



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, AZANGALALA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 187 OF 2011

BETWEEN

ALI ABDI MOHAMED.....APPELLANT

KENYA SHELL & COMPANY LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Rawal, J.) delivered on 22nd March, 2011

in

HCCC NO. 66 OF 2003)

JUDGMENT OF THE COURT

1. This is an appeal from the decision of *Kalpana H. Rawal, J. (as she then was)*, in *High Court Case No 66 of 2003* filed by *Ali Abdi Mohamed, (appellant)* against *Kenya Shell & Company Limited, (respondent)*.

Background

2. The appellant, vide an amended plaint dated 16th April, 2004, sought for general damages, special damages of Kshs. 43,250,000/= costs and interest. It was the appellant's case that he entered into a distributor/reseller agreement with the respondent on 17th July, 2000, for supply of oil products. The appellant contended that prior to his agreement with the respondent, he had entered into lease agreements dated 1st January, 2000, with three landlords; bought the oil products from the respondent upto 3rd January, 2001; that vide a letter dated 3rd December, 2002, the appellant closed his account with effect from 1st January, 2003; that the respondent had the appellant arrested on 8th January, 2002, and he was placed in police custody for five days; that he declined and refused to purchase petroleum products from the respondent as the respondent had without notification and contrary to the Agreement hiked the prices of its products and had attempted to impose the same on him; that he was denied by the respondent's official to get the supply of the products. For the foregoing reasons, the appellant claimed that the respondent breached the contract and as a result he had suffered loss and damage.

3. The respondent opposed the appellant's claim and in its Statement of Defence dated 6th May, 2014, denied there being any implied term in the Agreement, and stated that the respondent was entitled to

cancel the Agreement without notice as the appellant was in breach of *Clauses 13 & 17 of the Agreement*; which provided that:

"13. The Retailer shall not use his account to purchase product (sic) for other Retailers/Distributors other than for his own outlets. This agreement will be cancelled without notice should such act be found to have happened or is intended to happen.

17. Kenya Shell Limited shall use its own discretion to decline to supply the Retailer with petroleum products where Kenya Shell Limited feels its HSE Standards and Polices are being (sic) are about to be violated and compromised".

The learned Judge dismissed the appellant's suit and found that there was no valid agreement in writing between the parties and that the appellant had failed to prove, on a balance of probability, that the respondent had failed to perform its contractual obligations.

4. Dissatisfied with the Judgment, the appellant now brings this appeal on the grounds that the learned Judge erred in law and in fact by:

1. Holding that it is the Appellant who refused to purchase petroleum products from the Respondent whilst the evidence adduced was that the latter blatantly refused to supply the former with the products.

2. Holding that there was no binding contract between the Appellant and the Respondent when the evidence showed otherwise.

3. Disallowing the Appellant's evidence without any evidence to controvert the same from the respondent.

4. Drawing conclusions that were not supported by any evidence and justifying erroneous conclusion with conjuncture.

5. Basing her conclusion on matters that were not in issue.

6. Holding that the Appellant failed had not proved its claim for special damages while the evidence adduced showed otherwise.

7. Failing to appreciate the burden of proof required in a Civil Suit, and ignoring the case law placed before her.

8. Holding that the Respondent was not in breach of the contractual terms.

9. Failing to hold that the appellant suffered loss and damage.

10. Failing to properly evaluate the evidence in its entirety and arriving at conclusions not supported by evidence or law.

The appellant seeks the following orders: -

a) That the appeal to be allowed with costs and that the Judgment and decree of the High Court be set aside and an order be entered allowing the appellant's suit.

b) Costs of the appeal be awarded to the Appellant.

Submissions by Counsel

5. When the matter came up for hearing before this honourable Court, Mr. Amanya Cohen was present

for the appellant while Mr. J.O. Okeyo represented the respondent.

6. Mr. Cohen faulted the learned Judge for finding that there was no binding contract between the parties. According to counsel, the issue before the trial court was not whether there was a binding contract but whether there was an implied term; that there was a binding agreement between parties; that the High Court had no jurisdiction to determine whether the agreement was binding or not and that the learned Judge also erred in finding that the appellant had refused to purchase petroleum products; that the appellant had committed substantial investment for the promotion of the Respondent's products; that the appellant had suffered loss upon termination of the Agreement which loss included Kshs. 2.4 Million, being two years rental payment for 3 petrol stations respectively and Kshs. 10,000/= for a licence to store petroleum. In counsel's view, the learned Judge erred in finding that the appellant had not proved special damages yet the appellant had adduced documentary evidence to prove loss and damage.

7. Mr. Okeyo, learned counsel for the respondent, opposed the appeal and submitted that it is trite law that any party that alleges must prove; that the appellant failed to prove his case on a balance of probability. Regarding breach of contract, it was submitted that it was incumbent on the appellant to satisfy the court on the existence and nature of a contract and prove that it was breached; that the evidence produced by the appellant did not support the allegation that the agreement was terminated unlawfully; that the relationship between the appellant and the respondent only lasted three months and that the appellant's account was inactive from 3rd January, 2001 to June, 2002 prompting the respondent to close the appellant's account. On the issue of special damages, it was submitted that no demonstration has been made to prove the loss. Counsel urged us to dismiss the appeal.

Determination

8. This being a first appeal, the Court is enjoined to reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses. See: SELLE AND ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LTD AND OTHERS, [1968] 1 EA 123 (CAZ).

9. We have considered the grounds of appeal, authorities cited, submissions of learned counsel and the applicable law. On the question whether there was a binding contract between the parties, the appellant has faulted the learned Judge for holding that there was no binding contract between him and the respondent yet evidence was adduced to prove the existence of a valid Agreement. According to the appellant the issue that was before the trial court was not whether there was a binding contract but whether there was an implied term of the contract.

In the case of William Muthee Muthami v Bank of Baroda [2014] eKLR, this court observed:

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

In Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd & Another [2014] eKLR, this Court observed:

“It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration”.

Also the learned authors, *Cheshire, Fifoot and Formstons, the Law of Contract, (14th Edition)* at pages 34 and 35, have authored that:

“The first task of the plaintiff is to prove the presence of a definite offer made...Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer”.

10. From the record, we note that it is not in contention that the appellant and the respondent carried on

business together for a period of six (6) months before the agreement between the parties was terminated. It is instructive to note that there was an offer, acceptance and consideration, a valid contract therefore existed between the parties. In Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2014] eKLR, this Court stated:

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the Law of Contract Act is one such provision”.

Lord Clarke put it thus in RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14:

“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement”.

Lord Reid in Steadman – vs- Steadman (1976) AC 536, 540 stated:

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per litre and for a certain period of time,

12. The appellant has faulted the learned Judge for not finding that the respondent had breached the contract by terminating the same without proper notice and for hiking the agreed price of its products in breach of the agreement. The respondent disputes there being any implied term in the agreement for notice to terminate.

Halsbury's Laws of England 4th Edition (Reissue), at paragraph 778 provides as

follows:

“In addition to the terms which the parties have expressly adopted, there may be other terms imported into the contract, these latter being generally known as 'implied' terms, ... As a general rule, the Courts will enforce not only the terms expressly agreed between the parties, but also those which are to be logically implied from those express terms including from any recitals... The question of whether a term is to be logically implied from the express terms of the agreement is a matter of construing the intention of the parties”.

Atkin LJ in the case of Rose and Frank Co v J R Crompton & Bros Ltd, ([1923] 2 KB at 293, stated:

“To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly”.

Lord Neuberger in the case of Marks and Spencer plc v BNP Paribas Securities Services Trust Co

(Jersey) Ltd [2016] UKSC 72, stated:

“In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term”.

In *Lamb v Evans* [1893] 1 Ch 218, Bowen LJ stated:

“The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile”.

Bingham LJ in *The Aramis* [1989] 1 Lloyd's Rep 213 made some general observations about the circumstances in which a contract might be implied. At p.224 col. 1, he said:

"As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case – and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist".

Further:

"I do not think it is enough for the party seeking the implication of a contract to obtain “It might” as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract".

13. On the issue of reasonable notice, it is clear from the proceedings before the High Court that the appellant's account was inactive from 3rd January, 2001 prompting the respondent to close it. Further, we note that the respondent gave the appellant a closure notice in December, 2001. The appellant's account had been inactive since January, 2001, until January, 2003, when the same was closed. It is therefore reasonable to conclude as the learned Judge did, that the appellant was in fact given reasonable notice before termination.

14. The appellant has faulted the learned Judge for failing to find that he had suffered special damages of Kshs.43,250,000/=. The learned Judge in dismissing the appellant's claim for special damages found that:

"There was no breach of any contractual obligation by the defendant. I may add thereto that it is trite law that special damages has to be pleaded specifically and proved strictly. I have detailed the evidence from the plaintiff and observed that the lease agreement had been entered almost more than six months prior to the first transaction with the defendant and moreover, all of them have lapse due to afflux of time". e Court in the case of *Hahn vs Singh* [1985] KLR 716, stated that:

“... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred

from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves”.

Also in the case of *Bonham-Carter v Hyde Park Hotel, Ltd* ((1948), 64 TLR 177, Lord Goddard CJ, declared ((1948), 64 TLR at p 178):

'On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying:

'This is what I have lost; I ask you to give me these damages'. They have to prove it'.

15. It is trite that special damages must be strictly proved. The question here is whether the sum of Kshs. 43,250,000 claimed as special damages, although specifically pleaded, was strictly proved. It is instructive to note that the rental payments claimed by the appellant were paid for by him prior to the commencement of his agreement with the respondent. It therefore cannot be claimed that the respondent was responsible for the said loss. Further, as stated by the counsel for the respondent, the appellant was free to enter into business with other suppliers, as the agreement was non-exclusive. Consequently, the appellant would not have suffered any loss as he would have continued buying petroleum products from other suppliers.

The appellant also operated a restaurant and other businesses on the leased premises which businesses should have continued to operate, the termination of the agreement between the appellant and respondent herein, notwithstanding.

16. In the end, we have come to the conclusion that the learned Judge properly directed her mind to the pleadings and evidence and arrived at the correct decision. The appeal accordingly fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 31st day of March, 2017.

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR