.

R.E. ABURILI

JUDGE

3/2/2015