**REPUBLIC OF KENYA**
**IN THE COURT OF APPEAL**
**AT NAIROBI**

**CORAM : TUNOI, O'KUBASU & DEVERELL, JJ.A**

**CIVIL APPEAL NO. 159 OF 2004**
**BETWEEN**

**1. PROFESSOR DAVID MUSYIMI NDETEI**

**T/A OASIS MINERAL WATER CO.**

**2. OASIS MINERAL WATER CO. LIMITED………..……..APPELLANTS**

**AND**

**SAFEPAK LIMITED……………………………..………………RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nairobi (Gacheche, J) dated 6th November, 2002***

**in**
**H.C.C.C. NO. 92 OF 1998)**
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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the High Court of Kenya at Nairobi (Gacheche, J) delivered on 6th November, 2002 whereby the learned Judge entered judgment for the respondent, the plaintiff in the suit, in the sum of Shs.748,892.00 together with costs and interest against the 1st appellant, the 1st defendant in the suit and dismissed the appellants' counterclaim with costs.

The respondent, ***SAFEPAK LIMITED***, is a limited liability company incorporated in Kenya under the Companies Act. It manufactures plastic bottles used for packing mineral water, juices, edible oils, pharmaceutical products, agro-chemicals and carbonated beverages. The bottles are called P.E.T. bottles and they come in three colours. The raw materials for the bottles, which are granular in form and are convertible into the end products by an injection moulding process, are sourced from South Africa and the Middle East. The respondent asserted in the superior court that all the bottles that leave its manufacturing line, no matter the sizes, design or colour, are made of similar raw materials.

By its plaint dated 14th April, 1998, the respondent averred that it supplied assorted types of P.E.T. bottles and accessories to the appellants but that they had despite demand and notice refused or neglected to pay the balance outstanding against their accounts. It claimed Shs.748,892.00 from the 1st appellant, ***PROFESSOR D.M. NDETEI*** and Shs.722,533.50 from the 2nd appellant ***OASIS MINERAL WATER COMPANY LTD***., and also; against them jointly and severally.

In the amended plaint subsequently lodged the respondent, in the alternative, sought judgment against the

2nd appellant for the sum of Shs.1,471,425.45 as successor and assignee in title to the 1st appellant by virtue of the conversion of the 1st appellant into a limited liability company. In his defence the 1st appellant admitted having been supplied with the bottles, but he averred that the respondent knowingly and recklessly supplied him with bottles that were sub-standard and of poor quality and were unfit for the required purpose.

He averred that as they were of unmerchantable quality, his clients rejected his mineral water products as they changed colour after bottling. He therefore denied owing the stated sum and claimed that he has suffered loss and damage as a result of the respondent's negligence. He puts his losses at Kshs.18,984,658.00 for which he filed a counterclaim. During the proceedings before the trial court the appellants sought and were granted leave to amend their defence and they raised a new issue to the effect that due to the discoloration of the water their customers who had cancelled their orders and refused to do further business with them had shunned them and consequently, they had suffered industrial defamation. They claimed general and exemplary damages.

As the 2nd appellant neither entered appearance nor filed a defence since it was never served with summons, the learned Judge only proceeded to determine the issues as between the 1st appellant and the respondent. Before trial the main agreed issues were, inter alia:-

***1. Were the goods fit for their stated purpose and of merchantable quality?***

***2. Were the appellants estopped from alleging that the goods were not of a merchantable quality?***

***3. Was the respondent reckless and negligent in the material sale to the appellants?***

***4. Was there a meeting between the respondent and the appellants in respect of the dispute herein and was any agreement reached?***

***5. Has either party performed their part of the agreement reached, if any?***

***6. Have the appellants suffered loss and damages as alleged?***

On the first and second issues, the learned Judge found that in 1998 two years after the appellants had stopped purchasing bottles from the respondent ***Kenya Bureau of Standards*** had complained about the quality of the appellants' bottled water. The learned Judged deemed this sufficient to conclude that the discoloration could not be attributable to the bottles supplied by the respondent. She found further that the analytical report commissioned by the appellants was not really reliable. She held:-

***"I find that the analysis report that was prepared at the request of the defendant was not really analytical, for it did not have a comparative analysis of different packaging materials by different manufacturers, or even water from various sources. Dr. Gachanja who carried out the analysis, appeared in my mind to have formed the opinion that the plastic bottles which had been handed over to him by the defendant were the actual source of the contamination, yet it was clear for (sic) the evidence of the defence witnesses that the element of contamination by the defendant's employees could not be ruled out completely, as it could have either occurred prior to the filling of the bottles, as they were cleaned manually by three people".***

The learned Judge further faulted what she termed careless handling of the bottles by the employees of the appellant on the ground that the employees kept exchanging positions with others the numbers ranging from three to ten, all performing the same task of bottling. She concluded that the 1st appellant had failed to provide evidence to show that the goods that had been supplied by the respondent were of unmerchantable quality or that they were not fit for their stated purposes. She concluded that by the time when the appellants raised their complaint in October, 1996, they were already indebted to the respondent. She attributed their loss to other parties other than the respondent. The learned Judge answered the first two issues in the affirmative. As for the third issue she found no evidence of

recklessness and negligence. She concluded that if the appellants suffered loss and damage, they were not attributable to the respondent. She rejected the defence and dismissed the counterclaim together with the belated claim for defamation. The appeal before us complains on several grounds. The appellants submit, in the main, that the learned trial Judge erred on her consideration of the unchallenged analytical report by Dr. Gachanja (DWIII) and by dismissing it off-hand without going into its merits. The appellants contend that had the learned trial Judge done so she would have found that:-

i) That the foreign particles in the appellants' water originated from the bottles;

ii) That chemically there were 2 types of bottles manufactured and sold by the respondent physically evidenced by their colour although both were supposedly clear;

iii) That there were traces of bromine in the water which substance was admittedly used as an additive by the respondent in the manufacturing process;

iv) That the bromine substance was more in the coloured bottles than it was in the clear bottles;

v) That the bromine whose only natural source is seawater could only have originated from the bottles and not the water and nor the workers unless the respondent produced another scientific report to this effect; and

vi) The fact that the respondent supplied the appellants with PET bottles contaminated, inter alia, with bromine was clear proof that the respondent supplied the appellants with unmerchantable bottles or bottles unfit for the purpose, i.e. bottling of water for human consumption.

*Mr. Kyalo* counsel for the appellants submitted that the trial Judge erred in introducing in the judgment her alleged personal knowledge of the manufacturing of plastic water P.E.T. bottles without any reference to the evidence adduced by either party. Moreover, Mr. Kyalo argued, the respondent did not in any way controvert the findings by *Dr. Gachanja's* report, which he contended, were clear and unchallenged and showed beyond any scientific doubt that the particles in the water were found to contain bromine which is a substance which does not occur naturally, save in seawater or in the manufacturing process as a fire retardant. Again, Mr. Kyalo submitted that tests conducted by both Government Chemists and National Health Laboratory Services did not show any contamination of the appellant's water. We will revisit Dr. Gachanja's testimony before the trial court. He is an Analytical Chemist and a lecturer in the Department of Chemistry at JKUAT. He was tasked by the appellants to provide an analysis regarding mysterious particles which appeared in a specified bottled water product after it had gone through two stages of:-

(a) one micron filter and

(b) u/v treatment.

Specifically, the appellants wanted to know where the problem lay, and whether it was wholly or partially with the following:-

(a) The product i.e. the water;

(b) The filters;

or

(c) The containers i.e. the PET bottles.

The appellants complained to the analyst that the problem was episodic and had become worse gradually over time since March, 1996, reaching a climax in September, but seemed to have dramatically reduced in

October. The particles appeared any time immediately after the bottling and after several days of storage. This did not change even after they had installed new filters. They further explained that they hardly had any of these problems in 1994 and 1995, despite the fact that in those years they used only one stage each of one-micron filtration and u/v treatment. Dr. Gachanja analysed the samples of bottles and water as provided by the appellants and made his findings which were tendered in evidence during the trial of the suit. These were:-

***"Conclusions***

***1 Levels of $Na^+$, $K^+$, $Ca^{2+}$, $Mg^{2+}$, $Fe^{2+}$, and $SiO_2$ were higher in water in August compared with October.***

***2. PET bottles with colour were found to contain relatively higher amounts of Cu, Fe, Ti, Cr, Br, Mo and Zr compared with bottles with colour.***

***3. The particles were found to contain Si, Ca, Ti, Mn, Fe, Cu, Zn, Zr and Br.***

***Overall Observation***

***To initiate precipitation in a homogenous aqueous solution, the Ksp of a given sparingly insoluble salt must be exceeded. This will occur by either increasing the concentration of any one of the constituent ions or decrease in temperature. The PET bottle without colour was found to contain relatively lower amounts of the elements that were also found in the particles. There is less likelihood of particle formation when water is stored in the PET bottle without colour. On the other hand particle formation is more likely to take place with PET bottle with colour due to the higher concentration of elements found in the PET bottle."***

The learned trial Judge considered Dr. Gachanja's evidence together with that of ***Mr. Robert S. Linck*** (PW 11), the proprietor of ***Kilimanjaro Water Products Ltd***., who are in similar business with the appellants and who were the first in Kenya to use PET bottles. Mr. Linck testified that they had not encountered any discoloration of water bottled in such bottles which they had used for a period of over nine years. The learned trial Judge drew support from the testimony by Mr. Tushar Shah (PW 1) that the appellants' source of water was a borehole or a well "somewhere in Athi River, away from the bottling plant." She concluded:-

***"It is important to note that upon cross-examination, DW11 confirmed that two years after they stopped purchasing bottles from the plaintiff, the Kenya Bureau of Standards, did in 1998 complain about the quality of their bottled water. It would therefore appear, and it can be safely assumed that the discoloration could therefore not be attributed to the plaintiff's bottles."***

What is the probative value of the evidence of Dr. Gachanja as far as the matter before the superior court and this Court is concerned? This Court in ***PRAVIN SINGH DHALAY V. REPUBLIC*** Nairobi Criminal Appeal No. 10 of 1997 (unreported) stated:

***"It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of ELIZABETH KAMENE NDOLO V GEORGE MATATA NDOLO, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts: -***

***"The Evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:***

***- "Because this is the evidence of an expert, I believe it."…….***"

***That, we think, is the proper direction which a court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent grounds(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it"***

It is manifestly clear that the learned trial Judge did not place much reliance on the expert testimony of Dr. Gachanja and she gave a good and cogent reason for rejecting it. However, we do not agree with Mr. Kyalo that she dismissed it off-hand without analysis. The learned trial Judge was obliged in the circumstances to assess both the logical and legal relevance of the evidence and from it to derive its probative value by considering its reliability, materiality and cogency. The admirable academic credentials and expertise as shown to the court prove, no doubt, that Dr. Gachanja was a properly qualified expert in his field possessing special knowledge in analytical chemistry. His skill was derived from scholarly work, experience and practical training. His testimony was therefore logically relevant. But, the facts narrated to the trial Court showed that the issues before it could not be resolved by expert evidence alone. In the circumstances, therefore, it was the duty of the learned trial Judge to take into account other evidence since it was necessary to do so in order to dispose of all the issues in the trial. This, she did and for the course she chose, she cannot be faulted.

It is obvious from the record that the expert evidence tendered by Dr. Gachanja was not conclusive in determining the source of the discoloration and in this regard the learned trial Judge was perfectly entitled to consider, also, the testimony of PW1 and PW111. Having ourselves considered the expert evidence we are satisfied that the appellant's complaint that the learned Judge erred in not relying exclusively on the evidence of Dr. Gachanja is misplaced and without foundation. For this reason grounds 1,2,7,13 and 14 of the memorandum of appeal are dismissed. The other grounds of appeal deal with issues of fact. Despite the very persuasive submissions by Mr. Kyalo, there are no cogent reasons for us to differ from the findings of the learned trial Judge. It is trite that it is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. See **PETERS VS. SUNDAY POST LIMITED [1958] E**.A. 424. The rest of the grounds of appeal are without merit and they are rejected. In the result the appeal fails and is ordered dismissed with costs.

***DATED and DELIVERED at NAIROBI this 8th day of July, 2005.***

**P.K. TUNOI**

**……………………………**

**JUDGE OF APPEAL**

**E.O. O'KUBASU**

**………………………….**

**JUDGE OF APPEAL**

**W.S. DEVERELL**

**…………………………….**

**JUDGE OF APPEAL**

***I certify that his its a true copy of the original.***

**DEPUTY REGISTRAR**