IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 212 OF 2011

BETWEEN

CHARLES RONO TOMNO T/A

MUTEI WHOLESALERS……..…….……..APPELLANT

AND

RIFT VALLEY BOTTLERS LTD…….……RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Eldoret (Mwilu, J. as she then was) dated 14th March 2011 and delivered on 30th March 2011

in

Kisumu H.C.C.A. NO. 123 of 2004)

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JUDGMENT OF THE COURT

This appeal concerns a claim for damages by the appellant, **Charles Rono Tomno trading as Mutei Wholesalers,** which claim the High Court declined to grant on the basis that there was no evidence to support it.

In his plaint, it was the appellant's case that at all material times he was a licensed and authorized distributor and agent of the respondent engaged in the sales and distribution of the respondent company's products within Iten township and the environs, which he undertook with the aid of his motor vehicles registration numbers KYT 138 Isuzu Canter, KUS 283 Isuzu Canter and KSG 851 Isuzu Lorry and KAH 040U Peugeot. The appellant stated that as security under the contract, the respondent held the original log books for the appellant's motor vehicles aforestated and that under the Returned Profit Margin Scheme, the appellant paid the respondent a sum of Kshs.1,399,075 being full and final returns under the distribution arrangement.

The appellant further stated that on or about 11th September 2004 without notice, the respondent claimed that it was owed Kshs.1,002,025.34, and impounded the appellant's motor vehicles registration Nos. KYT 138 Isuzu Canter and KUS 283 Isuzu Canter ***("the motor vehicles").*** The appellant stated that this amounted to a breach of contract, the particulars of which were that the respondent unlawfully impounded

the motor vehicles resulting in the unlawful termination of the distribution agreement and stopping the business leading to a loss of Kshs 10,000/- per day from the date the motor vehicles were impounded. As a consequence, the appellant demanded the return of the motor vehicles impounded by the respondent in breach of contract, loss of earnings and general damages and an injunction restraining the respondent from the unlawful repossession of the motor vehicles, and further interference in the appellant's motor vehicles.

In a defence and counter claim, the respondent stated that the appellant though a distributor, was not an authorized and licenced distributor and agent of the respondent's products. That under the agreement, the respondent supplied various products to the appellant on credit. It was further provided that in default of repayment, the respondent would be at liberty to impound the motor vehicles and transfer them to itself. The respondent denied that the appellant had paid the amount owed in full, and counterclaimed a balance of Kshs.518,383/34 which still remained outstanding, and a further sum of Kshs. 50,000/- with interest being auctioneer's charges for impounding the motor vehicle.

During the hearing, the appellant testified that, he had been a distributor for the respondent's products since 1982. Initially, the parties entered into a distribution agreement for a period of three years, but on 23rd February 2001 the agreement was reduced to a period of one year. It was his evidence that he purchased liquid product from the respondent which he paid for in cash. The arrangement was such that the respondent company would transport the products to his premises, and would return with empty bottles and crates.

It was the appellant's further testimony that, in March 2003, the respondent demanded an amount of Kshs 1,002,025/- from him, and after negotiations, he agreed to pay the entire amount. At the same time, he deposited the logbooks and transfers for the motor vehicles, of which were to be returned to him upon payment of the outstanding amounts. It was also agreed that the appellant would pay the debt by monthly instalments of Kshs 100,000/- in the months of April, May and June as well as through the Return Profit Margin Scheme, where, for every crate of soda bought the respondent would retain Kshs. 10/-. In effect, a crate of soda would be sold to him at Kshs. 280/- instead of Kshs. 290/-. He claimed that by April 2008, he had repaid the loan in full.

According to the appellant, the outstanding invoices no. 113920, 113962 and 114007 totaling Kshs 518,383.34 which was the amount claimed by the respondent were settled through cash payments of Kshs. 73,875, Kshs. 104,250, and Kshs. 95,738 respectively, and credit notes for empty bottles and crates.

It was the appellant's case that, despite having repaid the debt in April 2003, the respondent continued to claim alleged unpaid sums from him, and on 3rd September 2004, impounded his motor vehicles, and stopped supplying him with products. It was his contention that this was done without notifying him of the sums due. The appellant admitted that since the agreement of 2001, no subsequent agreements had been entered into, but that he had in any event continued to sell the respondent's products.

As a consequence of impounding of the motor vehicles, the appellant claimed for damages for breach of contract and loss of profits, and for the return of the log books and the transfers of the motor vehicles. He concluded by stating that following a court order issued on 16th February 2005, the motor vehicles had since been returned to him.

Joel Mutai, the respondent's Chief Accountant who testified on behalf of the respondent, stated that the appellant was at one time a distributor of the respondent's products, but had subsequently faced financial difficulties, and as a result, had ceased to be a distributor sometime in 2004. It was his evidence that, the appellant would take products on credit and pay on a later date, and that the commitment letter dated 11th March, 2003 was based on a debt that accrued when the appellant collected products which he did not pay for.

He testified that the statement of account he produced in evidence for the period between 1st March 2003 and 28th September 2004 showed that the appellant had obtained products evidenced by various invoices

for which he received credit for the returned empties, but had failed to pay the outstanding balance. He stated that on 1st September 2004 the appellant made a cash payment of Kshs.104,250/- leaving a balance of Kshs.518,383.34. He concluded by stating that the appellant offered the logbooks and transfer forms for the motor vehicles after defaulting in payment, and denied breaching any agreement.

In dismissing the appellant's suit, Mwilu, J, (as she then was) found that there was uncontroverted evidence demonstrating that the appellant was indebted to the respondent at the time the motor vehicles were impounded, which was carried out pursuant to the terms of the agreement made between the appellant and the respondent. No breach of contract was established against the respondent and as a consequence the claim for general damages failed.

Being dissatisfied with the decision of the High Court, the appellant filed this appeal enumerating 7 grounds of appeal.

1. *That the learned judge erred in law and in fact in not making a finding that there was a breach of contract.*

2. *That the learned judge erred in law and in fact in not making a finding that there was trespass on the part of the respondent on the appellant's chattels namely motor vehicle registration nos. KSG 851, KAH 040H, KUJ 283 and KYT 138.*

3. *That the learned judge erred in law and in fact in making a finding that the appellant owed the respondent Kshs.518,383/34.*

4. *That the learned judge erred in law and in fact in allowing the counterclaim against the weight of the evidence tendered.*

5. *That the learned judge erred in law in not making a finding that the alleged sum of Kshs. 518.383/34 had already been paid in full.*

6. *That the learned judge erred in law in that the learned judge ignored the appellant's evidence in its entirety.*

Mr. Chebii, learned counsel for the appellant, submitted that though the High Court found that there was an agreement between the parties, which specified that the agreement could be terminated by written notice, since there was no termination of the agreement, the impounding of the motor vehicles amounted to an unlawful termination of the contract as this incapacitated the appellant's distributorship, that the learned judge should have found that there had been a breach of contract, given that no notice of termination was issued to the appellant.

Counsel's other complaint was that the respondent unlawfully impounded the motor vehicles, and that the attachment of the appellant's chattels amounted to trespass, as the agreement did not entitle the respondent to attach the appellant's motor vehicles. Instead, it was an express requirement of the agreement that the respondent would hold the motor vehicles as security for the debt until it was paid in full. It was counsel's further contention that as there was no court order, the attachment of the motor vehicles was unlawful.

In respect of the debt and counterclaim, counsel submitted that the learned judge wrongly found that Kshs. 518,383.34 remained due and owing to the respondent. According to counsel, the attachment of the motor vehicle took place on 8th October 2003. Subsequent to the commitment of 11th March 2003, the appellant did not obtain any further products on credit, but paid for the liquid in cash. The appellant paid by way of credit notes for returned empty bottles and crates in terms of the respondent's Return Profit Margin Scheme. Counsel argued that if the appellant was not accorded credit facilities from 8th October 2002, the appellant could not have been indebted to the respondent since all amounts were paid upfront, with the result that the respondent had resorted to continually shifting their demands.

Counsel submitted finally that the learned judge did not fully consider all the evidence as she failed to appreciate that the appellant's debt was liquidated through the Return Profit Margin Scheme, by credit notes for emptied bottles and crates paid into his account, and cash payments made by the appellant.

Ms. Nasiloli opposed the appeal and submitted that there was no contention that no valid distribution agreement existed between the parties. As a consequence, there could be no breach of contract or terms specifying that the impounding of the motor vehicles would amount to a breach of contract, and none was proved.

On the issue of trespass on the appellant's motor vehicles, counsel submitted that the appellant acknowledged his indebtedness to the respondent, and that by the time the motor vehicles were impounded, there was uncontroverted evidence to show that the appellant was indeed indebted to the respondent.

On the debt and counterclaim, counsel contended that the appellant had selectively produced statements up to 31st August 2004, yet as at September 2004, the appellant was indebted to the respondent in the sum of Kshs.518,383/34. The respondent's statement showed that after 31st August 2004, no cash payments were made by the appellant into his account with the respondent, which evidence was not challenged by the appellant.

Counsel's final complaint was that in failing to evaluate and take into account all the evidence, the learned judge wrongly concluded that the appellant's evidence proved the respondent's case.

Before we address the issues before us, it will be necessary to restate our duty on a first appeal as set out in ***Makube vs Nyamiro [1983] KLR 403;***

"… a Court of Appeal will not normally interfere with a finding of fact by a trial court, unless it is based on no evidence, or on a misapprehension of evidence, or the judge is shown demonstrably to have acted on wrong principles. "

We have considered the record of appeal and the submissions of counsel and find that the main issues for determination are as follows:

i. *Whether the learned judge made a finding that there was a breach of contract following the impounding of the motor vehicles;*

ii. *Whether the learned judge was required to reach a finding that there was unlawful trespass following the impounding of the motor vehicles;*

iii. *Whether the learned judge rightly found that the appellant owed the respondent Kshs.518,383/34;*

iv. *Whether the learned judge properly evaluated all the evidence.*

We turn to the complaint that the High Court failed to make a finding that there was a breach of contract, despite having found that a distribution agreement was in existence between the parties.

In determining whether by impounding the motor vehicles the respondent breached the contract, the learned judge stated thus:

"Turning to the issue of whether or not any party breached any of the terms of the contract between them, I make the following observations. The plaintiff did not state what specific term of that contract was breached by the defendant but the plaint states that the act of impounding the plaintiff' s motor vehicle was in breach of the contract between them. I did not find any clause in the agreement dated 23/02/2001 to support the averment. There was no agreement that the plaintiff's motor vehicles would not be attached/impounded for whatever reason. As a matter of fact there is no mention of what would happen as regards the plaintiff 's motor vehicles used in the transportation of the defendant's

products. I find no breach of any of the terms of the Key Distribution Agreement dated 23/02/2001 as is pleaded in the plaint and none is proved in evidence".

It was the appellant case that in view of the ongoing business relationship that existed between the parties, the assumption was that the old agreement continued to be in force which agreement ought to have been terminated by written notice, but was instead terminated when the appellant's motor vehicles were impounded resulting in the collapse of the business.

From the evidence, the respondent entered into a distributor agreement with the appellant on 23rd February 2001 for a term of 12 months where it was provided that renewal was at the respondent's discretion. When the 12 month period expired, the agreement was not renewed by the respondent. The question that arises is whether a contract existed extending the terms of the old contract.

On cross examination the appellant testified,

"The distributor agreement (Ex P1) was to be in force for early (sic) year (clause 1). It further says any renewal was at the discretion of the company (defendant). It was not renewed. Technically the terms of the agreement ceased to have effect after 12 months."

It is not disputed that the distribution agreement had expired, and had not been renewed by the respondent. Given, as the learned judge rightly found, that the distributor's agreement had lapsed, it follows that there was no contract that was capable of being breached by the respondent. Accordingly, this ground fails.

The appellant's next contention was that the trial court failed to reach a finding that the respondent unlawfully trespassed upon the appellant's motor vehicles when they were repossessed by the respondent on 11th September 2004.

In all fairness to the learned judge, we do not agree that this was among the issues for determination. From the pleadings and the issues on record, the issue that was before the court was whether by impounding the appellant's motor vehicles the respondent breached the contract leading to the unlawful termination of the distribution agreement between the parties. At no time was the issue of unlawful trespass placed before the High Court for determination and neither was it canvassed by the appellant. Accordingly, we are satisfied that it was not necessary for the court to reach a finding on the issue. See ***Nairobi City Council vs Thabiti Enterprises Limited Civil Appeal No. 264 of 1996*** and ***Galaxy Paints Co. Ltd vs Falcon Guards Limited (2000) 2 EA 385***.

Having said that, we consider the allegation that the impounding of the motor vehicles was unlawful, a matter of law, and well within the purview of this Court, and an issue for our determination.

It is the respondent's case that the basis upon which the motor vehicles were impounded was the commitment letter of 11th March 2003 which read thus;

"***Mutei Wholesalers***

ITEN

The Chief Accountant

Rift Valley Bottlers Ltd

ELDORET

Dear Sir

SODA ACCOUNT – KSHS 1,002,025.25

I herewith commit myself to the liquidation of the debt owed to yourselves. I also attach logbooks and transfer forms in respect of the vehicles listed below for safe custody and to act as securities until the debt is fully repaid. The securities will however not be fully transferred to yourselves unless there is default on my part:-

1. ***KAH 040U*** ***Peugeot 405 saloon***
2. ***KSG 851*** ***Isuzu lorry***
3. ***KYT 138*** ***Isuzu truck***
4. ***KUS 483*** ***Isuzu truck***

The debt of Kshs 1,002,025.25 will be serviced as follows:-

i. ***RPM at Kshs 10.00 per case***
ii. ***Transport of soda for myself***
iii. ***Injection of Kshs 100,000.00 per month for April, May and June 2003. Further injections will be reviewed after June 2003.***

Yours Faithfully

CHARLES TOMNO"

From the letter the appellant clearly stated that,

"The securities will however not be fully transferred to yourselves unless there is default on my part…"

Additionally, it is of pertinence to point out that, the logbooks were registered in the respondent's name, a fact which was well within the appellant's knowledge. When cross-examined by the respondent's counsel, the appellant admitted thus,

"This is a copy of logbook of M/V KYI 138 and M/V KUS 287- MFID (a) and (b). The vehicles are registered in the names of the defendant. I purchased them from them and I had not transferred them to my name. I had fully paid for them. I was slow in having them transferred. The company had signed the transfer forms. I signed other transfer forms in their favour when we made the arrangement."

To our mind, when the totality of the case is taken into account, we see no illegality in the impounding of the motor vehicles by the respondent. We say so as since the action taken by the respondent was based on the agreement between the parties, the question of illegality does not arise.

In the Uganda case of ***Behange vs School Outfitters (U) Ltd 2000 1 EA 20***, it was stated thus,

"One of the basic principles in the law of contract is that the parties have the freedom to fix the terms of their own bargain. The courts do not concern themselves with the question whether "adequate" value has been given or whether the agreement is harsh or one sided. The fact that one person pays "too much" or "too little" for a thing may be evidence of fraud or a mistake or it may induce the court to imply or to hold that the contract has been frustrated. But it does not of itself affect the validity of the contract. Thus in the absence of fraud, duress, undue influence, mistake or representation the courts will enforce a promise so long as some value for it has been given."

The letter of commitment authorized the full transfer of the motor vehicles in the event of default by the appellant. Since the logbooks were already registered in the name of the respondent, full transfer in this case would mean actual possession by impounding or attachment of the motor vehicles.

As to whether or not the appellant was in default as at 11th September 2004 is a question we will deal

with later, but on the basis of the agreement that authorized the transfer of the motor vehicles to the respondent upon default, we find that the action of impounding of the motor vehicles was lawful, and this ground fails.

Turning to whether the appellant owed the respondent, a sum of Kshs.518,383/34, the learned judge stated thus,

"***Let me turn to PExhibit No 2 which is the plaintiff's acknowledgment letter of debt of Kes 1,002,025.25 and an offer of the plaintiff's motor vehicles as security while the debt was being serviced. The securities were not to be transferred to the defendants "unless there was default on my part," such default being default in payment of the acknowledged debt of 1,002,025,25. The letter was dated 11/3/2003 and the securities were impounded by the defendant on 11.09.2004. The issue to resolve is whether the plaintiff was in default as at that later date. In his letter the plaintiff had offered to liquidate his indebtedness to the defendant through the scheme named return profit margin as well as injecting a sum of 100,000/= Kes for each of the months of April, May and June 2003. He admitted in evidence that he did not make the 100,000/= Kes each of those months. That must be a breach of his own agreement. The defendant claimed in a counterclaim a sum of Kes 518,383/34 due and owing as at September 2004. To deal with this aspect I refer to the statements of accounts produced by both the plaintiff and the defendant. The plaintiff contended that he always bought his goods in cash whereas DW1 stated that the plaintiff was in a credit basis with a credit limit of Kes 2.5m. The plaintiff produced statements upto 31/8/2004 which appears as the last entry in PExhibit no 8. That has two weakness firstly it shows that as at that date the plaintiff was in debt to a tune of 1,107,767/34 and secondly that it is a period earlier that 11/9/2004 when the motor vehicles were impounded and 8/10/2004, when the suit was filed… However PExhibit shows a balance of 518,383/34 as at 28/9/2004 due and owed to the defendant. There was no evidence of payment after the 28/9/2004 either by cash or through the Return profit Margin Scheme. The plaintiff did not show any cash payment which was not receipted and I therefore find that on a balance of probability that the defendant proves its counter claim on the basis of the plaintiff's own exhibits and those exhibited by the of the defendant more particularly Dexhibit no 3."***

As is evident from this excerpt, the learned judge took into account all the factors that pointed to the existence of a debt of Kshs. 513,383/34 as at 28th September 2004. The commitment letter was dated 11th March 2003, yet it is apparent that following his undertaking, the appellant continued to uplift liquid from the respondent. In return, the respondent would invoice the appellant for the liquid product sold, in terms of the Return Profit Margin Scheme by crediting the appellant's account with sums for all returned empty bottles and crates.

Our analysis of both the appellant and the respondent's statements of accounts show that the appellant extensively relied on the credits he received from the Return Profit margin Scheme to liquidate the amounts owing, which amounts only comprised a part of the invoiced sums. In view of the short fall, it is also apparent that it was incumbent upon the appellant to make further cash payments so as to liquidate the invoiced sums in full. The record shows that the appellant made some part payments in cash, and in so doing failed to liquidate the entire invoiced sums in full. The result was that, a debt continued to accrue, to the extent that by the end of August 2004 the appellant owed a sum of Kshs. 1,107,767.34 and by 28th September 2004 the debt had been partially liquidated to stand at Kshs. 518,383.34. And that by the 3rd September, 2004, when the motor vehicles were impounded, the appellant was in actual default.

When the totality of the evidence is taken into account, we are satisfied that the learned judge rightly concluded that the appellant owed the respondent a sum of Kshs. 518,383.34. This amount continued to remain due and owing to the respondent, so as to justify the order of the court for the payment of Kshs 518,383.34 by the appellant together with interest and costs as prayed in the counterclaim. It follows therefore that this ground accordingly fails.

On the issue that the learned judge failed to take the appellant's evidence into account, we find that this cannot be the case as, from the earlier produced excerpt, the learned judge painstakingly analysed the evidence of both the appellant and the respondent. Accordingly, like the learned judge, we are satisfied

that on a balance of probability that the appellant failed to prove his case in the face of the overwhelming evidence that lent support to the respondent's case.

For the aforegoing reasons, the appeal lacks merit and is hereby dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Eldoret this 29th day of October, 2015.

D. K. MUSINGA

……..

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……..……..

JUDGE OF APPEAL

A. K. MURGOR

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR