IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 155 OF 2013

BETWEEN

NATIONAL CEREALS & PRODUCE BOARD……APPELLANT

AND

ELDORET GRAINS LIMITED …….……. RESPONDENT

(An Appeal from the Judgment and decree of the High Court of Kenya at Eldoret, (Karanja, J.) dated 8th May, 2012

in

HCC NO. 103 OF 2009

****

JUDGMENT OF THE COURT

1. The appellant is aggrieved by the judgment of the High Court at Eldoret (J. R. Karanja, J.) delivered on 8th May 2012 ordering it to replace 2108 bags of contaminated white maize it had allegedly supplied to the respondent or pay to the respondent the value thereof amounting to Kshs. 3,689,000.00.

2. The appellant complains that the learned Judge disregarded the law on sale of goods; and that his decision was not supported by the evidence.

Background

3. The respondent 's case as pleaded in its plaint before the High Court was that in July 2008, it purchased 20,000 bags of white maize from the appellant for a total purchase price of Kshs. 35,000,000.00 based on a unit price of Kshs. 1,750.00 per bag; that after collecting 10,895.5 of those bags, it discovered that 2,510 bags were off colour and declined collect the remainder of the maize; that it demanded from the appellant and received a refund of Kshs. 15,933,750.00 on 5th May 2009 for the uncollected maize; that part of the consignment of maize that the respondent had collected, namely, 2108 bags of maize worth Kshs. 3,689,000.00 was unfit for human consumption and was condemned as such; that in the circumstances the appellant was under duty to replace the same or make good the value thereof. The respondent also claimed Kshs. 105,400.00 being the cost of transportation of the maize.

4. In its defence, the appellant averred that between 30th July 2008 and 12th August 2008 the respondent purchased from it 20,000 bags of maize at the stated price of Kshs. 35,000,000.00 based on a price of Kshs. 1,750.00 per bag. It contended that after collecting 10,889 bags of maize, which the respondent stored in its premises, the respondent failed to collect the balance of the consignment; and that on 5th May 2009 the appellant refunded Kshs. 15,933,750.00 to the respondent in good faith for the uncollected maize.

5. According to the appellant, it was not until after approximately two months after taking delivery of the maize that the respondent notified it of its discovery that 2,510 bags of maize collected was off colour and unfit for milling. The appellant asserted that the maize went off colour and became unfit for milling on account of the respondent 's negligence in the manner it managed its storage. The appellant pleaded further that during the same period, it sold 234,452 bags of maize to many other customers none of whom complained that the maize was unfit.

6. In support of its case, the respondent called three witnesses. The Sales and Marketing Manager of the respondent, Mr. Said Al-Amoody (PW1), stated that the respondent is in the business of milling and buys maize from farmers as well as from the appellant; that after the 2008 post election violence there was a shortage of maize and the respondent was constrained to purchase 20,000 bags from the appellant for a price of Kshs. 35,000,000.00; that the transaction was evidenced by a Sales Order dated 30th July 2008 that he produced; that after collecting about Kshs. 20,000,000.00 worth of maize, which was collected in bulk, the respondent realized that 2,108 bags of the maize already collected was unfit for human consumption; that the respondent took up the matter with the appellant but there was no rectification; that the respondent then demanded a refund of part of the purchase price paid; and that the appellant refunded Kshs. 15,933,750.00.

7. PW1 went on to say that in April 2009, public health officers accused the respondent of milling contaminated maize and that its officers, alongside those of the appellant, were arraigned in court for possession of contaminated maize.

8. The witness maintained that the contaminated maize was part of the consignment sourced from the appellant and rejected the suggestion that contamination occurred at the respondent's premises on account of the respondent's defective storage system.

9. Yusuf Keter, (PW2), a driver employed by the respondent stated that in August 2008 he transported maize from the appellant's silos in Bungoma to the respondent's stores in Eldoret and that on about three occasions the store clerk informed him that the maize collected from Bungoma was contaminated.

10. Godfrey Tabu Ojwang, (PW3), a store clerk employed by the respondent, stated that his duty involved receiving and packing goods; that in an exercise that commenced in July 2007 ending in August 2007, (must be 2008) the respondent's lorries transported maize in bulk from Bungoma to Eldoret; that on some occasions, the respondent received maize loads that had been transported to the respondent's store by at least seven lorries that were contaminated; that public health official visited the respondent's stores and confirmed the contamination as evidence by correspondence from the ministry of public health and certificates of analysis by the government chemist that he produced as exhibits. Under cross examination, PW3 stated that he had worked for the respondent as a store clerk for six years; that contaminated maize is normally returned to the supplier once detected; that in this case the contaminated maize was not returned to the appellant as the manager of the respondent said he would follow up the matter with the appellant.

11. The appellant's sole witness was its Silo Manager, Susan Chemtai Mwei, who at the material time, was based at the appellant's Bungoma silo. She stated that in July 2008 the respondent purchased from the appellant 20,000 bags of maize; that the respondent collected more than 10,000 bags and refused to collect the remainder of 9000 bags of its maize; that prior to collection, which was done in bulk, the respondent inspected samples of the maize; that in its silos at the time, the appellant had about 230,000 bags of maize and many of the appellant's other customers also took delivery of maize; that after 3 months, in October 2008, the respondent complained that some bags of maize collected from the

appellant was unfit for human consumption; that the complaint was raised "after a period of three months" and that the appellant could not take back the maize since it had already left the appellant 's premises; that none of the other customers complained about the maize. She confirmed that she was charged in connection with the maize alongside the respondent but was acquitted.

12. After considering the evidence and submissions, the learned trial Judge was satisfied that the respondent had established its case, and as already indicated, granted judgment. The Judge reasoned that:

> ***"It is evident that although the plaintiff purchased from the defendant total of 20,000 bags of maize, only part thereof was collected from the defendant 's Bungoma depot. Another part was somehow rejected by the plaintiff for being unfit for milling and hence for human consumption. This prompted the plaintiff to engage the defendant on that issue and indeed, in accepting that it had supplied some contaminated maize to the plaintiff, the defendant agreed to refund and did refund the monetary equivalent of the contaminated maize i.e. Kshs.15,933,750/= (see P. Exh. 2 (a) & (b)***
>
> ***It cannot therefore be the truth as alleged by the defendant that the refund was a demonstration of its good faith when the plaintiff refused to collect the contaminated maize. Why would the plaintiff refuse to collect the maize if it was suitable and why would the defendant refund the plaintiff some money if it was certain and absolutely sure that the maize supplied to the plaintiff was fit for the purpose it was intended?***

13. According to the Judge, "*it mattered not that other purchasers of the maize at the time did not complain …and that the* [respondent] *raised its complaints after a delay of two to three months*" as "*the fact remained that there was no substantial dispute that part of the maize including the 2108 bags supplied to the* [respondent] *was found unfit for the purpose intended*. "

14. As already stated, the appellant is dissatisfied with the Judge 's decision and has lodged this appeal.

The appeal and submissions by counsel

15. Mr. J. K. Songok, learned counsel for the appellant, referred to the memorandum of appeal and urged that the trial Judge disregarded the law on sale of goods and that the evidence did not support the decision. He submitted that the respondent retained the maize for a long time without intimating to the appellant that it had rejected it and must be deemed to have accepted the maize; that despite having taken delivery of the maize between July and August 2008, it was not until October 2008 that the respondent wrote to the appellant complaining about the maize; that in the circumstances the respondent took unreasonable time to reject the maize.

16. Furthermore, counsel argued, the respondent had mechanism of checking for the fitness of the maize; that the maize had been inspected prior to delivery; that it cannot be assumed that the appellant was the source of the contaminated maize; that delivery was done in bulk and should have been returned immediately the respondent repacked the maize in bags. Counsel argued that the trial Judge misapprehended the circumstances under which the appellant refunded the purchase price for the uncollected maize and wrongly assumed that it was tantamount to admission by the appellant that itsupplied the respondent with contaminated maize.

17. Opposing the appeal, learned counsel for the respondent, Mr. G. N. Kitiwa, submitted that immediately the respondent discovered that the maize was unfit, it raised the matter with the appellant and stopped collecting the maize; that the respondent's letter to the appellant dated 2nd October 2008 was a follow up of a complaint that had already been made; that as the maize was being supplied in bulk it was difficult to inspect it for fitness and immediately upon discovery that the maize was unfit, the respondent promptly informed the appellant; that under Section 20(d) and 35 of the Sale of Goods Act, the property in the maize had not passed to the respondent until it had the opportunity of examining the maize for fitness; and that the appellant refunded the purchase price of the uncollected maize thereby acknowledging that the maize was contaminated. According to counsel therefore, the learned trial Judge

was right in holding that the respondent was entitled to a replacement or the value of the contaminated maize.

Analysis and determination

18. We have considered the appeal and the submissions by learned counsel. The question that we have to determine is whether the finding by the learned Judge that the appellant was liable to replace 2108 bags of contaminated maize or to pay to the respondent Kshs. 3,689,000.00 being the value thereof was well founded.

19. This being a first appeal, we are entitled to review the evidence and to draw our own conclusions, mindful as always that the trial court had the unique benefit of seeing the witnesses testify. [See **Selle vs. Associated Motor Boat Co Ltd [1968] EA 123.**]

20. The undisputed facts are that on or about 30th July 2008 the parties entered into a contract, evidenced by a Sales Order, under which the appellant agreed to sell, and the respondent agreed to purchase from the appellant, 20,000 bags of maize for a total consideration of Kshs. 35,000,000.00 that was paid by the respondent. Delivery was to take place at the appellant's Bungoma silos. It is also not in dispute that the respondent collected part of that consignment but did not collect about 9,000 bags of maize and that in May 2009 the appellant refunded to the respondent Kshs.15,933,750.00 being the value of the uncollected maize.

21. There is controversy as to why the respondent did not collect all the maize it had purchased from the appellant and why the refund was made. According to the appellant, the respondent did not explain why it did not collect the maize for a considerable period and the appellant therefore sold it to its other customers. According to the respondent on the other hand, it stopped collecting upon discovery that part of the maize it had already collected was contaminated and unfit for milling.

22. Although the Sales and Marketing Manager of the respondent, Mr. Said Al-Amoody, (PW1), stated that after collecting about Kshs. 20,000,000.00 worth of maize, which was collected in bulk, the respondent realized that 2,108 bags of the maize already collected was unfit for human consumption, he did not say when that discovery was made.

23. The respondent's driver, Yusuf Keter, (PW2), told the court that in August 2008 he transported maize from the appellant's silos in Bungoma to the respondent's stores in Eldoret and that on about three occasions the respondent's store clerk informed him that the maize collected from Bungoma was contaminated. Hedid not state when that information was relayed to him.

24. The respondent's store clerk, Godfrey Tabu Ojwang (PW3), stated that the exercise of collecting the maize from the appellant commenced in July 2007 and ended in August 2007, (must be 2008;) and that at least seven lorries of maize were contaminated. Although it was his testimony that contaminated maize is normally returned to the supplier once detected, his explanation as to why in this instance the alleged contaminated maize was not returned to the appellant was because the manager of the respondent said he would follow up the matter with the appellant.

25. The respondent produced a letter dated 2nd October 2008 that it wrote to the appellant as follows:

> "*The Depot Manager*
>
> *National Cereals & Produce Board*
>
> *P. O. Box*
>
> *Bungoma.*
>
> *2nd October, 2008*

Dear Sir/Madam,

Re: Sales Order No: 893253

As you are aware the above sales order was of 20,000 bags we had to withdraw collecting from your depot after having collected 10,895.5 bags when we discovered 2,510 bags came out to be off colour and unfit for milling.

We kindly request your high office to either replace with white good maize or refund the balance of 9,104.49 and the 2,510 bags which we have set aside seeking assistance or a solution to the problem.

Thanking you in advance.

Yours sincerely,

Swaleh A. Taib

Director

*For: **Eldoret Grains Ltd.**"*

26. Although that letter bears the words "as you are aware", it is not clear when, if at all, prior to that letter the appellant was made aware that 2,510 bags were "off colour and unfit for milling ".

27. There can be no doubt that the respondent was under no obligation to accept the maize if indeed the same was unfit. The respondent was however under an obligation to intimate to the appellant, within a reasonable time, that it was rejecting the maize. [See **Benjamin's Sale of Goods**, 8th edition, sweet & Maxwell, paragraph 19-154 at page 1618]. The respondent seems to have retained the maize without intimating to the appellant within a reasonable period that it was rejecting the same. The evidence by the appellant 's witness, and this was not challenged on cross-examination, was that the respondent inspected the maize prior to taking delivery. The respondent 's driver stated that the store clerk informed him that some of the maize was unfit. The respondent had the opportunity therefore to reject the maize as early as July or August 2008 if indeed the same was off colour. The certification by the Ministry of Public Health that the maize was unfit for consumption was not done until April-May 2009. The contaminated maize was in the respondent's storage from July-August 2008. There is no evidence where and when the maize became contaminated, or that by the time it left the appellant's silos it was contaminated. There was also no certainty that the contaminated maize had originated from the appellant. That certification did not state where or when the maize became contaminated.The respondent did not write its letter to the appellant complaining about the maize until 2nd October 2008.That was after retaining the maize for over two months. In our view, the finding by the learned Judge that part of the consignment supplied by the appellant to the respondent "was defective" and that the appellant was therefore liable to replace the same failed to take into consideration the length of time the maize was in the respondent's possession.

28. The refund, in May 2009, by the appellant to the respondent of Kshs. 15,933,750.00 for the uncollected maize was in our view satisfactorily explained in terms that the appellant sold the same to its other customers when the respondent failed to collect the same. We think the learned Judge was wrong in construing the refund as an acknowledgment that the maize was defective. The refund did not relate to the "defective"maize. It related to the uncollected maize.

29. The result is that the appeal succeeds. It is allowed with the result that the judgment of the High Court in HCCC 103 of 2009 is hereby set aside and substituted with an order dismissing the respondent 's suit. The appellant shall have the costs of the appeal and of the proceedings before the High Court.

Orders accordingly.

Dated and delivered at Eldoret this 14th day of June, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

……..

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

…….

JUDGE OF APPEAL

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

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DEPUTY REGISTRAR