



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 186 OF 2011

UNILEVER KENYA LIMITED APPELLANT

-V E R S U S-

MOHAMED S. AHMED T/A

WAYANI DISTRIBUTORS RESPONDENT

(Being an appeal from the Judgment of the Hon. Chief Magistrate R. Mutoka (Mrs) delivered on the 18th day of August 2011 in Mombasa CMCC No. 2265 of 2003)

RULING

1. Appellant was aggrieved by the lower Court's judgment of 18th August, 2011.
2. The background of the present appeal is that Respondent was on or about the years 2002 and 2003 a distributor of Appellants product. Appellant during period ran a promotion called Mega Drive Bonanza for all its distributors whereby it offered various prizes to be won on their Distributors attaining required targets. Respondent's case in the lower Court was that a total cycle No. 10, 11 and 12 of Kshs. 26,466,654.63 and was therefore entitled to get the prize of Brand new Nissan 1400 ¹/₂ Ton. That despite demands Appellant failed, in breach of the contract, to give Respondent the prize. Respondent prayed for orders of specific performance of that contract and general damages for breach of contract.
3. Appellant defendant the action and also filed a Counter Claim. It denied Respondent participated in the promotion and in the alternative pleaded that Respondent failed to attain "**certain month on month (cycle) target for fourth quarter of 2002.**" That he did attain that target because his cheques were returned unpaid during the promotional period. In the Counter Claim Appellant pleaded for judgment of Kshs. 1,201,713.81 being Respondents debts for goods sold and delivered.
4. The Learned Trial Magistrate in her considered judgment gave judgment for Respondent for the prize and for Kshs. 1,201,713.81.
5. The role of this Court as first Appellant Court is set out in the case **KENYA PORTS AUTHORITY -Vs- KUSTON (KENYA) LIMITED (2009)2EA 212** wherein the Court of Appeal held inter alia that-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

6. Appellant presented rather convoluted grounds of appeal which Appellant used to introduce evidence not adduced before the Trial Court. In my humble view the 8 paragraph and 14 sub-paragraph Grounds of Appeal will adequately be dealt with by this Court considering the following issues-

(a) **Was there a contract between the parties whose terms were agreed?**

(b) **If (a) is yes, did the Appellant breach that contract?**

(c) **If (a) is in the affirmative is the Respondent entitled to an order of specific performance and damages?**

(d) **Is the Appellant entitled to judgment for Kshs. 1,201,713.81?**

WAS THERE CONTRACT?

7. Respondent pleaded that there was a contract and further in his evidence he confirmed that contract. Respondent relied on various documents relating to his distributorship with Appellant and also relating to the promotion the subject of this appeal. Appellant through its Sales Personnel and the Area Manager (DW1) informed Respondent of the promotion and supplied him with a leaflet entitled **“Drive into 2003 with the UKL Q4 Mega Drive.”** That leaflet set out the different prizes that were offered to Appellant’s distributors. The third prize was the one Respondent aimed for and which he stated he attained. That was confirmed by DW1 in cross examination when he stated-

“He (Respondent) achieved cycle 10. He achieved cycle 11 as well as 12.”

Appellant submitted that if there was a contract between parties that it was not “a good contract.” Appellant relied on the case **BAAKSHISH SINGH & BROTHERS -Vs- PANAFRIC HOTELS LTD (1986)KLR** as follows-

“In order for there to be a good contract, there must be a concluded bargain and a concluded contract which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. And where an agreement between two parties to enter into an agreement in which some crucial point of the contract matter is left undetermined or where there is a provision for the parties to agree on the critical point later and they never do, there is no contract at all.”

8. As correctly submitted by Counsel for the Respondent, in response to that submission, Appellant is not permitted to raise issues or pleadings not raised before the Trial Court. Before the Trial Court although Appellant denied the contract but alternative pleaded Respondent did not qualify, that pleading was not supported by the oral evidence adduced by Appellant’s witness when he stated-

“I know him (Respondent) as distributor in Changanwe when I was Area Sales Manager Mombasa ... There was a promotion [which] started at the end of 2002. We communicated with the distributors through our customer’s service agent. We sent leaflets to all distributors about the promotion.”

The leaflet mentioned there is the one DW1 referred to when he testified that Respondent achieved cycle 10, 11 and 12. Treitel on the book ‘**The Law of Contract 11th Edition**’ in discussing an offer in a contract stated-

“An offer may be addressed either to an individual or to a group of persons, or to the world at large”

9. There is doubt considering the offer made by Appellant to its distributors had intention to be bound by the offer in the promotion. Respondent was within the group to whom that offer was made. Once that contract was concluded it was not open for Appellant to change its terms to make it a condition that the distributor’s cheques must be cleared for such distributor to be considered part of the promotion. I find I am in agreement with analysis of the Learned Trial Magistrate when she rejected claim by Appellant that the condition of clearance of cheques was a condition of the contract. The addition of that condition was admitted by DW1 when he said-

“In the initial communication the only condition set related to sales. There was nothing about honouring a cheque.”

10. But I believe more importantly is that the Appellant did not prove on a balance of probability that Respondent’s cheques were dishonoured thereby disqualifying him from the promotion. DW1 submitted 4 cheques issued by Respondent which cheques he said were dishonoured. I have perused the cheques thoroughly and I cannot see any statement on them that they were dishonoured. It would have assisted the Court if Appellant produced confirmation from their bankers of such dishonour.

11. It follows, in view of my discussion above that I find there was a binding contract between the parties which contract provided that if Respondent attained the cycles, as it was confirmed by DW1, he was entitled to the third prize of the promotion.

DID APPELLANT BREACH THE CONTRACT?

12. Since there was a contract which provided Respondent would win a prize; and because DW1 Confirmed that Respondent did attend the cycle necessary for him to get the third prize; Appellant did breach the contract because it failed to award Respondent that prize.

IS RESPONDENT ENTITLED TO PRAYERS SOUGHT?

13. Respondent is entitled to the prayer for specific performance against Appellant. The Trial Court was therefore right to have granted that prayer. The award, however of Kshs. 1,217,381/- was in my view in error. If that award was intended to be special damages, it was not pleaded nor was it proved by Respondent. See the case **COAST BUS SERVICES LTD –Vs- MURUNGA DANYI & 2 OTHERS CIVIL APPEAL NO. 192 OF 1992 (UR)**. If the award was intended to be general damages I would state that generally if there is breach of contract what a party is entitled to is compensation for pecuniary loss see **GACHAGUA SAWMILLS LIMITED –Vs- ANTHONY OJIAMBO OLADI (2011)eKLR**.

IS APPELLANT ENTITLED TO THE CLAIM FOR KSHS. 1,201,713.81

14. Appellant did not at all prove this claim. DW1 stated in evidence stated Respondent was indebted to Appellant for the amount of Kshs. 910,123.83. DW1 then referred to MF1-D5. I have tried my best to go through voluminous documents some of which are illegible, but I could not see such an exhibit or see such a figure. That claim was therefore not specifically proved. I therefore find in the negative in regard to this last issue.

15. In conclusion the judgment of this Court is-

(a) The Learned Magistrate’s judgment is upheld save that the award of

Kshs. 1,201,713.81 is hereby overturned/set aside.

(b) Respondent is awarded half costs of this appeal.

DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE