**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, KIAGE & ODEK, JJ.A)**

**CIVIL APPEAL NO. 252 OF 2016**

**BETWEEN**

**ZINGO INVESTMENTS LIMITED..........................................APPELLANT**

**AND**

**KENYA SYNTANS & CHEMICALS LIMITED..................RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi* ***(Sergon, J.)*** *dated* ***23rd January, 2015*** **in HCCC NO. 267 OF 2011)**

**JUDGMENT OF THE COURT**

A brief background of the events leading to this second appeal is that the parties herein had an oral agreement where the appellant would order chemicals via phone or through a Local Purchase Order from the respondent. The norm was that the appellant usually paid the respondent for the goods once they were delivered. As per the terms of their agreement, the invoices issued to the appellant contained a clause to the effect that in default of settling the debt within 30 days from the date of delivery, the appellant would incur an interest rate of 2% per month on the outstanding debt until payment in full. By 26th June 2008, it was the respondent's claim that the outstanding debt owed to it by the appellant was Kshs. 2,148,293. The respondent filed suit on the basis that the appellant had breached their agreement and had failed and/or refused to settle the invoices for the goods supplied to it by the appellant.

It was brought to the attention of the court that the respondent made deliveries of industrial chemicals valued at Kshs. 1,753,469 and that the appellant only manged to pay Kshs. 93,787, leaving a balance of Kshs. 1,659,682. The respondent further listed all the outstanding invoices ranging from 12th March 2007 to 28th August 2007 amounting to the said Kshs. 1,659,682. The additional sum of Kshs. 488,611 was the 2% per month interest payable on the overdue amounts from 13th March 2007 to 12th June 2008 which totalled to Kshs. 2,148,293. The respondent thus prayed for judgment against the appellant, *inter alia,* for:

a) The sum of Kshs. 2,148,293.

b) Interest on the sum of Kshs. 2,148,293 at the rate of 2% per month from 12th June 2008 until payment in full.

The appellant filed its defence and later amended it to include a counterclaim categorically denying owing the respondent an ymoney. It affirmed to the court that it had fully paid for all the industrial chemicals supplied to it by the respondent. In the counterclaim, the appellant contended that on diverse dates between March 2007 and November 20 07, it pre-paid the respondent a total of Kshs. 2,900,000 for supply of chemicals. However, the respondent was only able to supply chemicals worth Kshs. 1,659,682. Therefore, contrary to the respondent's assertion, the appellant claimed that it was owed a sum of Kshs. 1,240,318 as a payment for goods not delivered and that was the prayer it made on the counterclaim.

The trial Magistrate considered the evidence tendered before the court and was satisfied that the respondent had established its case. Therefore entered judgement in favour of the respondent in the following terms;

a) Kshs. 2,148,293/-

b) Interest on the sum of Kshs. 2,148,293/- at the rate of 2% per month from 12th June 2008 until payment in full.

c) Costs of this suit

d) The defendant's counterclaim was dismissed with costs.

Being aggrieved by the judgment of the trial court, the appellant filed an appeal at the High Court.

Sergon, J. considered the appeal and delivered a judgment on 23rd January 2015 dismissing the appeal with costs to the respondent.

Undeterred, the appellant filed the instant appeal on 6 grounds which contained complaints that the learned Judge erred in law and fact by;

> **(a) Failing to take into account the evidence tendered by the appellant to the effect that it had paid the respondent the amount claimed.**
>
> **(b) Failing to take into account that the outcome would amount to unjust enrichment of the respondent to the detriment of the appellant.**
>
> **(c) Failing to find that the respondent's evidence was not credible and was laden with inconsistencies.**

When the appeal came up for hearing, learned Counsel **Mr. Muriithi** appeared for the appellant while his learned counterpart **Ms. Ogola** appeared for the respondent. All the parties filed written submissions and authorities in support of their cases.

**Mr. Muriithi** submitted that the learned judge failed to take into consideration the admission made by PW1 to the effect that on some occasions, it was normal for the appellant to make overpayments to the respondent. That such an admission was essentially in support of the assertions made in the counterclaim and the court ought to have arrived at the inescapable conclusion that the appellant was indeed overpaid by Kshs. 1,240,318, for the period when the cause of action arose. Counsel believed that there was overwhelming evidence to show that appellant paid the respondent a sum of Kshs. 2,900,000.

He concluded by stating that the court did not make its finding based on the evidence tendered by the appellant hence arrived at an erroneous conclusion. As a result it caused the respondent to be unjustly enriched. He urged the Court to allow his appeal.

**Ms. Ogola** pointed out that this Court lacked jurisdiction to entertain this matter since the appellant had not raised any point of law for determination by the Court. She contended that the appellant had appealed on matters based on facts which require this Court to interrogate the evidence adduced by the parties. This is contrary to **section 72** of the **Civil Procedure Act** chapter 21 Laws of Kenya (the Act) which provides that a second appeal to this Court is restricted to matters of law and therefore this Court must not interfere with the factual findings of the trial courts below.

Counsel also added a rider that in the event that the Court considers the appeal, her submission was that the denials contained in the defence and the claims made in the counterclaim were all an afterthought since the appellant's witness failed to explain in his testimony why they had never demanded for a refund of the alleged overpayment.

She averred that the appellant's production of the post-dated cheques without further evidence was not sufficient to prove the allegations contained in the counterclaim. On the other hand, the respondent produced invoices with corresponding delivery notes and in some instances local purchase orders. Further, the ledger accounts in respect of the appellant's account clearly showed that the appellant had an outstanding balance of the sum pleaded.

More specifically the claim of overpayment was well rebutted by the respondent's statement of account for the period of January 2007 to 31st December 2007. It clearly showed that the payment from the post-dated cheques was applied towards the reduction of the appellant's existing debt. This was demonstrated by the credit balance left on the said statement of Kshs. 1,659,682. The claim for overpayment could not therefore stand.

Counsel submitted that the appellant had failed to show it had cleared its liabilities in respect of deliveries made to it by the respondent. She urged the Court to be persuaded by the holding in ***BENEDETA WANJIKU KIMANI V CHANGWON CHEBOI & ANOTHER* [2013] eKLR** *and* ***FRANCIS MUCHEE NTHIGA V DAVID N. WAWERU* [2014] eKLR**. She concluded her submission by urging the Court to dismiss the appeal as it lacked merit.

We have considered the appeal and the rival submissions in light of the entire record and distilled the following for determination; whether this Court has jurisdiction to interfere with the concurrent factual findings of the courts below and; if so, whether the courts erred in determining that the appellant was in breach of the oral agreement and therefore owes the respondent money in default of payment of goods delivered to it.

As a second appellate court we are cognizant that our jurisdiction is limited to matters of law and not of fact. The same is provided for in **section 72** of the Act. We are persuaded by and approve the dicta of Onyango Otieno, J (as he was then) in ***KENYA BREWERIES LTD V GODFREY ODOYO* [2010] eKLR;**

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."***

We also take note of the dissenting judgement by Nyamu, J. (as he was then) more specifically approve his sentiments concerning the restriction as provided for in **section 72** of the **Civil Procedure Code** in ***KENYA BREWERIES LTD V GODFREY ODOYO*** (Supra);

***"Before illustrating the point, I must begin by stating that in my view, section 72 does not prevent this Court from finding that failure by first appellate court to properly analyse, re-assess or re consider the evidence and reach its own independent conclusions, is a matter of law and that only this Court can rectify any mistakes arising from such a failure."***

Other than looking into whether the courts below failed in their mandate in the interest of justice, it is important to note that the said courts made concurrent findings. The learned judge did not depart from any finding of the trial court, in fact he endorsed each and every conclusion arrived at by the trial magistrate and had good reason to do so. We take note of the holding in ***JOHN ONYANGO & ANOTHER V SAMSON LUWAYI [1986] eKLR***

***"This court will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases: Abdul v Rubia 1917/1918 7 EALR 73."***

From the foregoing, this Court must satisfy itself that the lower courts misapprehended the evidence and that their conclusions were founded on incorrect bases and more specifically that the first appellate court did not properly analyse, re-assess or re consider the evidence in order to reach its own independent conclusion.

The matter is one of a simple nature between parties who had entered into an oral agreement where one was to supply chemicals and the other was to pay for the supplies. There was no written agreement that raises the issue of interpretation of clauses. What the lower courts were charged with was essentially to determine who owes who what. In this case **section 107** of the **Evidence Act** on the burden of proof was the guiding principle;

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

We are further persuaded by the holding of this Court in ***MBUTHIA MACHARIA V ANNAH MUTUA NDWIGA & ANOTHER [2017] eKLR;***

***"The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence."***

From the record we note that the respondent filed suit and tendered in evidence the invoices and a statement of accounts as evidence of the debt owed to it by the respondent. The respondent subsequently amended its defence and introduced the counterclaim that contained the claim based on the four post-dated cheques as evidence of overpayment. This prompted the respondent to tender further evidence in its replying affidavit sworn by J.V Shah and dated 17th October 2008 which attached a ledger account statement for the appellant. It detailed the payments made by the appellant on various dates including ones made by the post-dated cheques as payment that was credited to clear an already existing debt. According to the said statement of account that still left a deficit of Kshs. 1,659, 682.

The burden of proof then shifted to the appellant who failed to prove the alleged non-delivery of goods already paid for or disprove the evidence tendered by the respondent that the post-dated cheques were not utilized as payment of an already existing debt. Therefore we find that the lower courts correctly applied the evidence and arrived at a legal and logical conclusion. We also find that the High Court did not err by endorsing the said findings.

We find no reason to upset the concurrent findings of the courts below. We further find that this appeal has no merit and the same is dismissed with costs to the respondent of this appeal and of the court below.

**Dated and delivered at Nairobi this 11th day of October, 2019.**

**R. N. NAMBUYE**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**JUDGE OF APPEAL**

**J. OTIENO ODEK**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**