



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, OWOUR & O'KUBASU J.J.A)
CIVIL APPEAL NO. 145 OF 2000**

BETWEEN

KENYA POST OFFICE SAVINGS BANK APPELLANT

AND

INTERIOR TRENDS LTD..... RESPONDENT

(Being and Appeal from Judgment and Decree of the High Court of Kenya at Nairobi (Hon. Mrs. K.H.Rawal, Commissioner of Assize) dated 12th May, 2000

in

H.C.C.C NO. 2403 OF 1997)

JUDGMENT OF THE COURT

The appellant, Kenya Post Office Savings Bank, filed a suit against the respondent, Interior Trends Limited, seeking judgment for Shs.647900/=, interest at 14% as from 3rd December, 1996 and costs of the suit. The relevant paragraphs of the plaint were as follows:-

"3.In 1996 or thereabouts the Plaintiff entered into an agreement with the Defendant for the supply of the Defendant to the Plaintiff of office furniture valued at Kshs.2,167,000/=. A deposit of Kshs.1 million was made to the Defendant by the Plaintiff upon the Defendant's request and instance. The plaintiff will rely on the contract for its full tenor and effect.

4.The plaintiffs claim against the Defendant is for Kshs.647,000/= being the sum due and owing from the Defendant to the Plaintiff for the value of furniture not supplied by the Defendant to the Plaintiff in breach of contract, particulars are within the Defendants knowledge.

5.Despite demand being made and Notice of intention to sue being given the Defendant has failed refused and neglected to pay the sum claimed".

The respondent filed a statement of defence and counterclaim in which it was averred inter alia:-

"3.The Defendant denies paragraph 4 of the Plaint and he puts the plaintiff to strict proof thereof.

4.In further answer to paragraphs 3 and 4 of the plaint and without prejudice to the foregoing the Defendant states that it was initially given a local purchase order to supply office furniture to the plaintiff's Eldoret Branch which was all delivered as requested. The Defendant was issued with

another order for the supply of furniture to the Plaintiffs Branch in Nakuru. When the Defendant started preparing the said order the plaintiff through their agent one Mr. Koech gave the defendants the wrong measurements and which he indicated that he wanted to change them after the furniture were ready, the defendant demanded an additional Kshs.200,000/= which the plaintiff refused or neglected to pay.

The defendant avers that it is the plaintiff who is in breach of the agreement in failing to pay the said sum of The defendant. 200000= ".asked for dismissal of the plaintiff's suit set out the counter-claim as above and then sought the following orders:-

- "a.Judgment against the plaintiff for the said sum of Kshs.200,000/=.
- b.Damages for breach of contract the exact amount to be determined by the court.
- c.Costs and interest together with any other relief as this court may deem fit and just to grant".

The suit came up for hearing before the learned Commissioner of Assize Rawal (as she then was). The plaintiff (the appellant herein) called Mr. Issack K. Koech who described himself as the Assistant Manager in charge of computer as its first witness. This witness gave brief and straightforward evidence to the effect that the respondent was paid a deposit of Shs.500,000/= for furniture in respect of Eldoret branch but the value of furniture delivered was Shs.352,1000/=. This meant that there was a balance of Kshs.147,900/= out of the deposit of Shs.500,000/=. Then there was yet another deposit of Shs.500,000/= for furniture in respect of Nakuru Branch but no furniture was delivered. That is why in concluding his evidence in chief, this witness stated:-

"I pray for judgment for Kshs.500,000/- and Kshs.147,900/= totalling to Kshs.647,900/= with interest and costs".

The appellant's second witness was Mr. Michael Amwoma who was the Branch Manager in charge of Eldoret North at the material time. He is the one who received and signed for the furniture delivered by the respondent at Eldoret.

The respondent called Mr. Peter Kimani Mbugua who was its Managing Director as the only witness to testify. This witness admitted the existence of the contract and the payment of deposits as per the evidence by the appellant's witnesses.

But Mr. Mbugua went on to state that there was extra expenditure of Kshs.213,000/- over and above the agreed prices and this variation was necessitated by the fact that there were slight changes in measurements. He was of the view that it was the appellant which breached the agreement.

The learned Commissioner of Assize considered the pleadings, evidence adduced and the submissions by counsel appearing for the parties and came to the conclusion that the appellant had not proved its case which she dismissed with costs and allowed the respondent's counter-claim in the sum of Shs.213,000/- with costs.

It is that decision that provoked this appeal to this Court. We have endeavoured to state in a summary form the evidence that was presented before the superior court by both parties in this suit. We have noted that the appellant's claim was for Shs.647,900/= being the deposit for furniture for Nakuru Branch which furniture was not delivered and Shs.147,900/= being the difference between Shs.500,000/- as deposit and Shs.352,100/- being the value of furniture delivered at Eldoret Branch. As for the respondent, it put in a written statement of defence and a counter-claim for Shs.200,000/= which figure was later changed to Shs.213,000/=.

The learned Commissioner of Assize considered the evidence placed before her and came to the conclusion that the appellant had not proved its case and that the respondent had proved that it was entitled to its counter-claim in the sum of Shs.213,000/=. As an appellate court, we have to review and

assess the evidence adduced in the trial court in order to determine whether the conclusion reached upon that evidence should stand - see Peter v. Sunday Post Limited [1958] E.A. 424.

We would start by considering the issue of the respondent's counter claim. In the pleadings, the respondent's counter-claim was stated as Shs.200,000/= but this was later changed to Shs.213,000/=. Mr. Kantai for the appellant submitted that since the request for Shs.200,000/- was rejected, then the superior court was wrong in awarding Shs.213,000/- to the respondent. In his view, the counterclaim ought to have been dismissed. On his part, Mr. Kariuki for the respondent told us that the respondent was entitled to the counter-claim. He, however, did not tell us why the figure was changed from the original Shs.200,000/= as claimed in the pleading to Shs.213,000/- which was awarded in the judgment.

On our part, we find no basis for the counter-claim. In her judgment, the learned Commissioner of Assize expressed herself thus:-

"The defendant's Managing Director Peter Kimani Mbogua gave evidence and deponed the fact of two tenders and payment of Shs.1,000,000/= in total as an advance payment thereof. He however stated that the furniture as mentioned in delivery notes of 28th January, 7th February and 29th April, 1997 (being Nos. 052, 055, 054 and 057) the furnitures worth Shs.1,315,600/- in all according to him were delivered to the post to its Eldoret Branch. The quotation of the furniture to be supplied was Shs.1,083,000/= and he claims Shs.213,000/= I must state that I cannot understand this claim. He agreed that the one receipt book produced containing the deliveries in question only shows the plaintiff as customer. No delivery to the other customers are referred here. The whole book contains delivery Nos. 051, 052 (with original), 055, 056 and 057 only. He also stated that he does not deal with deliveries. He also changed his version of over supply of furniture and stated that there was a change in quality of the furnitures. However, he denied having forged the delivery notes of January to April, 1997".

In view of the foregoing we, too, like the learned Commissioner of Assize, cannot understand the counter-claim of Shs.213,000/=. We are, therefore, surprised that having regard to the evidence adduced and the analysis of the same by the trial court as set out above the said court allowed the counter-claim and awarded the sum of Shs.213,000/= to the respondent. In our view, there was no evidence to support the counter-claim.

Coming now to the appellant's claim for Shs.647,900/= we have considered the evidence on record and having carefully reviewed and assessed the same and have come to the conclusion that the claim was proved. In the first place, the respondent admitted that it did not perform the contract in respect of Nakuru Branch. On being cross-examined the Managing Director of the respondent company said:

"It is true that on 2nd April 1997 the contract had been terminated and was not extended. We did not perform the Nakuru contract by that date".

Since the respondent admitted that it "did not perform the Nakuru contract" then there was no valid reason why it could be allowed to retain Shs.500,000/= paid to it as a deposit for delivery of furniture to Nakuru Branch of the appellant. That amount should be returned to the appellant. As regards Eldoret Branch delivery notes show that furniture worth Shs.352,100/= was delivered against a deposit of Shs.500,000/=. Again here there is no valid reason why the respondent can be allowed to retain the difference being Shs.147,900/=. This amount should also be returned to the appellant. Hence the appellant, quite rightly, sued for a liquidated claim in the sum of Shs.647,900/=. In our view, this claim could not be resisted.

For the foregoing reasons, we allow this appeal, set aside the judgment and decree of the superior court and in its place substitute therefor judgment in favour of the appellant in the sum of Shs.647,900/= plus interest as prayed in the plaint. The respondent's counter-claim is dismissed with costs. We award the costs of this appeal and costs of the suit in the superior court to the appellant.

Dated and delivered at Nairobi this 13th day of July, 2001.

R. O. KWACH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR