



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL APPEAL NO. 39 OF 2014**  
**(FORMERLY KISII HCCA NO. 145 OF 2012)**

**BETWEEN**

**SOUTH NYANZA SUGAR CO. LTD ..... APPELLANT**

**AND**

**INDUSTRIAL & RETAIL SCALES CO. LTD ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. E. M. Nyagah, SRM at the Senior Principal's Magistrates Court in Migori in Civil Case No. 328 of 2008 dated 25<sup>th</sup> October 2012)***

**JUDGMENT**

1. This is an appeal against the judgment and decree of the subordinate court dismissing the appellant's claim for refund of money paid to the respondent as a result of failure by the respondent to deliver goods.
2. The facts giving rise to this appeal are largely undisputed. In December 2002, the appellant "(SONY)" issued a tender for the supply of 50 roller weights. The respondent ("IRS") was the successful bidder quoting a sum of Kshs. 975,960.30 subject to 50% of the contract price being deposited as down payment and the balance to be paid upon delivery which within three weeks at the SONY factory at Awendo.
3. Thereafter SONY issued a local purchase order ("LPO") No. 69645 dated 19<sup>th</sup> February 2003 for supply of the goods. Upon receipt of the LPO, IRS raised an invoice dated 19<sup>th</sup> March 2003 for Kshs. 487,980.15 which SONY settled by issuing a cheque for the same amount on 11<sup>th</sup> February 2004 but the rollers were not delivered.
4. By a letter dated 9<sup>th</sup> November 2004, IRS wrote to SONY informing it that the price of steel had risen. It stated that, "*We therefore humbly request you to consider these fluctuations and we are reapplying for the revised quotation for the amount of Kshs. 1,202,085 for your kind approval.*" Following this request SONY issued a supplementary LPO No. 77333 dated 27<sup>th</sup> April 2005 ("the supplementary LPO") for delivery of 50 rollers which were required on or before 26<sup>th</sup> May 2005. IRS did not deliver the rollers causing SONY to lodge the claim in the subordinate court.
5. In the plaint dated 23<sup>rd</sup> December 2008, SONY claimed the deposit it had paid together with interest thereon at 24% per annum being the cost of the overdraft it took to finance the purchase

amounting to Kshs. 109,915 per year with effect from 11<sup>th</sup> February 2004. It also claimed the sum of Kshs. 200,000 being damages for the time it closed in June 2005 when tendering had to be done afresh.

6. IRS admitted that after the successful tender, SONY issued an LPO and it raised an invoice for payment. At paragraph 6 of its defence and counterclaim dated 2<sup>nd</sup> March 2009, it stated that:

*The Defendant does not admit receipt of a sum of Kshs. 457,980.15 by cheque issued on 11<sup>th</sup> February 2004 BUT hasten to add that if the same was paid which is denied then the cheque and the amount in question was paid in breach of the express terms of the tender.*

7. IRS also pleaded that SONY was guilty of breach of contract for failing to make payment in good time and for frustrating the performance of the contract by sending the 50% sum 13 months after the issue of the tender. It accused SONY of negligence and recklessness in performance of its part of the contract.
8. IRS averred that the supplementary LPO was issued upon its request and in an attempt to cure the breach of the earlier payment terms as it was issued 2 years after the first LPO. It stated as follows in its counterclaim:

*The Defendant avers that by reason of the Plaintiff's Breach of contract as particularized in paragraph 6 above, the Defendant had ordered and paid 50% of the items as ordered in the Local Purchase Order on the supplementary purchase order both dated 19<sup>th</sup> February 2003 and 27<sup>th</sup> April 2005 they have suffered loss and damage*

As a result it prayed for specific performance of the supplementary LPO.

9. The witnesses who testified reiterated what was contained in their respective pleadings. The appellant called its accountant engineer, David Mbai (PW 1) who testified that cheque for Kshs. 413,542.50 which comprised the 50% deposit less VAT was paid and the same cleared. He also confirmed that SONY issued the supplementary LPO with a revised quotation and that it never received the rollers. The respondent's witness Arthur Omondi Andiwo (DW 1) testified that after the supplementary LPO was issued, IRS wrote a letter requesting for the down payment. However, SONY responded by making a demand for refund of the deposit. He stated that IRS did not deliver because 50% of the deposit was never paid.

10. After hearing the witnesses, the learned Magistrate concluded as follows:

- a. *Following the issuance of a supplementary order No.77333, it expressly implied that the terms of payment had not changed. In effect it meant that SONY SUGAR was to pay 50% deposit on the sum of Kshs. 1,202,085/- less withstanding tax of 18% VAT making a total of Kshs. 492,854.85. They failed to do so and then were in breach of the contract.*
- b. *Despite the breach aforementioned. IRS undertook to deliver the goods all but with difficulties which was brought to the attention of SONY SUGAR at all times. Indeed SONY SUGAR expected the goods to be delivered by 29/8/05 and at the time did SONY SUGAR inform IRS that the contract had been cancelled. This in effect means that SONY SUGAR is therefore not entitled to the special damages as claimed.*

11. Following dismissal of the claim, SONY appealed against the judgment and decree on the grounds set out in the memorandum of appeal dated 21<sup>st</sup> November 2012 as follows:

- i. *The Learned Trial Magistrate erred in fact and in law when he held that it was the Appellant who was in breach of the contract on the face on failure of the Respondent to deliver the goods.*
- ii. *The Learned Trial Magistrate erred in law and in fact when he held that the Appellant*

- was not entitled to refund of the amount of Kshs.657,089.85 together with interests thereof despite the Respondent's admission that she received the payment as half of the purchase price for goods which the Respondent never delivered.
- iii. The Learned Trial Magistrate erred in fact and in law when in effect he held that despite the fact that the Respondent never delivered the goods in respect of which the Appellant had paid 50% of the value, she the Respondent was entitled to return the same.
  - iv. The Learned Trial Magistrate erred in fact and in law when he held that the Appellant had failed to prove her case and was thus not entitled to any of the amounts claimed.
  - v. The Learned Trial Magistrate erred in fact and in law when he failed to appreciate and to find that it was a breach of contract for the Respondent to have accepted totally failed to deliver the goods.
  - vi. The Learned Trial Magistrate erred in fact and in law when he held that the Appellant was not entitled to the refund of the amounts paid despite clear evidence that there was a failure on the part of the Respondent to deliver despite seeking several extension which were never honoured.
  - vii. The Learned Trial Magistrate erred in fact and in law when he failed to appreciate that in keeping both the goods and the money which she had been paid for it, the Respondent ate her cake and still had it.
  - viii. The Learned Trial Magistrate erred in law when he decided that the Respondent was entitled to return both the goods and the amount she had been partly paid when there was no counterclaim in the regard.
  - ix. The Learned Trial Magistrate erred in fact and in law when he failed to determine the Counter claim and have it dismissed as there was no evidence led in proof.

12. At the hearing, Mr Okong'o, counsel for the appellant, attacked the finding of the Subordinate Court on the ground that it was not dispute that IRS had received half of the contract sum yet it had not delivered the goods. He submitted that SONY was entitled to judgment for the amount paid particularly in view of the fact that no finding was made on the counterclaim. Counsel abandoned the claim for interest and special damages.

13. Although the respondent's advocates on record were served with the hearing notice, they did not attend the hearing hence the matter proceeded for hearing.

14. This is a first appeal and the duty of the first appellate court was succinctly summarized by the East Africa Court of Appeal in **Selle v Associated Motor Boat Company Ltd, [1968] EA 123, 126** as follows:

*Briefly put they [the principles] 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 witness and should make due allowance in that 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.*

15. It is in light of these principles that I will consider the evidence. It is clear that the problem between the parties arose after SONY failed to comply with the terms of the tender. As the respondent pointed out, the payment was made a year later resulting in a re-negotiation of the agreement between the parties which was consummated when the supplementary LPO was issued was for the supply of 50 rollers at a total cost of Kshs 1,394,418.60 inclusive of VAT.

16. The supplementary LPO was preceded by two letters from IRS. The first dated 9<sup>th</sup> November 2004 addressed to SONY sought variation of the original agreement due to increase in the price of steel. The letter stated in part that, "We therefore humbly request to consider these fluctuations and we are re-applying for the revised quotation for the amount of Kshs. 1,202,085 add 16% VAT for your kind approval...." In the subsequent letter of 31<sup>st</sup> January 2005, IRS wrote to SONY

requesting for the supplementary payments. It also noted, *“The other alternative, we can deliver the quantity based on the new prices against the received payments.”*

17. After the supplementary LPO was issued, IRS wrote to SONY, the letter dated 11<sup>th</sup> July 2005 in which it apologized for late delivery and explained that, *“After we asked you for a price review the time between your approval and Local Purchase Order issue was too long that the manufacturer had again increased his prices. We did not want to come back to you with another reason to get the price amendment done. For this reason we had to shop for another supplier. .... Due to this change everything had to be started all over again .... Everything is ready and we have been promised the 1<sup>st</sup> 50% pieces ready in about one and half weeks .... Therefore we are humbly requesting you to bear with us.”*
18. As delivery was not forthcoming, SONY instructed its advocates, *Otieno Yogo and Company Advocates*, write a demand letter threatening to sue IRS for return of the deposit. The lawyer issued the letter of demand dated 12<sup>th</sup> August 2005. Before IRS could answer to the demand letter, SONY wrote to IRS the letter dated 23<sup>rd</sup> August 2005 acknowledging the letter of 11<sup>th</sup> July 2005. It observed that, *“You indicated that the first 50% (25 rollers) would be ready in about one and half weeks time (22<sup>nd</sup> July, 2005”). This effectively suggested/implied that the balance of 25 rollers should be ready by 23<sup>rd</sup> August, 2005. Please confirm to us if the weights are ready to enable us released a vehicle for collection of 29<sup>th</sup> August 2005.”*
19. IRS acknowledged the demand letter and the letter from SONY dated 23<sup>rd</sup> August 2005. While seeking clarification on the content of the demand letter, it stated that it was experiencing some delay in delivering the rollers due to the absence of its Senior Engineer and delay in clearance of their goods by KRA. The letter noted further that, *“In the meantime, we are waiting to hear from our fabricators for further progress and final completion of the above rollers for onward transmission to you for the collection.”* After the said letter, the rollers were still not delivered.
20. The totality of the evidence is that the supplementary LPO constituted a variation of the original agreement which was confirmed and accepted by IRS in its letter of 11<sup>th</sup> July 2005 and subsequent correspondence confirming that that IRS was ready to deliver the rollers. In my view, IRS having accepted the money, it was bound to deliver the rollers or refund the deposit paid to it. IRS could not have it both ways. In this respect the learned magistrate erred by holding that IRS was not liable as a result of the breach by SONY.
21. IRS counterclaimed for specific performance of the supplementary LPO. The learned magistrate did not make any finding or decision on the respondent’s counterclaim. The respondent did not cross-appeal on this aspect of the judgment but in order to do justice to the case in the event of appeal, I will consider whether the IRS made out a case for specific performance.
22. The subject of the contract between the parties was one for sale of goods. Under the ***Sale of Goods Act (Chapter 31 of the Laws of Kenya)***, it is the buyer who has the right of specific performance in the following terms;

#### *55. Right to specific performance*

*(1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.*

*(2) The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.*

23. The respondent was not a buyer and its situation was akin to that of an unpaid seller where the buyer has neglected to accept and pay for goods. In this respect, **section 50** of the ***Sale of Goods of Act*** provides;

*50. Action for non-acceptance*

*(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.*

*(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.*

*(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.*

24. Flowing from the provisions I have cited, the plea for specific performance could not be granted. What the respondent was entitled to was damages. Indeed DW 1 testified that the respondent had incurred a cost of Kshs. 500,000 in procuring goods and services which was lost as a result of the breach. Although the respondent had submitted that it was entitled to the said sum in the counterclaim, this sum, which is in the nature of special damages, was not pleaded with particularity as required by the law (see ***Charles Sande v Kenya Cooperative Creameries Ltd CA Civil Appeal No. 154 of 1992 (UR)*** and ***Coast Bus Service Ltd v Murunga Ndanyi & 2 Others CA Civil Appeal No. 192 of 1992 (UR)***).

25. In conclusion I find that SONY was entitled to the deposit it had paid as a result of the failure of the respondent to deliver the rollers. I therefore allow the appeal, set aside the judgment and decree of the Subordinate Court and substitute the same with the following orders:

- a. Judgment be and is hereby entered for the appellant against the respondent for the sum of Kshs. 413,542.50 with interest thereon at court rates from the date of filing suit until payment in full.
- b. The appellant shall have the costs of the suit and this appeal.

**DATED and DELIVERED at MIGORI this 10<sup>th</sup> day of April 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Okong'o instructed by Okongo, Wandago and Company Advocates for the appellant.

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