



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OKWENGU, SICHALE & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 279 OF 2010

BETWEEN

MIDADO COMMUNICATIONS LIMITEDAPPELLANT

AND

TOTAL KENYA LIMITEDRESPONDENT

(Being an appeal from the judgment & decree of the High Court of Kenya at Nairobi (Azangalala, J) dated 29th November, 2007

in

HCCC NO. 25 OF 2002)

JUDGMENT OF THE COURT

1. This is a first appeal by **MIDADO COMMUNICATIONS LTD**, the appellant herein, against the judgment and order of the High Court, Azangalala, J (*as he then was*), of 29th November, 2007. In that judgment, the suit against the appellant by **TOTAL KENYA LIMITED**, who is the respondent herein, was allowed. The background to the appeal is that the appellant won a tender for the supply of 8000 metric tons of fuel oil at a unit price of KShs.16.70 per litre to **Kengen Company Ltd (Kengen)**. The appellant and the respondent then entered into a contract dated 24th August, 2000. According to the terms of that contract, the respondent agreed to supply fuel oil at the appellant's order to Kengen Kipevu Power Station at an agreed price of KShs.16.25 per litre.

2. On 14th September, 2003, the respondent supplied fuel to Kengen at the appellant's order. The respondent also supplied fuel to a third party, Triton Limited (Triton). Triton's supply was 1035.911 metric tons of fuel worth KShs.16,833,448.12, while the supply to Kengen was 1,906,110 metric tons worth kshs 30, 974,093.03. The respondent in error invoiced the appellant for the supply of 1035.911 metric tons of fuel oil worth KShs.16,833,448.12 instead of the supply of 1,906,110 metric tons made to Kengen, which, totalled KShs.30,974,093.03. Consequently, the appellant was served with another invoice which showed that the balance due and payable by the appellant was KShs.14,140,644.93. After giving credit for the sum of KShs.16,833,448.12 that had earlier been invoiced.

3. The appellant failed to pay the respondent the said amount. Consequently, the respondent vide a

plaint dated 18th January, 2001, filed in the High Court, Nairobi, sought judgment from the appellant for the sum of KShs.14,140,644.93 together with interest thereon at commercial rates from 1st November, 2000 till payment in full. In response, the appellant in its defence dated 5th November, 2002 denied ever entering into a contract with the respondent as alleged. The issues framed by the parties for determination by the High Court included:

- i. Whether there was a contract for supply of goods between the appellant and the respondent and if so what were the terms?*
- ii. Whether the respondent delivered to the appellant fuel worth Kshs. 30,974,093 in August 2000?*
- iii. Whether the appellant fully paid for the deliveries?*
- iv. Whether invoice No. 509133 given to the appellant by the respondent or the said supply was in error?*
- v. Whether the sum of Kshs. 14,140,644.93 is due and owing to the respondent?*

4. The learned Judge took into consideration the competing arguments and found that there was indeed a contract between the appellant and the respondent for the supply of fuel oil; that the respondent had delivered to the appellant fuel worth KShs.30,974,093 in August, 2000 and that the respondent had satisfactorily explained the error in the invoice for that delivery; and that the respondent had on a balance of probabilities persuaded the court that the appellant had not fully paid for the delivery of 1,906,110 litres of fuel oil. Accordingly the honourable court allowed the respondent's suit with interest at court rates.

5. Aggrieved by that decision, the appellant has filed this appeal on the following grounds:

- i. The judgment is a travesty of the law of evidence as established.*
- ii. The trial judge erred in law in granting judgment to the Respondent when it did not discharge its burden in any of the agreed issues.*
- iii. The Trial Judge erred in law in granting judgment to the Respondent when the Respondent's sole witness did not evidence (sic) or disclose existence of any contract or the material supply of the fuel.*
- iv. The Trial Judge erred in law in granting judgment, as he did not even attempt to establish a prima facie case against the appellant.*
- v. The trial judge erred in law in granting judgment as he did when the Respondent did not shift the burden of proof to the Appellant.*
- vi. The judgment is erroneous in law as the respondent did not strictly prove its case as it had pleaded more specifically on the alleged written contract, supply of fuel to KENGEN, wrong invoicing or the alleged debit balance.*
- vii. The judgment is so glaringly erroneous that to allow it to remain is unconscionable and will defeat the ends of justice.*
- viii. The Trial Judge completely misapprehended the law and arrived at a wrong decision.*
- ix. The judgment is not supported by the Respondent's evidence.*
- x. The judgment lacks in factual and legal basis and was given in Vacuo.*

Submissions by counsel

6. The appeal before us was heard on 19th July, 2016. Miss Ngunyari held brief for, learned counsel for the appellant Mr. Kipkorir while learned counsel Mr A.N Thangei represented the respondent.

7. Counsel for the appellant submitted that in the defence, the appellant categorically denied the existence of a contract or that any debt was owed to the respondent by it; that, at the hearing and during the cross examination, the respondent's witness admitted that there was no written contract and that he did not know if there was any supply made to Kengen; that there was no demand and no evidence of anomaly; that the contract was not signed by the appellant; that there was no demand and no credit note; that the respondent failed to discharge its burden of proof; that the respondent's sole witness did not provide sufficient evidence of the existence of the contract or the supply of fuel. Accordingly, there was no *prima facie* case against the appellant and there is no nexus between the plaint, pleadings and judgment.

7. Miss Ngunyari further submitted that the decision by the learned Judge was not only erroneous but it was a misapprehension and misunderstanding of the law; that there was no basis for the findings of the court. Counsel relied on **sections 107, 108 and 109 of the Evidence Act** that he who asserts must prove, and that in this case the respondents were obliged to prove the existence of the fact that there was a contract pursuant to which fuel was supplied and that there was breach of the contract.. Relying on the case of **BANQUE INDOSUEZ V D.J. LOWE & COMPANY LIMITED, CA NO. 79 OF 2002** counsel argued that in the circumstances of this case, special damages were not proved.

8. Mr Thangei opposed the appeal. He submitted that the trial Judge was right in two aspects; firstly, when he found that there was a contract between the parties; and secondly, that there were invoices presented to the appellant that all bore the appellant's stamp. Counsel submitted that the learned Judge was right in finding that there was a contract by performance of the parties; that some claim was not paid according to the Plaint as there was an error; that on 25th August, 2000 there were 2 pump overs to various points as items 6 and 7 dated 25th August, 2000 showed; that the respondent billed the appellant with an invoice which should have been sent to Triton and which had lesser quantity and invariably less cost; that upon realizing the error, the correct invoice was presented to the appellant; that the appellant took advantage of an honest and bona fide mistake in the course of trade; that the appellant confirmed having received the 1.904,348 litres of fuel and that the learned Judge was right in finding that the appellant failed to pay for the product received when invoiced.

Determination

9. We have considered the record, submissions made by both parties, authorities supplied by the parties on the law. This being a first appeal, our duty as a first appellate court is, to re-assess and re-analyse the evidence on record. See the case of **KENYA PORTS AUTHORITY V KUSTON (KENYA) LIMITED, (2009) 2EA 212** wherein the Court of Appeal held inter alia that:

“on a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

10. We note from the pleadings that the appellant admitted at paragraph 3 of its defence that it won a tender for the supply of to **Kengen** of 8,000 metric tons of fuel oil CST 180 at a unit price of KShs.16.70 per litre inclusive of VAT.

However, the appellant denied that the respondent supplied fuel to Kengen's Kipevu Power Station on its order. Although the respondent pleaded that there was a valid written contract dated 24th August, 2000 between it and the appellant for supply of fuel oil to Kengen's Kipevu Power Station, no written contract for supply of the fuel was produced. However, Michael Nohida who was at the material time an

accountant with the respondent testified that the appellant pumped 1,906,110 litres of fuel oil to Kengen's Kipevu Power Station at the appellant's request. Appropriate invoices were produced in evidence.

The witness further explained that the dispute arose because of a confusion over invoicing the appellant having been first invoiced for the wrong amount. The learned Judge who saw and assessed the demeanour of this witness, stated as follows:

"...Given the evidence adduced by the plaintiff especially the specific documents referred to above, I find and hold that there was indeed a contract between the plaintiff and the defendant for the supply of fuel oil. Issue number one is accordingly answered in the affirmative.

The same evidence shows on a balance of probabilities that the plaintiff did deliver to the defendant fuel worth Kshs.30,974,093 in August 2000. The price per unit was agreed. The defendant did not testify. It did not suggest how and why the delivery of 1,906,110 litres would cost less than the other deliveries. The plaintiff in my view satisfactorily explained the error in the invoice for that delivery. There is no doubt that the defendant invoiced Kengen for that delivery.

In the premises, the plaintiff has on a balance of probabilities persuaded me that the defendant did not fully pay for the delivery of the said 1,906,110 litres..."

11. We are in complete agreement with the learned Judge. The appellant's conduct in invoicing Kengen for the amount of fuel that was supplied by the respondent, implies that the fuel was part of the supply pursuant to the tender won by it.

12. We are guided by the case of ***TIMONEY AND KING V KING, 1920 AD 133 at 141*** that a contract can even 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.

13. It is evident, that there was an offer and an acceptance and that consideration passed between the parties. We note that the appellant settled the invoice issued by the respondent to the appellant in regard to the fuel supply for Kshs.16,833,448.12. The appellant's denial of any contract for supply of fuel to Kengen cannot therefore hold.

14. ***Chitty on Contracts, Vol. 1, General Principles, 29th Edition*** at paragraph 3-004 defines consideration in the following terms:

"The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer.

It should be emphasized that these statements relate to the consideration for each promise looked at separately. For example the seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price."

15. Based on the foregoing, we find that there was a contract between the appellant and the respondent. The confusion arising over the invoicing was duly explained and it is apparent that the appellant did not fully pay for the delivery of the fuel supplied to Kengen of 1,906,110 litres. In the circumstances, the sum of KShs.14,140,644.93 which was the balance after payment of Kshs.16,833,448.12 was due and owing from the appellant to the respondent.

16. We come to the conclusion that the learned Judge properly directed his mind to the pleadings and evidence and arrived at the correct decision. Accordingly, this appeal has no merit and it is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25th day of November, 2016.

H. M. OKWENGU

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR