REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E408 OF 2024

MAS TANNERY LIMITED ……APPELLANT
VERSUS
KONSE CHOTE MAKO……RESPONDENT

(An appeal arising from the judgement and decree of Hon. P. Muholi, Principal Magistrate, PM, of 3rd November 2021, in Milimani CMCCC No. 7992 of 2018)

JUDGEMENT

1. The matter at the trial court, was by the appellant, against the respondent. The respondent sought recovery of Kshs. 960,480.00; plus, costs and interests. He had delivered sheep and goat skins, at the business premises of the appellant in Nairobi, and the required price for each sheep, according to him, was Kshs. 240.00, making a total of Kshs. 960,480.00. It was alleged that the appellant had refused to pay, despite demand.

2. The appellant resisted the claim, and filed a defence, dated 5th February 2019. It was averred that the appellant had offered to pay Kshs. 250.00 for good quality skin, and Kshs. 100.00 for poor quality, or small, or undersize skin. After delivery, the skins were verified and selected, and it was established that 415 skins were of good quality and merited a price of Kshs. 240.00; 195 skins were undersize and merited a price of Kshs. 100.00; 3,390 goat skins were rejected and merited a sale price of Kshs. 100.00 each; while 2 sheep skins were rejected and merited a price of Kshs. 100.00. The total, according to the defence statement, was Kshs. 458,300.00. It was asserted that the appellant was not aware of any other contract.

3. An oral trial was conducted. The appellant testified in his case, while Mohamed Abur testified for the appellant. Judgement was delivered, on 3rd November 2021, in favour of the respondent, for Kshs. 458,300.00.

4. The appellant was aggrieved, hence the appeal herein. The grounds are that the decision of the court was not supported by facts, evidence or the law; the evidence was overturned by the trial court; the trial court relied on non-existent admissions; the trial court awarded costs and interests to a party who had declined an offer to collect back his impugned goods, hence failing to mitigate his loss; and finding existence of an oral contract, despite deficient evidence.

5. The respondent cross-appealed, on grounds that the trial court erred in finding in favour of the appellant; re-writing the contract between the parties; awarding costs, but limiting them to the same calculated on the lesser decretal amount as awarded; finding a quantum of damages not suggested by the evidence; and delivering a judgement lacking legality.

6. Directions were taken, on 2nd May 2025, for canvassing of the appeal, by way of written submissions.

7. The appellant submits that there was no meeting of the minds of the two parties, hence there was no valid contract. *Vincent M. Kimwele vs. Diamond Shield International Limited* [2018] eKLR (Kasango, J) and *Samuel Onango Ogolla t/a Zamken Building Construction & General Supplies vs. Board of Management St. Francis of Assis Myanga Secondary School* (2023) KEHC 363 (KLR) (Wananda, J) are cited. It is also submitted that the goods were not ascertained, contrary to the requirement that where the contract is for sale of unascertained goods, no property, in the goods, is

transferred to the buyer unless and until the goods are ascertained. It is submitted that the appellant ascertained the goods, offered the consideration for the same, but the respondent refused to accept the price, which meant that there was a total lack of acceptance in the whole agreement.

8. The other submission is that there was no admission, by the appellant, to pay Kshs. 458,300.00, which could be enforced. It is submitted that an award, for specific performance, is based on existence of a valid and enforceable contract, and *Reliable Electrical Engineers (K) Ltd vs. Mantrac Kenya Limited* [2006] eKLR [2021] KEHC 7272 (KLR) (PJ Otieno, J) is cited, to support the argument, as there was no valid contract that could be enforced by specific performance. The court, it is submitted, does not make a contract for the parties, and *Trollope & Colls Ltd vs. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 [1973] 2 All ER 260 (Lord Pearson, Lord Guest, Viscount Dilhorne, Lord Diplock & Lord Cross of Chelsea).

9. I have not seen submissions by the respondent.

10. There is only 1 issue for determination: whether there was a valid contract, which could be enforced against 1 of the parties.

11. The respondent pleaded to delivering 4,002 sheep and goat skins to the appellant, as per agreement, and received a note, allegedly signed by the appellant, after the appellant agreed to buy the goods. That note was not produced, in evidence, at trial, neither was it attached to the list of documents filed by the respondent.

12. The appellant admitted receipt of the goods, but argued that they had to be subjected to a verification and selection process, to ascertain merchantable quality. After the

ascertainment, the appellant generated a document, produced in evidence, dated 8th May 2018, which showed the grading of the skins as per quality, and the prices attached to them. Thereafter, the parties were unable to agree on the price, and, by a letter, dated 23rd August 2018, the appellant asked the respondent to collect his goods, which he never did.

13. There was no written agreement, hence the purported agreement must have been oral. The law, that ought to govern the situation, in the circumstances, is section 119 of the Evidence Act, Cap 80, Laws of Kenya, which states that:

> *"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and private and public business, in relation to the facts of the particular case"*

14. From the evidence presented, it should be clear that there was no agreement on the pricing of the goods. Hence, there was no meeting of the minds, in view of that, and the parties were not at *consensus ad idem.* There could have been no valid contract, in the circumstances, capable of enforcement.

15. *In William Kazungu Karisa vs. Cosmus Angore Chanzera* [2006] eKLR [2006] KEHC 1974 (KLR) (Ouko, J), it was held that parties, are expected to perform their respective obligations, in accordance with the terms of the contract executed or agreed upon by them. In the absence of agreement, there would be no obligations arising, and there should be no performance to be expected. As there was no agreement on the price, and as, given the nature of the goods, the subject of the contract, had to be ascertained afresh, for pricing purposes, the trial court could not force,

performance of obligations that the parties were yet to agree upon, on the appellant.

16. The respondent did not file submissions on his cross-appeal, and, ideally, I should treat it as abandoned. However, I shall still consider the grounds raised on merits, based on the duty cast on me, as a first appellate court, by *Selle and Another vs. Associated Motor Boat Company Ltd & Others* [1968] EA 123 (Sir Clement de Lestang, VP).

17. The cross-appeal seeks specific performance, on the basis that the agreed price, per skin, was Kshs. 240.00, and having delivered a total of 4,002 skins, according to the respondent, the appellant owed him Kshs. 960,480.00. As concluded above, there was inadequate evidence that the parties were at *consensus ad idem* on the pricing. The goods, the subject of the contract, skins, by their very nature would be subject to ascertainment, which would then be the basis for the pricing. The respondent did not establish that the price of Kshs. 240.00, per skin, which he asserted, had been agreed upon after the appellant had ascertained the goods, through inspection, to determine quality. Without that, there could not be any basis to expect performance by the appellant.

18. Under section 107 of the Evidence Act, it is required that whoever desires any court, to give judgement, as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. The burden of proof, on this, lies with whoever asserts those facts. The respondent asserted that the agreed price was Kshs. 240.00 per skin, but he did not discharge the burden, to prove that fact.

19. The applicable law, to the contract in question, was the Sale of Goods Act, Cap 31, Laws of Kenya. The trial court cited it, although it did not advert to any specific provision, it referred to goods being sold being of merchantable quality, and meeting the standard. It was also noted that the skins must have been of different sizes and quality, hence requiring being sorted out, and some would attract a higher quality than others.

20. The relevant provision, with regard to that, is section 35 of the Sale of Goods Act, which provides as follows:

> *"35. Buyer's right of examining the goods*
>
> *(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.*
>
> *(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."*

21. I would agree with the conclusion by the trial court, by their very nature, hides and skins would require sorting, to separate the good quality ones from those of poor quality, before pricing can be determined. It would not have been possible for the parties to agree on a price before that sorting or ascertainment had been done.

22. After the ascertainment follows acceptance or rejection of the goods. Section 36 provides for acceptance of the

goods, by way of a communication by the buyer. The provision states:

> *"36. Acceptance*
>
> *The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."*

23. The respondent testified that the price was agreed upon before the goods were supplied, and that the appellant informed him later that it was ready to pay a lesser price for the skins, but he was never paid. He declined to take the items after he was not paid after 2 months. He stated that an employee delivered the items, there was a note acknowledging receipt, which did not state a price. He said the police asked him to collect the items, but he refused, as he wanted the money.

24. The witness for the appellant testified that the skins were delivered, and a delivery or receive note was issued. They were sorted out or ascertained, where it was established that 415 were good quality, and a price of Kshs. 240.00 was offered. The rest were rejected for being undersize, and an offer of Kshs. 100.00 per skin was made. That offer was not accepted, and the appellant was invited to take away his materials.

25. The trial court acknowledged, in the judgement, the need for the ascertainment, in terms of section 35. However, the trial court did not address the question as to whether there was a meeting of the minds on the pricing. The parties were not at *consensus ad idem* on that, hence the appellant

declined to pay for the skins. At that point, the respondent should have collected his goods.

26. Upon the collapse of the sale, sections 35 and 37 of the Sale of Goods Act apply. Section 35 is about communication of the decision by the buyer on whether or not he accepts or rejects the goods. The appellant herein accepted only 415 of the goods, and rejected the rest. He offered to buy the rejects also, but that was not acceptable to the respondent, and that was why the sale collapsed. Upon the rejection of the offer, the appellant was not bound to return the goods to the respondent. That is the effect of section 37 of the Sale of Goods Act, which states:

> *"37. Buyer is not bound to return rejected goods*
>
> *Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."*

27. The respondent did not accept the offer to sell the rejected skins at Kshs. 100.00, and insisted on the Kshs. 240.00, which the appellant did not accept, after evaluating the quality of the skins. The mere fact that the skins had been delivered, did not amount to acceptance, according to section 30 of the Sale of Goods Act, for the appellant was entitled to ascertain and inspect the goods first, before indicating whether he was to accept them or not. It only found a small portion to be of good quality, and rejected the bulk. There was no agreement, thereafter, on the pricing, and it was at that point that the contract fell through, and the respondent ought to have collected his goods, and sought an alternative market.

28. As there was no *consensus ad idem* on the pricing, the trial court ought not have forced the contract on the

appellant, when the contract was never consummated in the first place, and should not have expected the appellant to have returned the goods, given that section 37 did not oblige it to do such a thing.

29. Consequently, I find and hold that the respondent did not establish that there was any agreement that the appellant was to pay Kshs. 240.00 per skin, for all the 4,002 skins deposited with the appellant by him. An award ought not have been made against the appellant. The appeal is merited and I allow it, and I find, for the same reasons that the cross-appeal is not merited, and I hereby disallow it. The effect shall be that the decree of the trial court is hereby set aside, and substituted with an order dismissing the said suit. The appellant shall have the costs of the appeal, and of the suit at the court below. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 25TH DAY OF NOVEMBER 2025.

W MUSYOKA
JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.
Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.
Ms. Eva Adhiambo, Legal Researcher.

Advocates
Mr. Wanyanga, instructed by Namada & Company, Advocates for the appellant.
Mr. Wanjohi, instructed by Jaafar Jelle & Company, Advocates for the respondent.