



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: MARAGA, MUSINGA & OUKO, J.J.A)
CIVIL APPEAL NO. 226 OF 2004

BETWEEN

RANGWAYS LIMITED APPELLANT

AND

CRISTOBAL INVESTMENTS CO. LTD.RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi of Ochieng' J. dated 8th June, 2004

in

CIVIL CASE NO. 2792 OF 1997)

JUDGMENT OF THE COURT

By a written agreement, the appellants sold to the respondent a supermarket known as Rangeways Supermarket on the following summarized terms:-

- i. Goodwill of the business - Kshs. 3,300,000
- ii. Furniture, fittings and equipment – Kshs. 1,700,000
- iii. Value of the selected stock-in-trade – Kshs. 289,484.70
- iv. Total purchase price - Kshs. 5,289,484.70
- v. Deposit of Kshs. 1,200,000 paid before the signing of the agreement.
- vi. The balance of Kshs. 4,089,484.70 to be settled as follows:-
 - a) Kshs. 3,589,484.70 to be paid upon signing the agreement and delivery of possession.

- b. Kshs. 500,000/= to be withheld by the respondent for a period of 60 days pending compliance by the appellant with **Section 4 (1)** of the Transfer of Business Act – Cap 500 of the Laws of Kenya.
- vii. The vendor to remove and carry away all stock-in-trade not required by the purchaser.
- viii. Upon payment of Kshs. 3,589,484.70 and signing of the agreement, the vendor was to hand over possession of the shop and business together with the furniture and fittings identified in the schedule.
- ix. The vendor and the directors of the appellants did warrant to the purchaser:
 - a. That the chattels in the schedule and the stock-in-trade are the vendor's property and that none of them is subject to any charge, lien, bill of sale, hire purchase agreement or any other encumbrances.
 - b. That the vendor has made full disclosure concerning all matters relating to the business upon which inquiry has been made by the purchaser.
 - x. The purchaser was not to assume any liability incurred in the business by the vendor who on the other hand agreed to indemnify the purchaser against all claims directed to the latter but incurred by the vendor.
 - xi. The vendor was to transfer to the purchaser the telephone lines in the premises, to produce to the purchaser receipts for payment of the telephone bill. Likewise, the vendor was to transfer to the purchaser water and electricity accounts.

Pursuant to condition vi (b) above the respondent issued a cheque for Kshs. 500,000/= to the appellant. Before it could be paid, the respondent stopped it and thereafter flatly refused to honour that part of the contract arguing that the appellant was not entitled to Kshs. 500,000, having deliberately made misrepresentation to the respondent regarding the value of the business, the goodwill, turnover, reputation of the business, clientele, creditworthiness, that all the utility bills had been paid; that the equipments sold with the business were serviceable and free of any encumbrance.

As a result of the stand-off, the appellant instituted an action against the respondent claiming Kshs. 500,000, interest on it and costs of the suit. The respondent filed a defence and counter-claim against the appellant and its two directors seeking that the appellant's suit be dismissed and judgment in the counter claim be entered jointly and severally against the appellant and the two directors for Kshs. 497,696.60, damages for misrepresentation and breach of warranties, refund of goodwill and costs. The dispute was tried by Hayanga, J. but upon his ceasing to exercise the functions of the office of judge, it fell upon Ochieng, J., in terms of **Order 17 rule 10 (1)** of the repealed Civil Procedure Rules, to write the judgment in the case.

Ochieng, J. found, *inter alia*, on the main suit that the appellant was entitled to Kshs. 500,000. On the counter-claim, the learned Judge concluded that the appellant was guilty of misrepresentation; that the appellant falsely gave the respondent a figure of Kshs. 2 million as the monthly turnover when in truth it was only Kshs. 500,000; that the water bill amounting to Kshs. Kshs. 101,072.05 and the telephone bill of Kshs. 8,522.10 were not settled as agreed. He also found that the respondent was forced to purchase a cash register at Kshs. 65,000 after the one listed in the schedule of the agreement was repossessed by the suppliers for non-payments; that the respondent had to spend Kshs. 9,600 to repair the freezer; that the alarm system left in the premises failed to function and the respondent was entitled to a refund of Kshs. 142,394.50 used to purchase and install another alarm system; that the respondent used Kshs. 54,280 to repair the premises which they were entitled to get a refund of. On the goodwill, the learned Judge held that the appellant's director – PW1 – was not an honest witness; that the appellant misrepresented the turnover as Kshs. 2 million; that the business was profitable, yet the appellant's creditors did not stop harassing the respondent for non-payment of goods supplied, forcing the latter to change the name of the business; that as a result of these factors, the respondent made losses hence no goodwill was transferred to

them.

Consequently, the learned Judge awarded the sum of Kshs. 279,796/60 as special damages for the payment of utility bills, purchase of a new cash register, installation of an alarm system and repair of the premises. He also ordered the appellant to refund to the respondent Kshs. 3,300,000 representing the goodwill. The total award of Kshs. 500,000 to the appellant was deducted from the award to the respondent leaving the latter with Kshs. 3,079,796.60 plus costs of the suit. Both parties were aggrieved with the decision, resulting to the appellant bringing this appeal and the respondent the cross-appeal. The appellant broadly argues that there was no basis for the award in respect of the cash register, alarm system, repainting and a refund of goodwill. In the cross-appeal, the respondent contends that the learned Judge was in error in dismissing the suit against the two directors of the appellant company and awarding them costs of the suit.

We must determine whether the learned Judge erred in awarding special damages in the sum of Kshs. 279,796.60 and in directing the appellant to refund to the respondent Kshs. 3,300,000 paid by the respondent as goodwill.

The figures of Kshs. 279,796.60 was made up as follows:-

i. Telephone bill	Kshs. 8,522.10
ii. Sharp cash register	Kshs. 65,000.00
iii. Freezer repairs	Kshs. 9,600.00
iv. Alarm installation	Kshs. 142,394.50
v. Repainting	Kshs. 54,280.00

Total - Kshs. 279,796.60

What was the evidence presented in support of this claim? We have observed earlier that the agreement made provision that the cost of furniture, fittings and equipment would be Kshs. 1,700,000; that upon execution of the agreement and payment of Kshs. 3,589,484.70, the appellant was to deliver vacant possession of the business premises **“together with the furniture, fittings and chattels in situ specified in the schedule.....”**

The appellant gave a warranty that the all the items in the schedule belonged to it and that none of them was subject to a charge, lien, bill of sale, hire purchase agreement or any other encumbrances whatsoever. The appellant further contracted to indemnify the respondent against all claims made on the respondent in respect of the appellant’s liabilities incurred in the business. The appellant was to deliver the premises duly repainted and polished. Finally, it was a term of the agreement that the appellant would settle the telephone and water accounts and produce evidence of payment to the respondent.

When the hearing of the appeal commenced, Mr. Mugo for the appellant withdrew grounds 1 and 10 of the Memorandum of Appeal, which challenged respectively, the award of Kshs. 65,000 in respect of a new cash register and Kshs. 8,522.10 for the telephone bill and Kshs. 9,600 for the repair of the freezer. That being so, we have only the issue of alarm installation and repainting of the premises to deal with in so far as an award of special damages is concerned.

We must, at this stage, reiterate the statement relied on by the learned Judge derived from the Uganda case of **Behange V. School Outfitters (U) Ltd.** 2000 1 EA 20 at 23, that:-

“One of the basic principles in law of contract is that the parties have 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 mistake or it may induce the court to imply or to hold that the contract has been frustrated. But it does not in itself affect the validity of the contract. Thus in the absence of fraud, duress, undue influence, mistake or

misrepresentation the courts will enforce a promise so long as some value for it has been given.”

The parties in this appeal freely contracted that the premises would be handed over together with all the items listed in the schedule “*in situ*.” *In situ* is a Latin word used in the context of the instant agreement to mean, “*on location, on site or in its original place*”, (The concise Oxford Dictionary, 9th Edn) importing, in our view, “*as is*” provision in the contract, denoting that the appellant was selling, and the respondent was taking the alarm system in whatever prevailing condition it existed and that the respondent was accepting it with all “*faults*” whether or not apparent. It is a common practice in the sale of goods or real estate purchase contracts that “*as is*” provision does not preclude a buyer from fully inspecting the item put up for sale.

There was evidence that the alarm system was installed in 1994, some 3 years before the sale transaction. The appellant maintained that the director of the respondent (DW1) inspected it. DW1 on her part testified in connection with the alarm system as follows:-

“There was security alarm for the shop but was not working at the time.... There was no warranty about the mechanical ability of the equipments.... The equipments alarm (sic) never worked. It was not tested.”

Clearly the respondent knew the state of the alarm system at the stage of taking over and there was no warranty regarding it. It was therefore erroneous for the learned Judge to find this aspect of the dispute in favour of the respondent.

It was a term of the agreement that the premises would be painted by the appellant. There was evidence of admission of the appellant that this term was not honoured. The respondent submitted a claim of Kshs. 66,280 as the amount they incurred in painting the premises. Although the learned Judge found that receipts amounting to Kshs. 54,280 were produced in proof of this claim, we ourselves find that those specifically making reference to painting total Kshs. 48,280 and that is what the learned Judge ought to have awarded.

We turn to consider what Mr. Mugo for the respondent described as the crux of this appeal, the question of goodwill. The learned Judge ordered a refund of Kshs. 3,300,000 paid for goodwill on account of the alleged misrepresentation to the respondent by the appellant that the business’ monthly turnover was Kshs. 2 million instead of Kshs. 500,000; that the appellant had good relationship with the creditors, yet hardly one month after the transaction, the appellant’s creditors began to harass the respondent; and that the business enjoyed good patronage from the neighbourhood. The learned Judge then proceeded to conclude that:-

“In effect, the plaintiff had misled the defendant. That action on the part of the plaintiff is called misrepresentation. I also believe that the said misrepresentation was deliberate. The plaintiff had run the business for 4 years. PW1 knew or ought to have known that the monthly returns were not in the range which she stated to DW1. The question of monthly returns is not one of opinion: it is a matter of facts derived from the records kept by the plaintiff. I further believe that the figures given to the defendant were intended to be relied upon by it, especially in calculating the goodwill of the business.”

We are unable to follow the learned Judge’s argument that what the appellant is purported to have told the respondent by word of mouth regarding the turnover of the business was a deliberate misrepresentation and his holding in the same breath that the issue of turnover cannot be based on opinion but on the business records.

But that is not the only contradiction in the judgment. On what basis, for example, did the learned Judge find evidence warranting the order to refund money paid as goodwill after making the following remarks?

“To my mind, DW1 and the defendants must blame themselves for what befell them. Much as she was trusting, DW1 must accept that the foundation of good business is the hard facts and figures. She may have asked for the plaintiff’s books of accounts but did not receive them. One wonders how then she was able to calculate the amounts to be paid either as goodwill, or for the furniture, fixtures and machines.”

In addition to this statement, even after relying on the definition of the term ‘goodwill’ as explained by Lord Lindsey in **Inland Revenue Commissioners V. Muller & Co’s Margarine Ltd** [1901] AC 217 at 235 and **Halsbury’s Laws of England** Vol. 29, 3rd Edition page 360 – to the effect that goodwill of a business includes whatever adds value to a business by reason of situation of the business, name and reputation, connection and introduction to old customers, the learned Judge proceeded to find that there was no goodwill. Apart from stating that the transfer of the business would include an element of goodwill of the business together with the right to use the name of Rangeways Supermarket, the agreement does not explain how the figure of Kshs. 3,300,000 was arrived at. Goodwill is calculated on the basis of a formula and cannot be arbitrarily arrived at. That question, however, not before us in this appeal.

That apart, evidence was presented before the trial court that the respondent’s director (DW1) had shopped in the supermarket for some time. She also admitted that at the time of the sale, the business was closed ostensibly for renovation. She was even aware that as a matter of fact, there were no renovations going on. She took over the business and managed it for two years and seven months. Even when the name of the business was changed only the word “new” was added to the original name, in our view, to signify the change of management. Goodwill is based, as we have noted above, on the probability that all or some of the customers will continue to go to the old place of business. It provides a ready pool of customers unlike a new business. The vendor, of course, cannot guarantee the purchaser that all the previous customers shall remain with the purchaser just as he cannot also promise the purchaser that the latter would maintain the same level of profitability and turnover.

The respondent’s director (DW1) who negotiated the transaction told the trial court that she had been engaged in other forms of business since 1973. It was therefore naïve of her to rely on a word of mouth on such critical things as turnover or profitability. Any prudent person wishing to go into business must conduct financial due diligence prior to entering into a binding sale agreement. The thrust of the respondent’s case is simply that it made a bad bargain, the essence of *laissez-faire* being that each party bargains in his own interest and for his own benefit. In such a system, there will be those who will make bad bargains through poor judgment.

We come to the conclusion on the appeal that the learned Judge made no error in awarding the appellant Kshs. 500,000. On the cross appeal, the appellant having withdrawn grounds 1 and 10 of the Memorandum of Appeal, and upon our own assessment of the evidence, the respondent was entitled to judgment as follows:-

i. The cash register	– Kshs. 65,000
ii. Unpaid telephone bill	– Kshs. 8,522.10
iii. Repairing cost	– Kshs. 48,280
iv. Repairing of the freezer	– Kshs. 9,600
Total	- <u>Kshs. 131,402.10</u>

We also find that the learned Judge erred in striking out the 2 directors of the appellant company who were named in their personal capacities in the agreement as vendors together with the appellant company.

We accordingly set aside the order striking out the 2nd and 3rd defendants in the counter-claim as

well as the order for special damages of Kshs. 279,796.60 and substitute therefor an award of Kshs. 131,402.10. We set aside altogether the award (or an order for a refund) of Kshs. 3,300,000 as goodwill. We find for the appellant in the sum of Kshs. 500,000 which we lessen by Kshs. 131,402.10 awarded to the respondent, leaving Kshs. 368,597.90 in favour of the appellant, plus interest.

The appellant will also have half the costs of this appeal as well as half of the costs in the court below.

Dated at Nairobi this 7th day of February 2014.

D. K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR