



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.

CIVIL APPEAL NO. 29 OF 2015

BETWEEN

JOSEPH GITONGA NDIRANGU.....APPELLANT

AND

TOTAL KENYA LIMITED.....RESPONDENT

*(Appeal from the judgment and decree of the High Court at Mombasa (Kasango, J.) dated 6<sup>th</sup> November 2014*

*in*

*HCCC No. 11 of 2006)*

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**JUDGMENT OF THE COURT**

The appellant, **Joseph Gitonga Ndirangu**, comes to this Court in this first appeal seeking to overturn the judgment and decree of the High Court at Mombasa (**Kasango, J.**) dated 6<sup>th</sup> November 2014 in which the learned trial judge dismissed his claim for specific performance of an alleged contract between him and the respondent, **Total Kenya Limited**, for sale of fuel. By the same judgment, the learned judge also dismissed the respondent's counterclaim for **Kshs 503, 814/-** being the alleged value of fuel wrongfully supplied by it to the appellant. The dismissal of the counter-claim is however, not an issue in this appeal.

The suit in the High Court started as **Civil Suit No. 4262 of 2000** before the Principal Magistrates Court, Mombasa. Subsequently it was transferred to the High Court, apparently because the counterclaim exceeded the pecuniary jurisdiction of the subordinate court at that time, and became **High Court Civil Suit No. 370 of 2002**. Following further transfer to the Commercial Division of the High Court, the suit ultimately became **Commercial Suit No. 11 of 2006**.

Also involved in the suit in the High Court was one **Isaiah Kiprop Chebii, (third party)**, against whom the suit abated after his death before conclusion of the trial. The respondent joined him in the proceedings as a third party, contending that at the material time, in his capacity as its depot manager in Mombasa, he had colluded with the appellant to enable him obtain from the respondent fuel of higher quality, grade and value than he had paid for.

As pleaded in his amended plaint dated 26<sup>th</sup> February 2003, the appellant's claim was that on 23<sup>rd</sup> and 24<sup>th</sup> October 2000 he entered into an agreement with the respondent to purchase from it a total of 80,000 litres of **Jet A1 Fuel** at the price of **Kshs 6/- per litre**, which he duly paid. The appellant took delivery of 30,000 litres, but in breach of the agreement, the respondent prevented him from taking delivery of the balance of the fuel and instead detained his lorry, thereby occasioning him loss and damage. He accordingly prayed for specific performance of the contract, special damages made up of loss of use of the lorry and loss of anticipated profit from the sale of the fuel, damages for breach of contract, interest and costs.

By its defence and counterclaim, the respondent denied entering into agreement with the appellant for the sale of Jet A1 fuel. Instead, it pleaded, the agreement was for the sale of **Fuel Oil 180 sludge** at Kshs 6/- per litre. However, due to fraud, misrepresentation or collusion with the third party, the appellant was wrongfully supplied with **Jet A1 Dead Stock/Kerosene**, worth **Kshs 32.80 per litre** disguised as Fuel Oil 180 Sludge. By way of counterclaim the respondent prayed for Kshs 503, 814 being the value of the Jet A1 fuel wrongfully supplied to the appellant, general damages, interest and costs.

In its reply to defence and defence to counterclaim, the appellant still maintained that its agreement with the respondent was for the purchase of Jet A1 Fuel rather than Fuel Oil 180 Sludge.

Three judges of the High Court, namely **Sergon, J., Ibrahim, J.** (as he then was), and **Mwongo, J.** heard the suit in succession before being transferred from the Mombasa station. Both the appellant and the respondent called one witness each. It ultimately fell upon Kasango, J. to hear the final submissions, consider the evidence recorded by her brothers, and prepare the judgment. By the judgment dated 6<sup>th</sup> November 2014, the learned judge dismissed both the appellant's claim and the respondent's counterclaim, thus precipitating this appeal.

Although the appellant's memorandum of appeal sets out seven grounds of appeal, his learned counsel **Mr. Gachiri Kariuki** compressed the same into three issues contending that the learned judge erred by:

- i. **failing to find the respondent in breach of contract and to award the appellant damages;**
- ii. **wrongfully admitting the evidence of the respondent's witness; and**
- iii. **failing to order the trial to start de novo.**

With the consent of the parties the appeal was heard through written submissions. For the appellant learned counsel submitted that the evidence adduced proved that on 23<sup>rd</sup> and 24<sup>th</sup> October 2000 the appellant entered into an agreement with the respondent to purchase a total of 80,000 litres of a substance variously known as Fuel Oil Sludge, Jet A1 (dead stock) or Jet Fuel, among other names, for Kshs 6/ per litre. The appellant duly paid a total of Kshs 480,496 but the respondent failed to deliver the entire consignment.

Counsel urged that the respondent's failure to deliver the full consignment constituted a breach of contract for which the appellant was entitled to an award of damages. It was further contended that the appellant, who expected to sell the substance at Kshs 32.50 per litre, had suffered loss and damage because of the respondent's breach of contract and was accordingly entitled to compensation.

As regards admission of the evidence of the respondent's witness, **Mr. Douglas Bariu (DW1)**, it was submitted that it was wrongly admitted because the witness was not involved in the transaction between the appellant and the respondent and was also not an expert witness. In counsel's view, there was no evidence to show, contrary to DW1's assertions, that Fuel Oil Sludge and Jet A1 Fuel were different substances and that the learned judge had erred in treating them as such.

Lastly it was submitted that the learned judge had misapprehended the appellant's case because she had not heard the witnesses herself. It was argued that the judge should have heard the case *de novo* instead of

proceeding from where the previous judges had stopped. We were accordingly urged to allow the appeal, award the appellant damages for breach of contract, loss of profit and loss of user of his lorry or in the alternative to order the respondent to refund, with interest, the money that the appellant had paid to it for the fuel which was never delivered.

The respondent opposed the appeal and submitted through its learned counsel, **Mr. Kamami** that no breach of contract on the part of the respondent was proved. It was argued that the trial judge correctly found that the agreement between the parties was for sale of Fuel Oil Sludge and not Jet A1 Fuel. However the product, which was seized in the appellant's lorry as he tried to get it out of the respondent's premises, was Jet A1 Fuel. Tests conducted on the substance confirmed that indeed it was Jet A1 Fuel and not Oil Sludge. In the circumstances, learned counsel submitted that the court did not err in declining to order specific performance or to award damages since there was no contract between the parties for the sale of Jet A1 Fuel. Counsel added that the appellant had failed to prove any special damages.

On the evidence of the respondent's witness, it was submitted that the same was properly admitted without any objection from the appellant and that the witness was duly cross-examined on his evidence. We were accordingly urged to ignore the complaint as a mere afterthought.

Lastly, it was submitted that there was no basis for the learned judge to order a *de novo* trial because the proceedings were duly typed and were available for consideration by Kasango, J. In any event, counsel submitted, the appellant did not object to Kasango, J. proceeding with, and concluding the trial, and also did not apply for the same to start *de novo*. Having actively participated till the end, it was contended, the appellant could not complain so late in the day.

We have duly considered the evidence on record, the grounds of appeal and the submissions by respective counsel. As in all first appeals, our duty is to exhaustively reappraise and re-evaluate the evidence on record and come to our own independent conclusion. As a first appellate court we will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings she did. (See ***RAMJI RATNA & COMPANY LTD V. WOOD PRODUCTS (KENYA) LTD CA. NO. 117 OF 2001***). In this appeal we shall also bear in mind that the trial judge, Kasango, J. heard only the submissions of the parties and prepared the judgment, and like ourselves did not have the advantage of seeing or hearing the witnesses testify.

As pleaded in his amended plaint, the appellant's case was that he had entered into an agreement with the respondent to purchase Jet A1 Fuel at Kshs 6/- per litre. On the other hand the respondent's defence was that the agreement with the appellant was for the purchase of Fuel Oil Sludge 180 at Kshs 6/- per litre, and not Jet A1 Fuel. That was the case submitted by the parties to the trial court to decide, and to the extent that none of the parties amended their claims to state otherwise, they were bound by their pleadings. A party must prove what it has pleaded and is not allowed to change goalposts and prove what it has not pleaded. The appellant was bound to prove what he had alleged in the plaint. (See ***CHALICHA FCS LTD. V. ODHIAMBO & 9 OTHERS [1987] KLR 182***).

In ***KENYA COMMERCIAL BANK LTD V. SHEIKH OSMAN MOHAMMED, CA. NO. 179 OF 2010***, affirmed that:

***“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”***

What evidence did the appellant adduce in support of his case as pleaded? In his evidence in chief before Serگون, J. the appellant testified that the agreement was for the purchase of **sludge**, which he described as **“the product, which settles at the bottom of the tank”**. Invoice No. MISC 516973 dated 23<sup>rd</sup> October 2000, which he produced as an exhibit, indicated that he purchased **“Fuel Oil 180 Sludge”** worth Kshs

180,186/-. However the receipt in respect of that same Invoice, which was issued by the third party, indicated in handwriting that the appellant had instead purchased "**Jet A1 Dead Stock**".

As regards the transaction on 24<sup>th</sup> October 2000, the appellant's exhibit, **Invoice No. MISC 517504** indicated that he had purchased 50,000 litres of "**Fuel Oil Sludge**." The words "**Fuel Oil Sludge**" were cancelled in hand and replaced with the words "**Jet A1 Dead Stock**", also in hand. The receipt in respect of that Invoice showed, once more in handwriting, that what was purchased was "**Jet A1 Dead Stock**." When he was cross-examined by counsel for the third party on 2<sup>nd</sup> December 2008, the appellant conceded that Fuel Oil 180 Sludge was not the same thing as Jet A1 Dead Stock.

DW1, the respondent's witness was its Mombasa depot manager, after dismissal of the third party. His evidence was that alterations by hand to the respondent's official invoices and receipts were irregular and were not permitted. As to why the appellant's lorry was impounded, the witness explained that it was because of the discrepancy between the product, which the appellant had paid for, and the product, which he was transporting out of the respondent's premises. While he had paid for Fuel Oil Sludge, he was taking out Jet A1 Fuel. The witness produced defence Exhibit 1, an analysis report prepared by a firm known as **SGS**, of samples of the product that was in the lorry when it was seized, which confirmed that it was Jet A1 Fuel rather than Fuel Oil Sludge. The witness further testified that while the price of Fuel Oil Sludge was Kshs 6/- per litre, the price of Jet A1 Fuel was Kshs 32.80.

From the evidence on record, we are satisfied that the learned judge cannot be faulted for holding that the appellant had failed to prove existence of a contract between him and the respondent for the sale of Jet A1 Fuel, which contract was breached by the respondent. The evidence on record is quite consistent with the transaction between the parties having been for the sale of Fuel Oil Sludge at Kshs 6/- per litre. Instead, due to collusion with the third party who irregularly altered the invoices and the receipts, the appellant was wrongfully facilitated to take delivery of Jet A1 Fuel costing Kshs 32.80 per litre purporting it to be Fuel Oil Sludge. In his own evidence, the appellant admitted that Jet A1 Fuel and Fuel Oil Sludge are two different substances.

In his written submissions, counsel for the appellant belatedly attempted to muddy waters by claiming that Jet A1 Fuel was variously known as Fuel Oil Sludge among other names. There is no basis for that submission in view of the evidence on record and the appellant's own admission that the two were distinct substances. We ask ourselves the further question, if indeed Jet A1 Fuel was one and the same thing as Fuel Oil Sludge, why did the third party bother to amend by hand "Fuel Oil 180 Sludge" to read "Jet A1 Dead Stock?" The answer must be simply because they are two different substances. It must also be remembered that the test of samples taken from the appellant's lorry established that the substance that the appellant was transporting from the respondent's premises was Jet A1 Fuel rather than Fuel Oil Sludge.

Having failed to prove the existence of a contract between him and the respondent for the sale of Jet A1 Fuel, the respondent could not in the circumstances of this case have been found in breach of contract and therefore liable to pay damages to the appellant. The jurisdiction of the court to order specific performance of a contract or to award damages (other than general damages) for breach of contract is predicated upon the existence of a valid and enforceable contract. We are satisfied that the conclusion of the learned judge that there was no valid and enforceable contract between the parties cannot be questioned.

As regards the complaint that the learned judge erred by failing to award the appellant damages for detention of his lorry and for loss of anticipated profit, we equally find the complaint bereft of merit. First there could be no basis for award of damages for loss of anticipated profit because no evidence was adduced to show that Fuel Oil Sludge, which the appellant had entered into an agreement to purchase, would have fetched 32/- per litre. The evidence on record shows that it was only Jet A1 Fuel, which the appellant could have sold for Kshs 32/-. But the evidence on record is also consistent that there was no agreement to sell Jet A1 Fuel to the appellant. Consequently, the claim for loss of anticipated profit from the sale of Jet A1 Fuel was misconceived and was properly rejected by the trial court.

As regards loss of use of the lorry, no evidence was led in support of the claim in the amended plaint for Kshs 20,000/- per day. The appellant also did not adduce any evidence regarding the number of days the lorry was detained. This claim, being in the nature of special damages obliged the appellant not only to specifically plead it, but also to strictly prove the same. (See **SAVANNAH DEVELOPMENT CO. LTD V. PORTS & TELECOMMUNICATIONS EMPLOYEES HOUSING CO-OP SOCIETY LTD, CA NO 160 OF 1991** and **BANQUE INDOSUEZ V. D J LOWE & COMPANY LTD (2006) 2 KLR 208**).

Regarding the evidence of DW1, he testified in his capacity as the depot manager who succeeded the third party. He may not have been involved in the agreement between the appellant and the respondent regarding the sale in question, but his evidence related to the respondent's procedures with which he was personally conversant. He also produced documentary evidence, which was in possession of the respondent relating to the agreement between it and the appellant. The appellant did not object to DW1's evidence. The witness was subjected to cross-examination by counsel for the appellant and the third party over a number of days. We are satisfied once again that there is no basis for the complaint in this ground of appeal and that the same is more of an afterthought than a genuine grievance.

Lastly is the question whether the learned judge should have ordered the trial to start *de novo*. **Order 18 Rule 8 (1)** of the **Civil Procedure Rules** empowers a judge to deal with evidence taken by another judge. The rule provides as follows:

***“8. (1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.”***

Kasango, J. had power under that rule to proceed with the trial as she did. The appellant did not object or apply for the hearing to start *de novo*. He participated in the proceedings before Kasango, J. without as much as a whimper. He acceded to the directions by the Court on the conclusion of the trial and duly presented his submissions. In those circumstance, and given the express power conferred on the court to conclude the trial on the basis of evidence recorded by the preceding judges, it cannot fall from the mouth of the appellant to complain.

We are satisfied that the appellant's claim was properly and deservedly dismissed by the High Court. This appeal has no merit and is accordingly dismissed in its entirety. We award costs of the appeal to the respondent. It is so ordered.

**Dated and delivered at Mombasa this 26<sup>th</sup> day of February, 2016.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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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.

**DEPUTY REGISTRAR**