IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 73 OF 2019

BETWEEN

CAROSA INVESTMENTS LIMITED.....APPELLANT

AND

KOBIL PETROLEUM LIMITED.....RESPONDENT

***(Appeal from the judgment and order of the High Court of Kenya at Nairobi (Sergon, J.) dated 16th February 2018* in HCCA No. 488 of 2014)**

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JUDGMENT OF THE COURT

This is a second appeal from the judgment of the High Court at Nairobi ***(Sergon, J.)*** dated 16th February 2018 by which the leaned judge upheld the decision of the ***Chief Magistrate's Court*** at Nairobi, dismissing ***Carosa Investments Ltd's (the appellant)*** claim against ***Kobil Petroleum Ltd (the respondent)***. A second appeal is limited to issues of law only. (See ***Kenya Breweries Ltd v. Godfrey Odoyo [2010] eKLR***). However, that had not stopped the appellant from inviting us to delve into matters of fact. The memorandum of appeal asserts in all the grounds of appeal that "*the learned judge erred in both fact and law*", which it ought not to do. Be that as it may, we shall confine ourselves to the issues of law only, as we are duty bound to do.

Before the trial court, the appellant pleaded that it entered into a petrol station dealership agreement with the respondent on 25th October 2004 pursuant to which it paid to the respondent a security deposit of ***Kshs 2 million***, on the understanding that upon termination of the agreement, the respondent would refund to it the security deposit. The appellant further averred that on 27th May 2015, the respondent terminated the dealership agreement but in breach of contract refused or failed to refund ***Kshs 1,270,024.15*** being the outstanding security deposit. Accordingly the appellant prayed for judgment for the said sum, interest at ***24%*** per annum from 27th May 2005 until payment in full, and costs of the suit.

By an amended defence filed on 15th August 2006, the respondent denied that the appellant had paid to it any security deposit and pleaded that the security deposit in question was paid by ***Robric Limited*** against which the respondent had a claim still pending in court exceeding the amount of the

security deposit. The respondent further pleaded that in or about 2004, Robric Ltd continued to operate the petrol station under the name of the appellant, but the management of the station remained the same.

In its reply to defence the appellant pleaded, among others, that it was distinct and separate from Robric Ltd, that it succeeded Robric Ltd and took over its trading account, and that it ultimately became the sole manager of the petrol station.

By a judgement dated 1st October 2014, the trial court dismissed the appellant's claim with costs. The court found that the appellant did not adduce any evidence to show that it took over the rights and obligations of Robric Ltd, which was a separate and distinct legal person and further that there was no evidence that the appellant paid any security deposit to the respondent.

The appellant was aggrieved and lodged a first appeal in the High Court. The parties agreed to canvass the appeal through written submissions, which they duly filed. However, when he came to write the judgment, Sergon, J. stated that the respondent had failed to file its submissions. He accordingly considered only the appellant's submissions before allowing the appeal with costs in a judgment dated 6th November 2017. On 21st November 2017, the respondent applied for review of the judgment on the ground of error apparent on the face of the record, and after satisfying himself that the submissions were indeed on record, the learned judge, by ruling dated 22nd January 2018, vacated the judgment of 6th November 2017.

After considering the respondent's submissions, on 16th February 2018, the learned judge delivered the judgment whichis impugned in this appeal and dismissed the appellant's appeal with costs. Like the trial court, he found that the appellant and Robric Ltd were separate and distinct legal personalities and that there was no evidence that the appellant had paid any security deposit to the respondent.

In this appeal the appellant contends that the learned judge erred by ignoring the admissions made by the respondent in its amended defence, by ignoring the dealership agreement dated 25th October 2004 between the appellant and the respondent; by failing to appreciate that the rights and obligations of Robric Ltd were transferred to the appellant; and by failing to consider all the facts.

In support of the appeal, ***Ms Gathara,*** learned counsel for the appellant submitted that the respondent admitted in its amended defence that Robric Ltd paid to it a security deposit of Kshs 2 million and that the appellant subsequently advised the respondent that it was taking over the rights and obligations of Rubric Ltd. It was contended, on the authority of ***IEBC & Another v. Stephen Mutinda***

***Mule & 3 Others* [2014] eKLR,** that the respondent was bound by its pleadings in the amended defence and that the learned judge erred by ignoring the admissions made by the respondent. Next, counsel faulted the High Court for ignoring the dealership agreement between the parties dated 25th October 2004. Counsel submitted that both the appellant and the respondent were bound by the terms of that dealership agreement which the court was duty bound to give effect to, rather than to re-write. The judgment of this Court in ***National Bank of Kenya Ltd v. Pipelastic Samkolit (K) Ltd & Another* [200] EA 503** was cited to support the proposition. It was further contended that the appellant adduced sufficient evidence to show that the deposit paid by Robric Ltd was to be utilized by the appellant. The appellant went out of its way to invite us to make findings of fact, different from those made by the two courts below, as to what was agreed between it and the respondent regarding the rights and obligations of Robric Ltd. Lastly, it was contended that the learned judge erred by failing to consider and evaluate all the evidence, which showed that the appellant took over the rights and obligations of Robric Ltd. It was urged that the High Court misdirect itself when it held that the appellant was a separate legal entity from Robric Ltd., yet the two companies shared common directors.

Ms. Effendy, learned counsel for the respondent opposed the appeal, submitting that the respondent did not admit the appellant's claim and that the appellant failed to adduce evidence to show that Robric Ltd assigned to the appellant its rights and obligations. Counsel argued that all the respondent did in its amended defence was to explain that the deposit in question was paid by Roblic Ltd which did not amount to an admission that the payment was made by the appellant.

It was further submitted that the agreement dated 25th October 2004, which the appellant was relying on, was between the appellant and the respondent and that Robric Ltd was not a party to it. Counsel contended that the two courts below did not err in holding that the security deposit was paid by Robric Ltd, which was a separate and distinct legal entity from the appellant. The decision in ***David Umara Bahola v. Tanasco Co Ltd* [2018] eKLR** was cited to support the separate and distinct legal personalities of the two companies.

The respondent lastly urged us to find that in arriving at his judgement, the learned judge had properly re-evaluated the evidence and arrived at the correct decision. On the authority of ***Ephantus Mwangi & Another v. Duncan Mwangi Wambugu* [1984] EKLR**, we were urged not to interfere with the findings of fact by the two courts below because the appellant did not present any ground to justify such interference.

We have carefully considered the record of appeal, the impugned judgment, the grounds of appeal, the submissions, both written and oral, made by the respective counsel and the authorities that they cited. In our view, this appeal turns on whether the appellant proved that it paid the security deposit of Kshs 2 million to respondent or that it was assigned Robric Ltd's rights and obligations under the agreement so as to be entitled to a refund of the deposit upon termination of the dealership agreement.

Going by the pleadings, as we must, the appellant's case as pleaded in paragraph 3 of the plaint is that it was the appellant which paid the

deposit of Kshs 2 million. That payment was allegedly made pursuant to the dealership agreement dated 25th October 2004. Looking at that agreement, it is plain that the parties to it were only the appellant and the respondent. Robric Ltd was not a party to the agreement. Indeed, the appellant did not refer to Robric Ltd at all in the plaint. It was the respondent who introduced the Robric Ltd in the amended defence, to explain that it received the security deposit from Robric Ltd rather that from the appellant, contrary to what the appellant pleaded in the plaint.

It is patently clear to us that the evidence on record does not support any payment of security deposit by the appellant to the respondent. The evidence, which is admitted by the respondent, shows that the security deposit was paid by Robric Ltd rather than by the appellant. The appellant however changed tack and claimed that it was entitled to refund of the deposit, having been assigned the rights and obligations of Robric Ltd.

First, that was not the appellant's case as pleaded. Second, the agreement dated 25th October 2004 on which the respondent relies, does not refer to any assignment either by Robric Ltd or any other party. It is a straightforward agreement between the appellant and the respondent to the exclusion of Robric Ltd. Third, and more critical, the agreement itself provides that the rights and obligations under it could not be assigned. ***Clause 7(a)*** of the agreement provides as follows:

> "*This license is personal and exclusive to the licensee who may not under any circumstances assign or transfer the benefit and obligations under it or any part thereof PROVIDED THAT when the licensee is a limited liability company, any transfer of the majority of its issued shares to a third party without the knowledge or approval of the company shall constitute an assignment of this license."* (Emphasis added).

The only agreement that Robric Ltd could have assigned to the appellant is the agreement dated 1st July 2003 between it and the respondent. But that is not the agreement which the appellant relied upon. Moreover, that agreement too contained a clause, also 7(a), which prohibited assignment of the rights and obligations under it.

When parties have reduced the terms of their agreement into writing, one of them is not entitled to introduce extrinsic evidence to show that they agreed differently from what the written agreement states. (See ***section 98*** of the ***Evidence Act***). If there is to be a variation of the written agreement, the variation must also be in writing, which is not the case here. The evidence on record shows that assignment of rights and obligations under the dealership agreement was expressly prohibited and the appellant did not adduce any admissible evidence to show otherwise.

The appellant also impugns the judgment of the High Court for failing to consider admissions made by the respondent. Having carefully considered the amended defence, we do not see any admission as understood in law. The respondent denied the appellant's averments and stated expressly that the deposit in question was paid by Robric Ltd rather than by the appellant. It explained the circumstances under which Robric Ltd paid the deposit. For a statement or a pleading to constitute an admission, it must be clear and unambiguous. In ***Choitram v. Nazari [1984] KLR 327, Madan, JA***, (as he then was), stated the principle as follows:

> *"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt..."*

We respectfully agree with the above statement of the law. We are equally satisfied that there is no basis for holding that the first appellate court failed to discharge its duty of reevaluating the evidence and reaching its own independent conclusions. The court properly considered the evidence adduced by the parties and concluded, correctly in our view, that the appellant did not prove that it paid the security deposit, or was assigned the rights and obligations of Robric Ltd, which was a separate and distinct legal entity. In these circumstances, we see no basis for interfering with the conclusions by the learned judge. Ultimately we have come to the conclusion that this appeal is bereft of merit and we hereby dismiss it in its entirety, with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 8th day of May, 2020

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR