



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 53 OF 2014

BETWEEN

MPATA INVESTMENTS LIMITED.....APPELLANT

VERSUS

SYLVANUS LUSI AMITO t/a SAVORSEN SAFARIS.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi, (B. P. Kubo, J.) delivered on the 15th day of March, 2006

in

HCC NO. 1607 OF 1999)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court at Nairobi, (B. P. Kubo, J. as he then was) delivered on 15th March 2006 allowing the respondent's claim against the appellant for an amount of USD 5,336/=, interest and costs.

Background

2. In a plaint dated 10th August 1999 presented to the High Court at Nairobi, the respondent sought judgment against the appellant for USD 7,076 (equivalent to Kshs. 501,000.00) and interest at 26% per annum. The basis of the claim was that the respondent, as a tour operator, and the appellant, as owners of Mpata Safari Club, Masai Mara, had a 'partnership' under which the respondent organized tours for the appellant's clients, while the appellant would accommodate the respondent's clients at Mpata Safari Club.

3. The respondent pleaded that between July and August 1995 it organized tours for the appellant's clients and that as at 27th August 1995 an amount of USD 37,308 was due from the appellant while over the same period the appellant offered accommodation to the respondent's clients for the amount of Kshs. 401,452.30 (USD 7,291); that upon offsetting that amount of USD 7,291 and allowing for payments made by the appellant to the respondent, or to the respondent's account, there remained an outstanding balance

amounting to USD7,076.

4. In its amended defence and counterclaim dated 4th April 2001, the appellant denied the existence of a 'partnership' and stated that the respondent may have introduced business clients to it; that such clients were responsible for the respondent's charges; and that any amount that may have been due to the respondent from the appellant was settled. The appellant contended that the respondent's assertion that an amount of USD 37,308 was outstanding as at 27th August 1995 "was erroneous and misconceived."

5. The appellant admitted having offered accommodation to the respondent's clients and asserted that the total outstanding amount on account of such accommodation exceeded the amount of USD 7,291 acknowledged by the respondent.

6. In its counterclaim, the appellant pleaded that the liability it had incurred with the respondent in tour arrangements was USD 35,742 against which it paid to the respondent or to the respondent's account, an amount of USD 36,903.31 between 4th August 1995 and May 1996 with the result, it contended, that it had overpaid the respondent by an amount of USD 1,161.31. It accordingly sought judgment by counterclaim against the respondent for that amount.

7. In a reply to amended defence and defence to counterclaim, the respondent denied the appellant's counterclaim. The respondent asserted that no money was ever paid to him by the appellant and that "in the event that any transaction of money was ever done either between the [appellant] and the [respondent] and or any other person acting on behalf of the [respondent] the same was for totally different transactions other than the [respondent's] claim in the plaint."

8. In the course of the trial, the appellant applied to amend the amount of the counterclaim from USD 1,161.31 to USD 1,335.31 but the court declined to allow the amendment.

9. Two witnesses testified before the trial Judge. The respondent testified on his own behalf while Moses Munchil, an employee accountant, testified on behalf of the appellant. After considering the evidence and the submissions by counsel, the learned Judge was satisfied that the respondent had proved his claim to the extent of USD 5,336 only. Accordingly, the Judge granted judgment in favour of the respondent against the appellant for USD 5,336, interest at court rates and costs.

10. The appellant then lodged this appeal.

The appeal and submissions by counsel

11. Learned counsel for the parties elected to canvass the appeal before us by written submissions. In his submissions dated 24th August 2016, counsel for the appellant, Mr. Lubulellah, referred to the memorandum of appeal and submitted that the trial court failed in its duty to properly analyze, evaluate and review the evidence; that had the court done so, it would have found that the respondent did not prove his case on a balance of probabilities; that the Judge erred in refusing to allow the appellant to amend its defence and counterclaim to correct the amount counterclaimed, and in disregarding the appellant's counterclaim, and failing to make a finding thereon; that in preferring the evidence of the respondent "as the more authoritative" to that of the appellant, the court failed to appreciate that the appellant is a corporate body, separate and distinct from its directors and shareholders, and its witness was competent to testify authoritatively on the appellant's accounts.

12. In his written submissions in opposition to the appeal, Mr. T. O. K'opere, counsel for the respondent, began by submitting that the appeal is incompetent, having been filed 8 years after delivery of the High Court judgment; that the certificate of delay filed with the record of appeal is suspicious; and that the notice of appeal and the letter bespeaking proceedings from the lower court were served late.

13. On the substance of the appeal, Mr. K'opere, submitted that the Judge properly evaluated and analyzed the evidence and considered all the pleadings; that the appellant's attempt to further amend the

defence and counterclaim was properly declined by the court as it would have been prejudicial to the respondent; that the complaint that the Judge did not consider the appellant's defence and counterclaim is misconceived as the Judge discounted an amount of USD1,335 when allowing the respondent's claim.

14. The Judge was also entitled, counsel argued, to attach more weight to the testimony of the respondent's witness than that of the appellant, considering that the appellant's witness was not in the employment of the appellant at the material time and neither was he an expert. Counsel further submitted that although the Judge did not expressly dispose of the counterclaim, it is evident that he dealt with the parties' substantive claims as set out in the pleadings and indeed partially allowed the counterclaim by offsetting part of it against the respondent's claim.

Analysis and determination

15. We have considered the appeal and the submissions. The complaints as to the competence of the appeal are matters the respondent should have raised earlier in an application under rule 84 of the Rules of the Court. See rule 104(b) of the Rules. Therefore, the substantive core issues for determination in this appeal are: whether the respondent established his claim to the required standard of proof; whether the court erred in declining the appellant's request to further amend its defence and counterclaim; and whether the court considered the appellant's counterclaim.

16. In addressing those questions, our task as the first appellate court, as pronounced by this Court in **Selle v Associated Motor Boat Company [1968] E.A 123**, is to review the evidence and to draw our own conclusions. We are entitled, as an appellate court, to interfere with conclusions by the lower court, if there is no evidence to support a particular conclusion or if the lower court has plainly gone wrong. See **Peters v Sunday Post Limited [1958] E. A. 424**.

17. We begin with the question whether the respondent established his claim to the required standard of proof. From the evidence, there can be no doubt that the parties had a business relationship on the basis of which the respondent arranged tours for the appellant's guests. The appellant in turn accommodated the respondent's guests at its facility, Mpata Safari Club, in the Masai Mara.

18. The respondent, Silvanus Lusi Amito, who testified as PW1, stated that between 31st July 1995 and 27th August 1995, his firm, Savorsen Safaris, organized tours for the appellant's clients at a total cost of USD 37,308. Of that amount, the respondent gave credit for an amount of USD 7,291 leaving a balance of USD 30,017. The appellant then paid to the respondent or to the respondent's account a total of USD 23,941.00 leaving a balance due to the respondent of USD 7,076 claimed in the plaint. (The correct computation translates to USD 6,076).

19. To demonstrate that the respondent did arrange tours for the appellant's clients, Mr. Amito produced, as plaintiff's exhibits 1,2,3,4,7,10,11, copies of the appellant's "Guest Folios" for the period July to September 1995 containing particulars of guests and accommodation arranged by the respondent on behalf of the appellant.

20. To further support the claim, Mr. Amito, produced as exhibits 12 and 13, ten invoices the respondent addressed to the appellant for a total of USD 35,568 for the period July to August 1995. Alongside those invoices, the witness also produced, as exhibit 8, a statement of account dated 27th August 1995 tabulating the ten invoices (exhibits 12 and 13) as well as invoice number 1660 for USD 1,740 on the basis of which the respondent asserted that the amount outstanding as at 27th August 1995 before giving credit for payments received from the appellant was USD 37,308.00.

21. The statement (exhibit 8) reflected two credits for USD 2,190 and USD 9,000 respectively. The witness however explained that the credit for USD 9,000 reflected in the statement of account had been paid by the appellant to the respondent by two cheques for USD 1,000 and USD 8,000 each. The cheque for USD 8,000 was however stopped. In that regard the witness produced, as plaintiff's exhibits 5, 6 and 15, a copy of the appellant's payment voucher No. 3403; a copy of the cheque No. 027815 drawn on Citibank dated 16th

August 1995 for USD 8,000; and a copy of the respondent's letter dated 6th February 1996 with the subject reference "Bounced cheque No. 027815 of USD 8,000.00."

22. The respondent acknowledged liability to the appellant in relation to accommodation for the respondent's guests at the appellant's facility, Mpata Safari Club amounting to KShs. 401,452.30 (USD 7,291) and in that regard produced a copy of the appellant's statement as exhibit 9. The respondent also acknowledged that the appellant had made payments on the respondent's account as follows: USD 2,000 to a debt collector Alexander James (exhibits 14 and 20); and USD 18,751 to one Mzee Clement in California USA. (exhibits 17 and 18).

23. Based on the foregoing, the respondent sought judgment for USD, 7,076 made up as follows:-

"Outstanding claim as above US Dollars 37,308

Less Defendants statement [0030] 7,291

Less cheque No. 694781 2,190

Less cheque No. 027814 1,000

Cheque No. 027815 [stopped] 8,000

Less paid to Mzee Clement California [O.B.O] 18,751

Less paid to Alexander James 2,000

Balance Due U. S Dollars 7,076"

24. That amount includes an amount of USD 1,740 arising from invoice number 1660 that was the subject of extensive cross examination. That invoice does not appear in the record of appeal before us.

25. Based on the foregoing and on our overall review of the evidence tendered by the respondent, the learned Judge was right in our judgment when he concluded:

"Having duly considered the pleadings and the evidence tendered in this case, I am satisfied that the plaintiff has, on a balance of probability, proved his case, except for the claim of US \$1,740 subject matter of invoice No. 1660 dated 27.08.95 which must, accordingly, be discounted from the plaintiff's claim for US \$7,076, which in turn reduces the said claim to US \$5,336. The upshot is that the plaintiff's [respondent's] claim succeeds in part."

26. That, however, is not the end of the matter. There is the question of the appellant's counterclaim and the refusal by the Judge to allow further amendment to the counterclaim. In its amended defence and counterclaim dated 4th April 2001, the appellant averred that against its liability to the respondent in the amount of USD 35,742.00, it had paid to the respondent's account an amount of USD 33,371 as at 8th February 1996 leaving a balance of USD 2,371 due to the respondent as at that date. Subsequent to 8th February 1996, the appellant asserted that it paid a total of USD 3,532.31 for the benefit of the respondent with the result that it had made an overpayment of USD 1,161.31. The appellant accordingly counterclaimed that amount.

27. Moses Munchil, an accountant employed by the appellant, stated in his evidence that he was in charge of the appellant's finances; that based on the appellant's records, there was a contract between the parties under which the respondent arranged tours on behalf of the appellant; and that the appellant used to accommodate the respondent's clients. He referred to the statement produced by the respondent (exhibit 8) and confirmed that it related to the appellant's customers with the exception of the entry relating to invoice 1660 for USD 1,740. He stated that the alleged invoice No. 1660 was never received

by the appellant and did not relate to the appellant's customer. Accordingly, the witness stated that the amount that should have been indicated in the respondent's statement (exhibit 8) as due from the appellant to the respondent as at 27th August 1995 should have been USD 35,568 and not USD 37,308.

28. Mr. Munchil further testified that the parties agreed to offset their respective claims against each other. It is common ground that under that arrangement, the respondent was entitled to offset an amount of USD 31,232 made up as follows:-

"DATE PAYEE AMOUNT

4/8/95 S. Amito 2,190

11.8.95 S. Amito 1,000

13.10.95 Mzee Clement 12,751

27.10.95 Mzee Clement 6,000

31.10.95 Alexander James

Consultants 2,000

(b) Invoice to Savorsen

Safaris being charges

At Mpata Safari Club 7,291 31,232

29. The controversy is over an amount of USD 2139 the appellant claims to have incurred on an air ticket for the account of the respondent and an amount USD 3,532.31 the appellant claimed to have made to the respondent or to the respondent's account after 8th February 1996 made up as follows:-

"(a) 24th April, 1996 cheque

Voucher No. 3914 to Vintage

Travel Tours on Account of

Savorsen US \$ 767.55

(b) 26th April, 1996

Cash payment of Kshs.

20,000/= to S. Amito US \$ 348.40

(c) 7th May, 1996 Cheque

Payment Voucher No. 3935

To S. Amito (Kshs.10,000/=) US \$ 174.20

(d) 15th May, 1996 – Cash

Payment Voucher to S. Amito

(Kshs. 100,000/=)US \$ 1742.16

(e)16th May, 1996 Cash

Payment to S. Amito US \$ 500.00

Total paid after 8.2.96US \$3,532.31”

30. If it is established that the respondent is liable to the appellant for the amounts of USD 2139 and USD 3532.31, it follows that the appellant's counterclaim for USD 1,335.31 would have been established. The question therefore is whether, on a balance of probabilities, the appellant established its entitlement to those amounts.

31. Regarding the claim for USD 2139, the appellant's witness stated that the appellant paid for a return air ticket from Nairobi to Los Angeles for a Mr. Amito. In that regard he produced a copy of the appellant's local purchase order dated 25th August 1995 addressed to Vintage Tours & Travel as well as an invoice from that firm for the amount of USD 2139 (defence exhibits 1 and 2). The respondent's witness observed that the ticket appeared to have been issued in the name of his brother Ishmael Onditi Amito and not in his name and stated that he could not recall the circumstances under which the ticket was issued and disputed that the amount should be charged to him.

32. That a ticket was purchased by the appellant and issued to I. O. Amito was not, based on the record, seriously contested. The contention was that the respondent did not request the appellant to issue a ticket in favour of his brother. Given the course of dealings and the manner in which the parties related to each other, and the explanation offered with respect to this item, we are satisfied that the expense of an air ticket was incurred on the respondent's account and that the appellant was entitled to offset the amount of USD 2,139 against the respondent's claim.

33. We are however unable to reach the same conclusion with regard to the claim for USD 767.55. The witness stated that this amount was paid to Vintage Tours & Travel on the respondent's account. He produced a cheque payment voucher that indicated "payment on Sarvosen Safaris A/c" with no indication what the payment related to. Neither did the witness explain what that payment was for. When the claim was put to him, the respondent denied that it related to his account. The amount of USD 767.55 was not in our view established as due from the respondent.

34. With respect to the claim for USD 348.40 the appellant produced a petty cash voucher dated 26th April 1996 for Ksh. 20,000.00. That voucher also refers to "A/c Mr. Amito" and indicates that it relates to "payment on account motor vehicle hire." Although the respondent denied that this amount related to his account, in our view the appellant established this claim against the respondent on a balance of probabilities.

35. In relation to the claim for USD174,20, the appellant produced a copy of a cheque payment voucher dated 7th May 1996 indicating the name of the payee of the cheque for Kshs. 10,000.00 as Silvanus Amito (Sarvosen Ltd). There is no indication in the voucher what that payment related to and neither did the witness explain what that payment was for. We don't think the appellant established this claim.

36. In support for the claim of USD 1,742, the appellant produced a petty cash voucher dated 15th May 1996 for Kshs. 100,000.00. That voucher refers to "A/C to Amito Silvanus" and relates to payment on account "for telephone services from K.P.T.C." It is no clear whether this amount was for transmission to KPTC or for retention by Amito Silvanus. We are not persuaded that a case for setting off this amount was been established.

37. And in relation to the claim for USD 500 the appellant produced a petty cash voucher dated 16th May 1996 for USD 500. That voucher also refers to "A/c to SilvanusAmito" and indicates that it relates to "part payment on account for motor vehicle hire." Although the respondent also denied this amount

related to his account, we think this claim was also proved on a balance of probabilities.

38. In effect, therefore in addition to the conceded amount of USD 31,232 that the respondent acknowledged as due to the appellant, the appellant established an additional amount of USD 2,683.91 for which the respondent is liable.

39. It is clear from the impugned judgment that the learned Judge did not consider or adequately consider the appellant's counterclaim. Had he done so, he would have come to the conclusion, as we have, that in addition to the amount of USD 31,232 referred to above that the appellant was entitled to offset against the respondent's claim, the appellant had also, on a balance of probabilities established an additional amount USD 2,683.91. The result is that against the respondent's claim for USD 35,568, the appellant was in turn entitled to offset a total of USD 33,915.91. The net result is that the respondent would be entitled to judgment for only USD 1,652.09.

40. In view of this conclusion, it would be otiose to consider whether leave to further amend the defence and counterclaim should have been granted.

41. We accordingly allow the appeal, set aside the judgment of the High Court and substitute therewith judgment in favour of the respondent against the appellant for USD 1,652.09. Interest on that amount shall accrue at court rates from the date of judgment of the lower court until payment in full.

42. The appellant has substantially succeeded in its appeal. It shall have half the costs of the appeal. Each party shall bear its own costs in the High Court.

Dated and delivered at Nairobi this 16th day of December, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR