Mjengo Limited v Menengai Oil Refineries Limited (Civil Appeal 80 of 2019) [2025] KECA 85 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 85 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 80 OF 2019

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

JANUARY 24, 2025

BETWEEN

MJENGO LIMITED ..... APPELLANT

AND

MENENGAI OIL REFINERIES LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nakuru (A. Ndungu, J. on behalf of R. Korir, J.) dated 22nd May 22, 2019 in Civil Case No.79 of 2016)

JUDGMENT

1. The facts which triggered the litigation before the High Court which yielded the judgement, (the subject of this appeal) delivered on 22nd May 2019 by A. Ndungu, J. on behalf of R. Korir, J. in Nakuru High Court Civil Case No.79 of 2016, are either common ground or uncontroverted. Briefly, at all material times relevant to this dispute, the respondent was engaged in the business of manufacturing various fast-moving goods for sale through a number of re-sellers and or distributors in East Africa. It is also uncontested that the appellant was engaged in the business of selling the respondent's aforesaid products, and that, the said products would be supplied to the appellant by the respondent on agreed terms and consideration as stated here below.

2. As the facts disclose, prior to 2011, the respondent traded with the appellant on a bonus system whereby they offered "commission" to its distributors on an ex-gratia basis deepening on market penetration and it would also give credit to the distributors who promoted and sold its products in their respective regions. However, with effect from August 2011, there was a change of management in the respondent company, and the hitherto arrangement of paying bonus schemes to the re-sellers of its products was abolished on the grounds that it was no longer sustainable and in its place the respondent introduced a direct sales and marketing business model where all its customers were on the same level but it would offer discretionary discounts directly to large volume customers such as the appellant herein.

3. There is no dispute that the appellant was fully aware of the new terms. Nevertheless, it continued to purchase goods from the respondent at the new trading terms. According to the respondent, the appellant benefited from the discretionary discounts, and as of September 2011, a total sum of Kshs. 38,703,041 was due and owing from the appellant in respect of goods supplied by the respondent. However, despite demand, the appellant failed to settle the said debt, contending that it had not been paid an unspecified commission by the respondent.

4. The above turn of events prompted to respondent to seek legal redress against the appellant by a plaint dated 22nd August 2016 in which it prayed for judgment against the appellant for:

    a. the principal sum of Kshs.38, 703,041; (b) interests as per the agreed trading terms at the rate of 2% per month from the month of September 2011 until payment in full; (c) Alternatively, interest at court rates; (d) Costs of this suit and, any other relief that the Court would deem just and appropriate.

5. In its defence dated 27th September 2016, the appellant maintained that its relationship with the respondent began in or about the year 2005 and that it would build up customers and hand them over to the respondent who in return gave it commission on direct sales which was not ex gratia but at 2% on turn over and that the appellant's commission changed from month to month and as their relationship grew, the appellant gave up its business with KAPA Oil Refineries to concentrate on the respondent's business. However, the ownership of the respondent changed and its new owners immediately changed the terms of engagement and stopped paying commissions even for the work that was previously done thereby occasioning the appellant losses as it used to earn a credit note of about Kshs.5 million. Therefore, it lost about Kshs.100 million which the respondent neither acknowledged to be owing nor did it offer to pay to the appellant.

6. After hearing the parties, Korir, J. in her judgment delivered on 22nd May 2019, determined the following issues: (a) whether the defendant (now the appellant) breached the contract; and,

    b whether the plaintiff (now the respondent) was entitled to the reliefs sought.

7. On the first issue, the learned judge found that the appellant did not file a counter-claim nor did it substantiate the commission claimed since it did not state the exact figure. Therefore, the failure to file a counter-claim was fatal as it failed to prove that the respondent owed it outstanding commission. Regarding the second issue, the learned judge entered judgment in favour of the respondent for the sum of Kshs.38,703,041 plus interests at court rates from the date of instituting the suit. The respondent was also awarded costs of the suit.

8. The appellant is now before us seeking to set aside the said judgment and substitute it with an order dismissing the respondent's case with costs. In its memorandum of appeal dated 10th September 2019, the appellant cites ten grounds of appeal which can be summed up as follows: (a) whether the respondent specifically pleaded and proved its claim for special damages, (grounds 1-4); (b) whether the commission paid was ex gratia or contractual, (ground, 5); (c) whether promissory estoppel applied to this case, (ground 6); (d) whether the appellant's failure to counter-claim the commission was fatal to its case, (ground 7); (e) whether the respondent proved its case to the required standard, (grounds 8 & 9); (f) whether the learned judge was selective in considering the evidence before her, (ground 10).

9. During the virtual hearing of this appeal on 13th November 2022, Mr. Kiche held brief for Mr. Ohaga, SC. for the appellant while Mr. Situma appeared for the respondent. The appellant's written submissions are dated 20th July 2020 while the respondent's written submissions are dated 14th September 2020.

10. In its submissions, the appellant faulted the trial judge for finding that the commission paid was ex-gratia yet the respondent's witnesses (PW1 and PW2) in their respective testimonies admitted that there were commissions before the respondent's ownership changed and the new management abolished commissions paid to its customers. Therefore, that was an acknowledgement that there existed a trading relationship between the appellant and the respondent that commenced prior to the takeover by the new regime and that commission was paid by the respondents to the appellant which was terminated without notice when the new shareholders took over the respondent.

11. The appellant also submitted that the commission was essentially the consideration for the appellant's promise to assist the respondent by deepening market penetration for its products which was the basis for the contractual relationship between the parties. Therefore, the trial Judge erred in law and in fact when she held that the commission was not a promise but rather an appreciation for the work done by the appellant. The appellant contended that it was inconceivable for the High Court to hold that the commission enjoyed by the appellant for discharging its role of selling the respondent's products was ex-gratia.

12. Regarding the contention that the learned judge erred in fact and in law in holding that promissory estoppel did not apply in the particular circumstances of the relationship between the parties, the appellant submitted that a promise or representation is a key element of promissory estoppel and that the appellant relied on the respondent's representation which was in words, by conduct and by paying the commission. The appellant argued that on the strength of the respondent's representation, it distributed the respondent's products, therefore, the respondent is estopped from denying that the appellant was entitled to the commission. The appellant maintained that the learned judge erred by failing to appreciate that it would be inequitable for the respondent to dishonor its promise to pay commission to the appellant having regard to the dealings which had taken place between the parties. To fortify its argument, the appellant relied on the High Court decision in Nairobi County Government vs. Kenya Power and Lighting Company Limited [2018] eKLR in support of its submission that the promissory estoppel is applicable in the circumstances of this case.

13. On whether the respondent specifically pleaded and strictly proved the special damages, the appellant submitted that the respondent produced various invoices and delivery notes, but it failed to incorporate the credit notes due to the appellant in terms of the agreed terms for July, August and September, 2011. The appellant also submitted that due to the accounting relationship, the respondent had an obligation to provide a true and fair statement of accounts taking into consideration the credit notes due to the appellant arising from the commissions earned. The appellant maintained that the respondent failed to prove that it was entitled to the entire sum of Kshs.38,703,041.

14. In opposing the appeal, the respondent submitted that it specifically pleaded and proved the special damages of Kshs.38,703,041 plus contractual interest and that its evidence tendered by PW1 and PW2 was not controverted by the appellant. Further, the appellant did not object to the production of its invoices in support of the special damages, but, it instead opted to advance an unpleaded counter-claim and its submissions on the said issue were not anchored on its evidence. Accordingly, the respondent submitted that first four grounds of appeal are thus nothing but a red herring.

15. Addressing grounds 5 and 6 relating to the question whether the commission paid to the appellant was ex-gratia, the respondent submitted that DW1 during cross examination admitted that the bonus scheme was abolished and a discount structure started. Therefore, the appellant was at liberty to cease trading with the respondent if they were not satisfied with the discount trading system offered after August 2011. On the contrary, the appellant continued to purchase goods for sale after August 2011. In support of this submission, the appellant cited Central Farmers Limited vs. Rift Valley Outlest Limited

[2012] eKLR where this Court in addressing the possibility of implying a term into a contract in the absence of proof of a trade usage stated that in the absence of proof of custom or usage, a term cannot be implied into a contract.

16. On the doctrine of promissory estoppel, the respondent maintained that the communication terminating the ex-gratia commission and replacing it with discretionary discounts was clear and unambiguous and at no point did the respondent conduct itself in a manner giving rise to a legitimate expectation for the appellant. Accordingly, the ingredients of promissory estoppel do not exist in this case.

17. Addressing ground 7 of the memorandum of appeal, the respondent submitted that the appellant's claim for loss of revenue on account of "commission" and loss of alternative business is unsustainable because the appellant preferred no counter-claim or set-off in its pleadings, therefore, the appellant's case is not anchored in law.

18. Submitting on grounds 8, 9 and 10 of the memorandum of appeal, the respondent maintained that the standard of proof is on a balance of probabilities and asserted that it proved the existence of a business relationship, how it was operated and how the appellant eventually fell into arrears of Kshs. 38,703,041. Further, documentary evidence was produced including invoices, delivery notes, statements of accounts and schedule of interest and the appellant's managing director did not contest the respondent's testimony. Therefore, the learned judge considered all the evidence adduced and arrived at a well-reasoned judgment.

19. This is a first appeal, therefore, it is a retrial. We are obligated to re-evaluate all the evidence and arrive at our own independent conclusions. (See Selle vs. Associated Motor Boat Co Ltd [1968] EA, Mariera vs. Kenya Bus Service (MBS) Ltd [1987] KLR 440). We are also required to bear in mind that unlike the trial court, we did not have the benefit of seeing and hearing the witnesses testify. Therefore, we should not lightly interfere with the trial court's findings on matters of fact unless it is demonstrated that the findings are not supported by the evidence on record or they are manifestly wrong. (See Peters vs. Sunday Post Ltd [1958] EA 474).

20. We will first address the question whether the respondent pleaded and proved the special damages it was awarded by the trial court. The appellant's case is that the special damages awarded were unmerited because they were not strictly proved and that in arriving at the figure of Kshs.38,703,041, the respondent failed to incorporate the credit notes due to the appellant in terms of the agreed terms of engagement for the months of July, August, and September 2011.

21. Its trite law that special damages must be both specifically pleaded and strictly proved before a court can award them. (See this Court's decision National Social Security Fund Board of Trustees vs. Sifa International Limited [2016] eKLR). This is because special damages are not always a direct result of the act in question. The degree of certainty and specificity required for proof depends on the circumstances of the case. Special damages cannot be inferred from the act in question. This Court in Douglas Odhiambo Apel & another vs. Telkom Kenya Limited Civil Appeal No. 115 of 2006 (UR) was emphatic that:

> "...Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved."

22. The basis upon which the trial court awarded the respondent special damages in the sum of Kshs.38,703,041 was its finding that the appellant was supplied with goods worth Kshs.38 million by

the respondent for sale in its region. In support of the foregoing, the respondent relied on a bundle of invoices for the months of August and September 2011. These documents were produced by the respondent's managing director Mr. Okhar Singh Rai, PW1 and PW2, Lucy Kariuki, its accountant. It was their case that despite having been supplied with the goods, the appellant never paid the requisite price as per the invoices. The trial court was also satisfied that during cross- examination, DW1 stated "I do not object to the invoices produced by menengai" thereby rendering the invoices produced by the respondent uncontroverted.

23. The question before us narrows to whether the special damages of Kshs.38,703,041 awarded to the respondent were proved to the required standard. As mentioned above, the appellant's witness (DW1) confirmed that he did not object to the respondent's invoices during his cross-examination on 5th October 2021. A reading of the respondent's plaint dated 22nd August 2016 clearly shows that the claim for special damages was carefully pleaded. At paragraph 9 of the plaint, it is pleaded that the respondent was supplied with the goods in August and September 2011. At paragraph *10*, the value of the goods supplied is stated at Kshs.38,703,041. At paragraph *11*, it was clearly pleaded that the appellant refused to pay the said sum despite requests to do so. At paragraph *12*, the respondent clearly averred that the amount was to attract a monthly interest at the rate of 2% as per the applicable terms. It was also pleaded at paragraphs *12* and *13* that the appellant had ignored requests and demands to pay. Lastly, at prayer (a) of the plaint, the respondent prayed for the said sum. We therefore have no doubt that the respondent's claim for special damages was specifically pleaded and strictly proved to the required standard. Accordingly, we affirm the trial Judge's finding that the evidence adduced by the respondent met required threshold for proof of a special damages. (See Hahn vs. Singh [1985] KLR 716.)

24. We now turn to the issue whether the failure by the appellant to file a counter-claim was fatal to its case. In determining this issue, the trial judge stated:

> " I find it strange that the defendant did not file a set -off or counterclaim by virtue of Order 7 rule 3 of the Civil Procedure Rules, 2010 which provides...the failure of the defendant to file a counterclaim was fatal as it has failed to prove that the plaintiff owed it outstanding commissions. In the premises, I can only find in favour of the plaintiff."

25. This Court in Nairobi City Council vs. Thabiti Enterprises Ltd [1995-1998] 2 EA 231 held that a court should not grant a counter-claim unless pleaded. We note that there was evidence of credit notes issued even after August 2011 as demonstrated in cross-examination of PW2 who confirmed that the last credit note was issued on 29th September 2011. Be that as it may, since the appellant did not file a claim for set-off and/or a counter-claim, the trial court's hands were tied because the allegations levelled against the respondent were not supported by the appellant's pleadings. We also find that even if the trial court were to find that the payment of the commission was contractual and not ex-gratia, the respondent would not have been condemned for breach of contract because the appellant did not counter-claim the alleged commission. Therefore, the learned Judge did not err in finding that the appellant failed to proof that the respondent owed it outstanding commission and that the failure to file a counter-claim was fatal to the appellant's case.

26. Next, we will address the issue whether the commission the appellant received from the respondent was ex-gratia and not contractual. Addressing this issue, the trial judge stated:

> " Where a trade usage is not known such as to warrant a court to take judicial notice of such a practice, it is trite that the person relying on it must not only plead it but must also prove it...i find that the defendant failed to prove the existence of trade usage and customs as regard

the commissions it received from the plaintiff and therefore does not constitute part of the contractual agreements."

27. Having affirmed the trial court's finding that the failure by the appellant to claim for a set-off or a counter-claim was fatal to its case, and having affirmed the trial court's finding that the respondent proved its special damage to the required standard, we find that the issue whether the payment of commission was contractual or ex- gratia and whether promissory estoppel did apply in the circumstances of the relationship between the parties has been rendered otiose and/or an academic exercise. Accordingly, it will serve no utilitarian purpose for us to deliberate and determine the said issue. A court of law does not act in vain.

28. The other ground urged by the appellant is that the learned judge was selective in evaluating the evidence before her. It is imperative that a court evaluates all the evidence, and not to be selective in determining what evidence to consider. What must be borne in mind, however, is that the conclusion which is reached must account for all the evidence. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.

29. However, by requiring the trial court to consider and weigh all the evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led. Stated differently, in order to determine whether there is any merit in the appellant's argument that the trial court was selective in evaluating the evidence, this court must consider the evidence led in the trial court, juxtapose it against the judgment of the trial court, and finally determine whether there is any basis for interfering with the said judgment.

30. If a Court of Appeal is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the Court of Appeal. We have gone through the evidence tendered before the trial court and the parties' submissions. We have also read the impugned judgment, and particularly the manner in which the learned judge evaluated all the evidence. In fact in this judgment, we event reproduced some excerpts from the judgment. We are satisfied that the learned judge considered all the evidence tendered by the parties. We find no merit in the argument that the learned judge was selective in her assessment of the evidence.

31. Lastly, the appellant deployed a lot of energy arguing that the doctrine of promissory estoppel applies to this case and invited us to be persuaded by the said line of reasoning. Promissory estoppel as we understand it is the legal principle that a promise is enforceable by law, even if made without formal consideration when a promisor has made a promise to a promisee who then relies on that promise to his subsequent detriment. In order to seek damages based on promissory estoppel, a plaintiff must show that: (a) the promisor made a promise, with the intention that a reasonable person would act on it; (b) the promisee believed the promisor, and acted on that promise in good faith; (c) the promisor later reneged on that promise causing financial harm to the promisee; and (d) the nature of the promise is such that the only way to avoid injustice is by enforcing the promise. (See Hughes vs. Metropolitan Railway Co. 1877 2 AC 439).

32. In 1947 Justice Denning (as he then was) in Central London Property Trust Ltd vs High Trees House Ltd [1947] KB 130 summed up the applicable principles in cases of promissory estoppel in the following words:

> "... a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on."

33. Therefore, where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any preexisting relationship between the parties or not. The foregoing statement sums up the true legal position. The Court must have regard to the dealings which have taken place between the parties. We earlier highlighted the undisputed facts of this case. There is no contest that the appellant would collect the respondent's goods on credit, and it would re-sell/distribute them and that it would be paid a commission based on the turnover. It is common ground that the ownership of the respondent changed and the new management found the existing arrangement to be unsustainable and terminated it. These changes were communicated to the appellant. The appellant refused to pay the outstanding invoices and it was sued culminating in the impugned judgment. We are clear in our mind that the elements of promissory estoppel as discussed above do not exist in the facts of this case. Therefore, the attempt to invoke the doctrine of promissory estoppel in the circumstances of this case is misguided.

34. Arising from our conclusions on all the issues discussed above, the inevitable verdict is that this appeal is devoid of merit. Accordingly, we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY, 2025.

M. WARSAME

..... JUDGE OF APPEAL

J. MATIVO

..... JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

I certify that this is a

true copy of the original.

Signed.

..... JUDGE OF APPEAL

DEPUTY REGISTRAR.