



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 93 OF 2009

BETWEEN

DEVCON GROUP LIMITED APPELLANT

AND

TIMSALES LIMITED RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Milimani, Nairobi (Lesiit, J.) dated 6th March, 2009

in

H. C. C. No. 165 of 2007)

JUDGMENT OF THE COURT

1. This is a first appeal against the judgment of the High Court dated 6th March, 2009 wherein the appellant was ordered to pay the respondent Kshs.18,555,799.19/= with interest of 16% per annum from 1st March, 2007 until payment in full. As the first appellate court our duty is analyze and re-evaluate the evidence adduced in the High Court and to reconsider it to determine if it warranted the decision reached. As was stated in ***Selle & Another -vs-Associated Motor Boat Co. Ltd. [1968] 123*** at p 126:

“An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamid Saif v. Ali Mohamed Sholan [1955] 22 EACA 270).”

2. It was the respondent’s claito m that pursuant to an agreement between itself and the appellant in the year 2004 it supplied timber products to the appellant as and when ordered and in consideration thereof the appellant would pay for the products within 30 days of delivery. It was a further term of the

agreement that any overdue amounts would attract an interest of 3% per month. The respondent supplied products worth Kshs.8,598,696.11/=. However, the appellant failed to make payments within the requisite time and the principal amount accrued an interest of Kshs.9,957,103/= as at 28th February, 2007. Consequently, the respondent filed suit seeking the principal amount and accrued interest plus further interest from 1st March, 2007 until payment in full.

3. In its defence, the appellant denied the existence of any contract between itself and the respondent and further denied that the respondent was entitled to interest as claimed. The appellant averred that the interest sought was exorbitant and contrary to **section 44** of the **Banking Act** because it exceeded the principal amount. In the alternative, the appellant averred that the agreement, if any, between itself and the respondent was subject to the continued performance of its (appellant's) contract with the University of Nairobi to undertake certain construction works for the university. The appellant contended that because its contract with the university was terminated, the sub-contract between itself and the respondent also came to an end.

4. At the trial the respondent called one witness while the appellant closed its case without calling any witness. PW1, Rakesh Bvats (Rakesh), the respondent's Financial Controller, reiterated the foregoing in his evidence. He testified that the appellant acknowledged its indebtedness to the respondent by firstly, issuing three cheques as payments which were eventually dishonoured for lack of funds. Secondly, by a letter dated 5th June, 2006 it made a proposal for payment of the debt. He gave evidence that the amount of interest charged on outstanding accounts was 3% per month and was reflected in the delivery notes and invoices acknowledged by the appellant.

5. After considering the matter on merit, the trial court entered judgment in favour of the respondent. Aggrieved with that decision, the appellant filed the appeal anchored on the following grounds:

- i. ***The learned Judge erred in finding that there was a contract proved between the appellant and the respondent;***
- ii. ***The learned Judge erred in law and in fact by relying on documents which were not produced or proved;***
- iii. ***The learned Judge erred in finding that the payment of interest was proved;***
- iv. ***The learned Judge erred in finding that there was evidence of delivery notes and purchase orders whereas there was no such evidence and if any it was not admissible;***
- v. ***The learned Judge erred in trying to justify the plaintiff's (respondent) case all through the judgment instead of relying on the evidence on record;***
- vi. ***The learned Judge erred in ignoring the failure to call for the evidence of one Mr. Rai who was only party aware of the alleged contract was fatal to the plaintiff's case;***
- vii. ***The learned Judge erred by finding there was evidence of acknowledgment of goods.***

6. At the hearing of the appeal, Mr. J. Kimwere, learned counsel for the appellant, condensed the above grounds in his submissions. He submitted that firstly, there was no contract between parties. He argued that not all goods were delivered, some of the goods worth Kshs.1.3 million were still at the respondent's premises and therefore, the respondent could not claim payment of the same pursuant to **section 6** of the **Sales of Goods Act**. Some delivery notes which were produced had not been signed.

7. Mr. Kimwere submitted that the basis upon which the trial court awarded the interest rate of 3% per month was not explained. He maintained that there was no agreement to pay such interest. He also argued that the documents were produced contrary to the **Evidence Act** as the witness did not expressly state he was producing the same. Further, no exhibits were presented to the court.

8. Mr. M. O. Omuga, learned counsel for the respondent, in opposing the appeal, submitted that the respondent did not raise any objection to the production of documents before the High Court. The respondent filed a notice to admit documents which the appellant chose not to respond to. Further, the appellant did not participate in formulation of the issues before the trial court. The respondent's documents were produced by its witness during the trial. According to him, the appellant had admitted its indebtedness and had offered to offset the same monthly. On the issue of interest, Mr. Omuga submitted that the trial court altered the interest payable from 1st March, 2007 until payment in full to 16% per annum which was lower than the contract rate. He urged us to dismiss the appeal.

9. We have considered the record, submissions by counsel and the law. In our view the following issues arise from the judgment of the High Court:-

- a. ***Whether the respondent's documents were properly produced?***
- b. ***Whether a contract existed between the parties? If so, what were the terms of the contract?***
- c. ***Whether the appellant was indebted to the respondent?***
- d. ***Whether interest was payable on outstanding amounts?***

10. It is the respondent's case that it filed and served upon the appellant's advocates a notice to admit documents which included delivery notes, invoices, dishonoured cheques and correspondences between the parties. It is not in dispute that the appellant never responded to the same. That being the case the appellant is deemed to have admitted the contents and authenticity of the documents. This Court in ***Simon Muchemi Atako & Another -vs- Gordon Osore (2013) eKLR*** held,

"In addition to the evidence of Dr. Njagi, the appellants had served upon the respondent notice to admit documents under the then Order XII Rules 2(1) and (3) of the Civil Procedure Rules. The documents involved included treatment notes at St Mary's Hospital, Mumias and Butere General Hospital which also showed the injuries sustained by the appellants. In the absence of objection to the said documents, the respondent was deemed to have admitted the contents and authenticity of the documents."

We take note that contrary to the allegations by the appellant's counsel, the respondent's witness did produce the said documents at the trial.

11. 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."

See ***Halsbury's Laws of England, Vol. 22, 5th Edition, paragraph 308***. In this case we find that the respondent's contention that there was an oral agreement between the parties to deliver timber products to the appellant is corroborated by the delivery notes and invoices produced in court. We concur with the following sentiments of the trial court,

"To conclude this point, the evidence adduced by the plaintiff (respondent) clearly demonstrates that there was a contract between the plaintiff and the defendant. The contract was partly oral and partly written. There were offers to buy products from the plaintiff by the defendant through purchase orders, made to the plaintiff in writing. There was an acceptance of that offer through the delivery of the products to the defendant or through collection by the defendant, which was acknowledged in writing by the signing of the delivery notes. There was consideration which the plaintiff claimed from the defendant through invoices."

12. Therefore, what were the terms of the contract? We agree with the trial court that the terms of the

agreement were contained in various documents which were produced in court. One of the terms as indicated in the delivery notes and invoices was that interest at the rate of 3% would be charged on all overdue accounts. Another term, according to the respondent's evidence, was that interest would accrue upon the appellant failing to pay for goods within 30 days of delivery. We find that there was no evidence in support of the appellant's contention that the parties' contract was subject to the continuance of a contract between itself and University of Nairobi.

13. The next issue for consideration is whether the appellant was indebted to the respondent. From the foregoing it is clear that pursuant to the agreement between the parties, the respondent delivered products to the appellant which were not paid for. It was the respondent's unchallenged evidence that it had delivered products worth Kshs.8,598,696.11/= to the appellant who failed to pay for them. Again from the record, the appellant admitted indebtedness by firstly, issuing three cheques of a total sum of Kshs.3,387,200/= to the respondent which were later dishonoured upon presentation to the bank. Secondly, by its letter dated 5th

June, 2006 addressed to the respondent whose contents we set out herein below:-

"RE: OUR DEBT TO YOURSELVES

First of all, please allow the chairman and myself to thank you most sincerely for the patience and your professionalism in handling this matter.

Since the failure to complete our last contract and thus our debt to you, we have not had the best of luck in obtaining a new contract.

We are now back in the driver's seat after successful negotiations and being awarded a contract, with this in mind we propose the following:

1; That every month, we will endeavour to send you Kshs.200,000/= from the proceeds of our payment schedule from that contract starting July, 2006.

2.....

3. I hope this remedy to our problems will somewhat alleviate our embarrassment and the lack of trust in us."

This Court in **Barclays Bank of Kenya Limited -vs- Evans Ondusa Onzere [2015] eKLR** observed,

"A relevant dictum is the case of Choitram -v- Nazari, (1984) KLR 327, where it was stated that admissions need not be in the pleadings; that admissions may be in correspondence or documents which are admitted or they may even be oral."

14 . With regard to the interest of 3% on the outstanding amount we concur with the trial court that it was clear from the documents on record that the same was a term agreed upon by the parties. As such the trial court was correct in not interfering with the intention of the parties since it would have been tantamount to re-writing the contract between the parties. In **National Bank of Kenya Ltd vs Pipe plastic Samkolit (K) Ltd & Another (2001) KLR 112** this Court at page 118 held:

"...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

15. We also find that the accrued interest of Kshs.9,957,103.08/= as at 28th February, 2007 as claimed by the respondent was not challenged by the respondent in evidence. Consequently, we find as the trial court did, that the amount which was due as at 28th February, 2007 was Kshs.18,555,799/=. As to the interest

payable on the amount from 1st March, 2007 until payment in full we are guided by the case of **Salim & Another -vs- Kikava (1989) KLR 534** wherein this Court held that although a court had wide discretion in awarding interest under **section 26** of the **Civil Procedure Act**, the discretion should be exercised judicially. We see no reason to interfere with the trial court's discretion in awarding interest at the rate of 16% per annum from 1st March, 2007 until payment of the outstanding amount in full.

16 The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 11th day of March, 2016.

E. M. GITHINJI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR