



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 30 OF 2005.

WILLIAM KIPKOLUM MATUU..... APPELLANT.

VERSUS

HILL BERRET & CO. LTD..... RESPONDENT.

J U D G M E N T.

1. This appeal arises from the decision and judgment of the Resident Magistrate at Kitale in Kitale SPMCC No. 71 of 2003 in which the appellant, **William Kipkolum**, was sued by the respondent, **Hill Barret & Co. Ltd.**, for the sum of Ksh. 82,574/- on account of two cheques issued to the respondent by the appellant in the months of December, 2000 and January, 2001 respectively.
2. In the plaint dated 27th February, 2003, the plaintiff (respondent) averred that a request was made by the defendant (appellant) that the cheques ought not be presented to the bank for payment as they would be replaced with cash payment sometime in the month of February, 2001, but this was not done despite notice to the defendant to honour the cash replacement of the said cheques.

The respondent therefore prayed for judgment against the appellant for the sum of Ksh. 82,574/- plus interest and costs.

3. The appellant denied the claim and averred in his statement of defence dated 19th June, 2003, that he was not indebted to the respondent in the sum claimed or any smaller sum thereof. He further averred that he operated a fuel account with the respondent who demanded to be furnished with a blank cheque as security and which was not for banking. That, at the request of the respondent, he (appellant) issued a cheque for Ksh. 25,000/= pending the taking of accounts and after it was revealed that only a sum of Ksh. 10,000/= was owed to the respondent the same was paid in cash and a receipt issued.
4. It was also averred by the appellant that despite promises made by the respondent's agents the material two cheques were never returned to him. He contended that the respondent had no cause or reasonable cause of action and prayed for the dismissal of the claim with costs.

However, in the reply to defence dated 23rd June, 2003, the respondent contended that the appellant was truly indebted to itself in the claimed amount and in an attempt to settle the amount, the appellant issued two cheques of Ksh. 25,000/= and Ksh. 57,574/= respectively, which were to be replaced with cash payment but all in vain.

5. After the trial of the case in which both sides called a witness each, the learned trial magistrate rendered her judgment on the 30th September, 2005, in favour of the respondent.

Thus, judgment was entered for the respondent/plaintiff against the appellant/defendant in the sum of Ksh. 82,574/= together with costs and interest.

Being dissatisfied with the judgment, the appellant filed the present appeal on the basis of the grounds contained in the memorandum of appeal dated 31st October, 2005, but belatedly filed herein on the 20th March, 2014.

6. At the hearing of the appeal, **Mr. Kiarie**, learned counsel for the appellant argued that the learned trial magistrate misapplied the law on the burden of proof and made findings which were against the pleadings and evidence. That, the respondent's case as pleaded in the plaint did not disclose the consideration for the amount claimed in that paragraph of the plaint simply talks about the claimed amount and refers to cheque without indicating why the amount was paid. That, the defence by the appellant was specific in denying the claimed amount.
7. Learned counsel for the appellant contended that it was incumbent upon the respondent to prove the claim and adduce such evidence as would discharge the burden of proof placed on them.

That, the evidence by the respondent fell short of proving the claim and in that regard, section 107 and section 112 of the Evidence Act were cited and so was the decision of the Court of Appeal in the case of **Anne Wambui Ndiritu Vs. Joseph Kiprono Ropkoi (2004) e KLR.**

8. It was further argued by learned counsel, that the evidence at the trial indicated that fuel would be supplied to the appellant on credit and that the appellant always undertook in writing to pay for it by signing on a slip of paper which remained with the respondent. That, a cheque for the fuel would be issued at the time the fuel is supplied or at the time the suits were produced and returned. That, the cheque of Ksh. 25,000/= (P. Exh. 1) was issued pending the taking of accounts and was to cater for the fuel supply for the months of October, and November, 2000 thereby demonstrating that some cheques would be issue in advance awaiting the taking of accounts.
9. Learned Counsel, indicated that after the taking of accounts it was found that only Ksh. 10,000/= was due for payment. That, the amount was paid in cash and a bank deposit slip was produced although the cheque issued in respect of the amount was never released to the appellant by the respondent. That, the evidence by PW1 did not indicate that he inserted the amount on the cheque or that he was present when the amount and date in the cheque was inserted.

That, the cheque was dated 9th January, 2001, without reference as to the time the fuel amounting to over Ksh. 57,000/= was supplied.

10. Learned Counsel for the appellant, argued further that primary documents giving rise to the disputed amount would have provided good evidence of the supply of fuel to the appellant but there were never produced thereby rendering the respondent's evidence insufficient in discharging the burden of proof expected of it. That, the trial court erred by placing the burden of proof on the appellant yet the same remained with the respondent.
11. In reference to the judgment of the trial court, the appellants' learned counsel argued that the burden of proof was shifted to the appellant when the court made findings to the effect that the appellant did not take any action in retrieving the cheques after the taking of accounts and that the counterfoil respecting P. Exh. 2 was not produced meaning that the cheque was for banking.

Learned Counsel contended that the cheque (P. Ex. 2) was blank when it was issued as it was meant for security and that the appellant made a request to the respondent that the cheques (P. Exh. 1 and P. Exh. 2) be retained without being presented for banking as they were merely security.

12. Learned Counsel, argued that the learned trial magistrate misunderstood the evidence and failed to properly appreciate it. That, a third cheque of Ksh. 25,000/= was referred to in evidence but was not pleaded neither was it mentioned in the court's judgment.

Learned counsel therefore urged this court to allow the appeal with costs.

13. In opposing the appeal, the respondent through Learned Counsel, **Mr. Onyancha**, made reference to its submissions before the trial court and argued that the two cheques (P. Exh. 1 & 2) were issued after all the necessary accounts were taken and thus represented the amount due and owing to itself (respondent). That, allegations of forgery made by the appellant respecting the figures and amounts in the said cheques were never pleaded nor proved. That, the cheque of Ksh. 25,000/= (P. Exh. 1) ought to be considered in the light of the evidence by PW1 to the effect that a second cheque of Ksh. 25,000/= was released to the appellant after cash was paid.

14. The respondent argued further that the appellant alluded to a receipt issue to him after clearing the cheque (P. Exh. 1) but he failed to produce the same yet it was in his custody.

That, the cheque of Ksh. 57,574/= (P. Exh. 2) had a counterfoil admittedly in possession of the appellant but the same was never produced by him thereby contravening section 107 of the Evidence Act.

That, according to the appellant, the counterfoil was blank and according to his evidence, the cheque (P. Exh. 1) was drawn upon an account held at Barclays Bank of Kenya at Eldoret which was not the only cheque issued upon that account.

15. The respondent contended that the cash deposit slip allegedly intended to replace the first cheque (P. Exh. 1) was in actual sense payment of Ksh. 10,000/= being the balance of the amount of Ksh. 15,000/= paid in cash for the replacement of the second cheque of Ksh. 25,000/=.

The respondent urged this court to find that the appeal is devoid of merit and dismiss it with costs.

16. Having considered the appeal on the bases of the supporting grounds and in the light of the rival submissions by the parties, the duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the court considered the evidence adduced by the respondent through its employee, **Samuel Kalya (PW1)**, and the evidence adduced by the appellant (**DW1**) in person.

17. Together with the pleadings, the evidence clearly indicated that the basic issue for determination was whether the appellant was truly and justly indebted to the respondent in the claimed amount was specifically pleaded in the plaint for it to be established or proved by necessary evidence.

18. Indeed, whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist (S.107 (1) Evidence Act).

The respondent was therefore expected to prove to the required standard the existence of the appellant's indebtedness to itself on account of supply of fuel.

19. It was the trial court's finding that the burden of prove placed on the respondent was duly discharged by the existence of the two cheques (P. Exh. 1 and P. Exh. 2) allegedly drawn in favour of the respondent by the appellant.

Judgment was therefore entered for the respondent against the appellant in terms of the sums of money reflected in the two cheques.

In this court's opinion, for the cheques to be treated as having established the claimed amount and hence the appellant's indebtedness to the respondent credible evidence was required to show that the cheques were actually written and issued by the appellant given that his defence was a denial of indebtedness in the amount claimed.

20. From the testimonies of the respondent's employee (PW1) and the appellant (DW1), it was apparent that the appellant normally obtained fuel from the respondent and effect actual payment of the same at a later stage either by cheque or cash.

According to the respondent, the two cheques (P. Exh. 1 and P. Exh. 2) were issued by the appellant but were withheld from banking awaiting replacement with cash which was not done by the appellant resulting in the present suit.

21. The appellant contended that he issued the two cheques in blank form for security purposes pending the taking of accounts and thereafter payment of the amount due to the respondent for the supply of fuel. He testified that all the payments were made in cash and receipts issued accordingly and if payment was not immediate then a receipt would be issued and signed by himself or agent for retention by the respondent until actual payment.

22. With regard to the first cheque of Ksh. 25,000/= (P. Exh. 1), the appellant conceded that it was issued by him for payment of fuel but was to be retained by the respondent pending the taking of accounts which revealed that he owed the respondent only a sum of Ksh. 10,000/=, which he paid in cash thereby settling the entire amount reflected on the cheque (P. Exh. 1) which was never returned to him by the respondent.

With regard to the second cheque of Ksh. 57,574/- (P. Exh. 2), the appellant conceded that it was issued by himself but only as security to ensure constant supply of fuel by the respondent. However, he contended that the amount reflected on the cheque was not written by himself thereby implying that he owed no such money to the respondent. He said that even that cheque (P. Exh. 2) was never returned to him by the respondent.

23. There was indication from the appellant that in most of the material transactions he dealt with the respondent's employee, Sammy (PW1). The said employee confirmed that cheques were normally accepted from the appellant and in that regard the material cheques (P. Exh. 1 & 2) were issued and accepted by the respondent. An additional cheque of Ksh. 25,000/= was also issued but this was returned to the appellant after clearing the amount in cash. The remaining two cheques (P. Exh. 1 & 2) reflecting a total amount of Ksh. 82,574/- were never cleared in cash as promised by the appellant. They remained unpaid and therefore owing to the respondent by the appellant.

24. Sammy (PW1) denied that blank cheques were issued by the appellant. He contended that both cheques (P. Exh. 1 & 2) were written and issued by the appellant. He said that the amount reflected in the second cheque (P. Exh. 2) was entered after accounts were taken and contended that the cheque was not a forgery as implied by the appellant.

The foregoing evidence viewed in the light of the appellant's admission that he indeed issued the two cheques (P. Exh. 1 & 2) clearly showed and established on a balance of probabilities that the appellant was indebted to the respondent in the sum reflected on the cheques (i.e. Ksh. 82,574/=) for the supply of fuel. The appellant's defence indicating otherwise was clearly discredited and unproven by himself.

Thus, the respondents' burden to establish the claimed amount and the appellant's indebtedness in that amount was duly discharged.

25. In the circumstances, this court must agree with and affirm the judgment entered by the trial court for the respondent against the appellant.

In sum, this appeal is devoid of merit and is hereby dismissed with costs.

[Delivered and signed this 9th day of April, 2015.]

J.R. KARANJA.

JUDGE.