New Kenya Co-operative Creameries Ltd v Sammy Kipkoech Rotich t/a Kirosa Enterprises Ltd (Civil Appeal 169 of 2019) [2024] KEHC 4078 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 169 OF 2019

RN NYAKUNDI, J

APRIL 25, 2024

BETWEEN

NEW KENYA CO-OPERATIVE CREAMERIES LTD ..... APPELLANT

AND

SAMMY KIPKOECH ROTICH T/A KIROSA ENTERPRISES LTD ..... RESPONDENT

JUDGMENT

Representation:

Onyinkwa & Co. Advocates

M/s Magut & Sang Associate

1. The appeal herein arises from the judgment and decree of the trial court in Eldoret CMCC No. 517 of 2016 – *New Kenya Cooperative Creameries Limited v Sammy Kipkoech Rotich*. The plaintiff/appellant instituted a suit against the respondent vide a plaint dated 10th may 2016 amended on 14th July 2018 seeking the following reliefs;

    a) The sum of Kshs. 1,626,452.59

    b) Costs of the suit

    c) Interest on (a) and (b) at court rates

2. The defendant/respondent entered appearance and filed a defence on 14th August 2018 and the matter proceeded to a full hearing.

    Stanley Tum testified as PW1 and adopted his witness statement dated 11th June 2018 as evidence in chief. He was an employee of the plaintiff and it was his testimony that they used to supply the defendant with milk products for which he would pay for. Prior to March 2012 the defendant used to

pay in cash but thereafter he was supplied with goods and an invoice served. They would receive a letter of request of goods and the goods would be supplied and an invoice issued. He stated that between march 2013 and December 2014 they raised invoices for which the defendant attempted to pay but the cheques were dishonoured. He produced the invoices which were not paid and stated that their value was Kshs. 144,262.59. He however stated, while producing the documents that he is not the one who made them. he also produced the cheques as evidence and stated that the total amount for the cheques was Kshs. 1,462,190/- and bank charges of Kshs. 20,000/- were incurred. He also produced the demand notices from the bank and the commitment to pay by the respondent. he denied that the respondent had a credit loan of Kshs. 200,000/-.

3. The respondent testified as DW1. He adopted his witness statement as evidence in chief. It was his testimony that he used to obtain goods from KCC and would pay within 7 days. Further, that he used to deal with Kenneth Kiprono on behalf of the plaintiff. After 2 years, he introduced him to William Kiptanui. He clarified that Kenneth was the plaintiff's salesman. In the course of business, he trusted Kiprono to the point that he would sign blank cheques and let him fill the slot for the amounts to be paid. He then received a call from the bank telling him there were insufficient funds in the account. On enquiring from Kenneth Kiprono, he told him he had used the company's money to buy a vehicle from CMC and that he would sort him out. The respondent then directed the bank to countermand the cheques. He lost Kshs. 500,000/- and Kenneth Kiprono was charged with a criminal case.

4. The respondent testified that he received delivery notes to show what was delivered and produced a cash sale receipt dated 20th may 2015 as an exhibit. He also produced the delivery notes dated 12th December and 15th December 2016. He testified that he was never given computer generated receipts. He was given handwritten ones which he would stamp and sign. The only person who was able to explain the transactions was Mr. Kirui. He maintained that he was never indebted to the plaintiff.

5. DW2 was Disman Kimosop Kendagor who was in charge of receiving supplies at Kirosa Enterprises, the respondent's business. He testified that the people from KCC would deliver goods, give invoices and stamp them with their stamp. He denied ever seeing computer printouts of the receipts and denied ever seeing PExh2(a),3(a),4(a),5(a) and 7(a). He stated that the plaintiff had booklets that had documents that they would stamp. Further, that he was once pressured to sign the documents Thuranira, one of the plaintiff's employees had, in the presence of a police officer but he declined.

6. The court directed the parties to file submissions and upon considering the submissions, the trial court dismissed the suit with costs. Being aggrieved with the judgement and decree of the trial court the appellant instituted the present appeal vide a memorandum of appeal dated 22nd November 2019 premised on the following grounds:

    a. That the learned trial magistrate erred in law and in fact in dismissing the appellant's case.

    b. That the learned trial magistrate erred in law and in fact in holding that the appellant did not supply goods worth Kshs. 1,626,452.59/-.

    c. That the learned trial magistrate erred in law and in fact in holding that in the absence of any delivery notes to confirm that indeed milk products worth Kshs. 1,626,452.59/- was supplied the n the invoices produced by the appellant could not be ascertained whether or not they were signed by the respondent's employees.

    d. That the learned trial magistrate erred in law and in fact in holding that the defendant countermanded the cheques they had drawn in favour of the plaintiff upon realizing that more than what had been delivered was debited to their account and which amount was inserted by the appellant's employees when no such evidence was led in court.

e. That the learned trial magistrate erred in law and inf cat in failing to address the issue of the bounced cheques that were issued by the respondent to the appellant.

f. That the learned trial magistrate erred in law and in fact in delivering a judgement which was clearly against the weight of the evidence on record.

g. That the learned trial magistrate erred on law and in fact in failing to consider the submissions of the appellant.

7. The parties were directed to file submissions on the appeal. The appellant filed submissions on 4th December 2023. There were no submissions on behalf of the respondent on record.

Appellant's Submissions

8. Learned counsel for the appellant faulted the reasoning of the trial magistrate in finding that the appellant did not produce any delivery notes to confirm that indeed it supplied the respondent with milk worth Kshs. 1,626,452.59. Further counsel faulted the finding that the appellant was unable to prove whether the invoices produced in evidence were signed by any employees of the respondent. He urged that from the testimony in court, there is no dispute that the appellant used to supply milk products to the respondent herein.

9. It is the appellant's case that it is not in dispute that cheque payments began in 2012.Furthermore, the respondent agreed and/or admitted that after the goods were delivered by the appellant, an invoice was issued and the respondent issued post-paid cheques with an allowance of payment of seven (7) days. The appellant admitted that it is indeed true that it used to supply the milk products to the respondent on credit and upon delivery, invoices were issued by the respondent which could be settled later on.

10. The appellant faults the learned trial magistrate for dismissing the appellants suit with costs. This is because the learned trial magistrate dwelt much on the facts that were not disputed by the respondent. Counsel quoted the trial magistrate as follows ; -

> " On the first issue, the plaintiff alleged that it delivered to the defendant goods worth Kshs 1,626,452.59for which she claims payments, the plaintiff did not produce any delivery note to confirm that indeed it supplied the defendant with milk products worth Kshs. 1,626,452.59. The plaintiff was unable to prove whether the invoices that they produced in evidence were signed by any employees of the defendant"

11. On this quote, counsel urged that during hearing, the respondent testified that he was not disputing the fact that milk products were supplied to him on credit and he used to pay within 7 days. He further confirmed that he drew the cheques produced as Pexh3(a) and Pexh3(b) . Counsel cited the testimony of PW1 and urged that it is clear that the respondent received milk products from the appellant on credit and that for every delivery made, invoices were issue by the appellant which were to be settled later on. This was the agreement between the parties as per the evidence on record. Counsel maintained that the learned trial magistrate erred in law and fact by failing to take into account the evidence adduced by the appellant herein thus dismissing the appellant's case.

12. It is the appellant's case that during the hearing it came out clearly that the respondent issued dishonoured cheques in respect to the milk products supplied to him by the appellant. The appellant produced the dishonoured cheques issued by the respondent totalling to Kshs. 1,462,192/= as PExh 3(b), 3(c), 5(b) and 7(c), (d) & (e). PW1 also testified that Kshs. 144,262.59 worth of milk products were unpaid for. This totals to Kshs. l,626,452.59 that the appellant is claiming. Additionally, investigations were carried out on the dishonoured cheques drawn by the respondent and a complaint

was lodged at Langas Police station vide OB No. 20/28/01/2015. Counsel reiterated that the appellant proved that the plaintiff issued dishonoured cheques in view of the products supplied to him. On the other hand, the respondent alleged that he had a credit limit of Kshs. 200,000/= hence it was not possible that he owed the appellant Kshs. 1,626,452.59. However, no evidence and/or proof whatsoever was produced to show that the respondent had a credit limit of the aforesaid amount. In fact, the PW1 stated that such an arrangement would be against the company policy.

13. Counsel urged the court to set aside the judgment of the trial court and substitute the same with a judgement in favour of the appellant for a sum of Kshs. 1,626,452.59. Further, that the costs of this appeal and the sub-ordinate court be borne by the respondent with interest.

Analysis & Determination

As this is an appellate court, the duty of the court must first be laid out. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

> " The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

Further, in *PIL Kenya Limited v Oppong* [2009] KLR 442, it was held that:

> " It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanour and giving allowance for that".

Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. An appeal court cannot properly substitute its own factual findings for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution. See *Kiruga v Kiruga and another* (1988) KLR. 348."

Upon considering the memorandum of appeal, submissions of the parties and the record of appeal, the following issue arises for determination;

Whether the trial court erred in dismissing the suit

14. In the impugned decision, the trial court found that the plaintiff failed to produce the delivery notes to prove that they had supplied goods worth Kshs. 1,626,452.59 to the defendant. I have considered the documentary evidence that was tabled in the trial court and what emerges is that there was a variance between the invoices alleged to have been issued by the plaintiff and those received by the defendant. The plaintiff produced computer printouts of invoices whereas the defendant alleged the tall invoices used to be handwritten. The defendant produced copies of the handwritten invoices as evidence as to what had been delivered to him.

Section 107 (1) of the *Evidence Act* which provide as follows:-

> " whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

(See *Abdsheikh D/O Salim Abdsheiikh v Wanya and another*, Mombasa, High Court Civil Case No. 381 of 1989 (HCK) 1993) eKLR 569

In the same vein in *Evans Nyakana v Cleophas Bwana Ongaro* (2015) eKLR was held that:

> " As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issues. That is the purport of section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidence burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person. The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in in that person who would fail if no evidence at all were given as either side."

The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru J in *William Kabogo Gatau v George Thuo Others* (2010) KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

The burden of proof is the one at stake from the evidence on record. The burden was on the Appellant to establish that a ground for review or Appeal exists on the decree of dismissal of suit. The standard and burden of proof is in the civil standard of the balance of probability. Even if the Appellant established one of the grounds of the claim, the trial court may still in its discretion, refuse a remedy pleaded in the plaint. The better view is assessed on the strength of the Appellants case before the court below and as to whether a *prima-facie* case requiring of an answer was established to warrant the respondent to given defence in rebuttal. My assessment of the evidence as presented before the trial court demonstrates that the respondent was able to dislodge and deconstruct the narrative by the Appellant to persuade the learned trial magistrate to dismiss the claim. It was therefore the burden of proof vested with the Appellant at the primary court to be discharged for an Appeal jurisdiction the legal trajectory applicable is well set out in the case of *Williamson* (*supra*). In exercising discretion my reading of the judgement shows that there were adequate reasons why the court took the position of dismissing the suit in its entirety.

For the trial court it is a legal requirement under Section 107 (i) of the *Evidence Act*, to show by way of logical reasoning that a fact in issue had been proved to show that the claim crystallised for a finding of issuance of a remedy as against the respondent. The law indeed operates on a binary system of evaluating and scrutinizing the evidence in which the only values are zero and one. The fact that either happened or did not is an issue underpinned on the doctrine of proof on a balance of probabilities. The essence of this is that from the impugned judgment the court was left in doubt and the aforesaid doubt was resolved against the appellant who carried the burden of proof. The degree of persuasion which the trial court must feel before it could decide that a fact or facts in issue deed happen was in the

realm of unripen cause of action. All what was expected of the Appellant was to satisfy the learned trial magistrate that the occurrence of the fact or facts in question did happen on a balance of probabilities. The appeals court in which I preside would therefore require to be satisfied that the facts which are required for the justification of exercising discretion o overturn the judgement do exist. When assessing the probability of both oral and documentary evidence the occurrence of the event subject matter of this appeal only has rays of the occurrence of the event but to the extent that it occurred to call upon payment of 1, 626,452.59 as against the respondent is a possibility which is not exemplified to the level of a balance of probabilities. I have in mind as a factor to whatever extent that transaction happened in the particular circumstances but the completion of it to establish an issue on a balance of probability as laid down by the magistrate was more improbable than probable.

The plaintiffs failed to produce the delivery notes that would have been concrete evidence that the goods were supplied to the respondent for the amount claimed. Further, it is apparent that there was fraud perpetuated by the alleged issuing of the computer printed invoices that were produced in court as there were no accompanying delivery notes to verify that the goods were indeed delivered to the defendant. The respondent on his part, had even provided copies of delivery notes as evidence of what was delivered to him. I have also considered the fact that the appellant was unable to prove that the invoices produced were signed by any of the respondents' employees. In the appeal, the appellant has done nothing to prove that this was an erroneous finding as well and therefore the trial court was well guided in this finding.

15. I am therefore in concurrence with the judgement of the trial court based on elaborate and meticulous analysis of the evidence. On the approach founded on evidence and reasoning I find no merit in the appeal and substantially so the same is dismissed with costs to the respondent.

16. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25TH DAY OF APRIL 2024

R. NYAKUNDI

JUDGE