



IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION (APPELLATE SIDE)
CORAM: D. S. MAJANJA J.
CIVIL APPEAL NO. 215 OF 2018

BETWEEN

ANTI COUNTERFEIT AGENCY APPELLANT

AND

ESTHER MAWIA MWANIA T/A

TONERMART TECHNOLOGIES 1ST RESPONDENT

WALL STREET BUSINESS PARE LIMITED 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P.N. Gesora, SPM dated 4th April 2018 at the Commercial Magistrates' Court, Milimani, in Civil Case No. 6431 of 2013)

JUDGMENT

Introduction and Background

1. On 14.10.2013, the 1st Respondent filed suit in the Subordinate Court stating that on 24.10.2012 and 26.10.2012, the Appellant's agents confiscated her goods namely; 661 pieces of HP Toners and 260 HP Ink Cartridges all valued at Kshs. 6,449,200.00 and a full inventory of the same done. That on 02.05.2013, the Appellant's agents, released only 196 toners to the 1st Respondent leaving a balance of 465 pieces whose value together with 260 pieces of the Ink cartridges was Kshs. 4,761,600.00 which the 1st Respondent claimed from the Appellant. The 1st Respondent further claimed that she has never been charged with any offence under the ***Anti-Counterfeit Act, 2008*** in relation to or in connection with the seized goods.
2. The Appellant filed a defence and counterclaim in response to the 1st Respondent's claim. It admitted that it seized and prepared an inventory of the goods after receiving a complaint that they were counterfeit. It denied that the goods were valued at Kshs. 6,449,200.00. It stated that upon seizure, it proceeded to store the goods at a depot situate along Mombasa Road which it had leased from the 2nd Respondent, *Wall Street Business Park Limited*. That in December, 2012, following heavy rains, overflowing water seeped into and filled the Appellant's depot where the seized goods had been stored. As a result, all the ink cartridges and 69 toner cartridges were damaged. The Appellant

averred that this loss and damage was occasioned wholly due to the negligence, breach of duty of care and the lease agreement on the part of the 2nd Respondent. In the alternative, it pleaded that it was not liable for the loss as the rainfall and its consequential effect was an Act of God and beyond the control of the Appellant. The Appellant thus sought indemnity from the 2nd Respondent against liability, loss or damage arising out of the said incident.

3. The Appellant maintained that upon discharge of its statutory mandate of seizing the suspected counterfeit goods, it was incumbent upon the complainant to avail a final report within three (3) months of the date of the seizure confirming whether or not the suspected goods had been verified as counterfeit on the strength of which the Appellant would arrest and prefer appropriate criminal charges against the 1st Respondent. That the complainant submitted a report outside the stipulated three-month period which report attested that 219 toner cartridges were counterfeit and all the ink cartridges were genuine. The Appellant stated that the 1st Respondent as a suspect in respect of the verified counterfeit goods was neither arrested nor prosecuted in court due to the lapse of the three-month statutory period. The Appellant reiterated that any loss and or damage suffered by the 1st Respondent could not be attributed to it.
4. The Appellant stated that on or about 01.04.2013, the 1st Respondent complained to the Appellant through a meeting with its Deputy Director, Enforcement and Legal Services that some of her seized goods were being offered for sale in the market. The Appellant, upon verification from the depot, did establish that 249 toner cartridges were missing from the depot. It averred that such loss or disappearance of the said toner cartridges from the depot could only occur with the collusion, permission, and or involvement of among others the 1st and 2nd Respondents. It stated that it reported the matter to the Kenya Police and investigations to establish the culprits and preferring appropriate charges is ongoing.
5. The Appellant confirmed that all the genuine toner cartridges in its possession were available for release to the 1st Respondent, out of which she collected the 196 toner cartridges while 13 others remained uncollected at the 1st Respondent's own instance. The Appellant thus denied that it had withheld 465 toner cartridges and that they were worth Kshs. 4,761,600.00 The Appellant maintained that the seizure was done in good faith.
6. In its counterclaim, the Appellant averred that the 2nd Respondent should it be held liable to compensate the 1st Respondent for any legally valid loss and damage suffered due to

the 2nd Respondent's commissions and/or omissions. The Appellant denied the 1st Respondent's demand for all the uncollected cartridges, including the ones established as counterfeit and the Appellant averred that having established that 219 toner cartridges are counterfeit, it would be contrary to public policy, order and law for the 1st Respondent to seek the release of the counterfeit goods or compensation in lieu of non-release thereof.

7. The Appellant sought declarations alia that it is not liable to compensate the 1st Respondent for any loss and damage arising from the seizure and that notwithstanding the provisions of **section 28** of the **Anti-Counterfeit Act**, that it is entitled to retain in its custody for purposes of prosecution of the culprits and/or destruction vide an order of the court any seized and detained goods verified as counterfeit after the lapse of three months from the date of seizure. It sought a declaration that the 1st Respondent be barred from collecting or seeking compensation in respect of the seized goods and an injunction restraining the 1st Respondent in any way writing demand letters, demanding, threatening or in any other manner howsoever requiring the Appellant to answer and/or compensate the 1st Respondent in respect of the seized goods. It prayed that the Subordinate Court do order that the counterfeit goods as seized from the 1st Respondent and in possession of the Appellant be forfeited to the State and destroyed at the 1st Respondent's costs and that in the alternative, a declaration do issue that notwithstanding **section 28** of the **Anti-Counterfeit Act**, the Appellant do retain custody and/or possession of the seized goods certified as counterfeit pending the institution of criminal charges against the suspects thereof. Further, that the Subordinate Court do order that the 1st Respondent collect genuine 13 toner cartridges which are still in its possession failure of which the Appellant was entitled to charge storage charges at such a rate as shall be stipulated by court.
8. The 2nd Respondent did not enter appearance or file a defence hence the court entered interlocutory judgment against it.
9. At the hearing of the suit, the 1st Respondent (PW 1) testified on her own behalf while the Appellant called its Inspector Jelena Murari (DW 1). The Subordinate Court rendered its judgment on 04.04.2018. It was found that the Appellant appeared to have dumped the seized goods on the floor and the same were damaged by water. It held that the Appellant had a duty of care to ensure that the goods were safe and that it failed to exercise the same and as such, it was grossly negligent. The trial court was convinced that the 1st Respondent suffered loss and damage and was entitled to compensation as

pleaded in the plaint. It therefore entered judgment in her favour for Kshs. 4,761,600.00, costs of the suit and interest from the time of filing suit.

10. The Appellant is dissatisfied with this decision of the Subordinate Court and appeals against it through its Memorandum of Appeal dated 02.05.2018. The 1st Respondent has filed a Notice of Preliminary Objection dated 26.07.2022. The appeal was canvassed by all parties through written submissions.

Analysis and Determination

11. Since this is the first appeal, this court is enjoined by the provisions of **section 78** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** to evaluate and examine the trial court's record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where the Court of Appeal outlined the duties of a first appellate court as follows:

[An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...

12. Before I delve into the substance of the appeal, I propose to deal with the technical grounds raised by the 1st Respondent her Notice of Preliminary Objection. The 1st Respondent states that the memorandum of appeal should be struck out on the ground that it offends **Order 9 Rule 9** of the **Civil Procedure Rules**, having been filed by a firm of advocates that is not properly on record. She contends during the trial, the Appellant was represented by the firm of *Millimo, Muthomi & Company Advocates* but is now represented by the firm of *J. O Adera* in this appeal. That it is not in dispute that the firm of *J.O Adera* came on record without leave of the court in contravention of the mandatory provisions of **Order 9 Rule 9** which provides the advocate on record after judgment is entered shall be deemed to still be on record unless and until the requirements stipulated therein above are fulfilled.
13. The Appellant opposes the preliminary objection. It states that its appeal does not offend the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** as this appeal is a new and fresh proceedings within the meaning of **section 2** of the **Civil Procedure Act** commenced by way of a Memorandum of Appeal as prescribed at **Order 42** of the **Civil**

Procedure Rules. It submits that since the proceedings before this court and the Subordinate Court are different suits, it did not require leave of the court to engage a different advocate to commence the appeal.

14. **Order 9 Rule 9** of the **Civil Procedure Rules** provides as follows:

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- 1. upon an application with notice to all the parties; or*
- 2. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.*

15. The Appellant has cited the court's decision in **PSL Capital Limited v Benma Technical Services Limited [2018] eKLR** which relied on **Tobias M. Wafubwa v Ben Butali KSM CA Civil Appeal No. 3 of 2016 [2017] eKLR** where the Court of Appeal observed as follows:

The application of rule 9 is an issue that has incessantly recurred vexed the courts, and in determining the issue, of whether or not compliance is mandatory, the courts have reached varied conclusions dependent on the circumstances and facts of each case. Needless to say that, in each case, the purport of these rules, their application, and the mischief that sought to be addressed requires to be taken into account.

.....

Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate. [Emphasis mine]

16. The above holding by the Court of Appeal supports the Appellant's arguments that an appeal is a new "suit" and not a continuation of proceedings of the subordinate trial

court of and as such, leave of court is not mandatory for the change of advocates in the circumstances of the case. The Appellant's instructions to the firm of *Millimo, Muthomi & Company Advocates* were terminated and/or spent or exhausted with the conclusion of the trial in the subordinate court. The Appellant was at liberty to instruct a different firm of advocates, in this case, *J. O Adera* to file the instant appeal without necessarily having to file a Notice of Change of Advocates or filing an application to come on record in place of the previous advocates. The 1st Respondent's objection therefore has no merit and the same is dismissed.

17. Turning to the substance of the appeal, I agree with the Appellant that the trial court erred in finding that it was grossly negligent yet the 1st Respondent had neither pleaded, particularized nor proved any particulars of gross negligence as required by law (see ***Paul Gakunu Mwinga v Nakuru Industries Ltd [2009]eKLR*** and ***Lomolo (1962) Limited v Anam Kwamgueli [2019]eKLR***). From the Complaint, the Appellant's cause of action against the Appellant was that it failed to release 465 HP Toners and 260 pieces of cartridge all worth Kshs. 4,760,600.00. The issue for determination then, was whether the Appellant was liable for failing to release the seized goods.
18. As noted in the introductory part, it was not in dispute that the Appellant seized the 1st Respondent's goods which consisted of 661 pieces of *HP* Toners and 260 *HP* Ink Cartridges which were inventoried by the Appellant in the presence of the 1st Respondent. It was also not disputed that the seized goods were stored in a warehouse leased to the Appellant by the 2nd Respondent. It is not disputed that the Appellant did not return all the toner and ink cartridges seized as the 1st Respondent claimed that only 196 toners were returned. The Appellant admitted that not all seized goods were returned and that actually all the ink cartridges and 69 toners were damaged while at 2nd Respondent's premises and that this damage was solely caused by the 2nd Respondent's negligence and breach of duty of care. In the alternative, the Appellant stated that the damage was caused by rainfall which was an Act of God and beyond the Appellant's control. That 219 toner cartridges were found to be counterfeit whereas all the ink cartridges were found to be genuine.
19. As concerns the interlocutory judgment entered against the 2nd Respondent, the 2nd Respondent submits that this judgment was not final and that formal proof was necessary to assess damages at the hearing and as a result the court found the Appellant liable. While I agree that an interlocutory judgment is not final and that formal proof for assessment of damages is required, it settled that once interlocutory judgment entered against a party, the question of liability becomes a foregone conclusion against that

party (see *Felix Mathenge v Kenya Power & Lighting Company Ltd [2008]eKLR*). This means that the 2nd Respondent's liability was determined in the affirmative and what remained was assessment of the damages payable by it. I however accept the position taken by the 1st Respondent that the issue of liability and quantum of damages as against the Appellant remained a live issue for hearing and determination as the 1st Respondent did not make any claim against the 2nd Respondent.

20. I reject the argument that since the interlocutory judgment found that the 2nd Respondent was liable for the destroyed cartridges, it follows that the Appellant could not be held liable for the same. The interlocutory judgment only related to the claim by the Appellant against the 2nd Respondent. The 1st Respondent did not sue the 2nd Respondent nor did she relieve the Appellant from returning the goods it was obliged in law to return. The Appellant could only seek indemnity for damages against the 2nd Respondent.

21. The Appellant admitted that it was still holding on to 219 toner cartridges which it maintained, were counterfeit and which it was required to retain and destroy under statute. On the evidence of what informed the decision that the said goods were counterfeit, the Appellant stated that it was the verification done by the complainant that informed the said conclusion. The Appellant also admitted that no criminal charges were preferred against the 1st Respondent for the seized goods. **Section 28(1)** of the **Anti-Counterfeit Act** provides that:

28(1) Where any goods are seized and detained under section 23, they shall be returned, less any portion thereof which has been reasonably utilized for the purpose of any test or analysis, to the person from whom they were seized within a period of three months after the date of seizure unless, within such period, some person is charged with an offence under this Act and it is alleged that such offence was committed in relation to or in connection with such goods.

[Emphasis mine]

22. From the above provision, the only way seized and detained goods cannot be returned to a person is if the person has been charged with an offence under the **Act** and that it is alleged that such an offence was committed in relation to or in connection with the seized goods. Since the Appellant did not prefer any criminal charges against the 1st Respondent, it follows that it was under an obligation to return the said seized goods to the 1st Respondent. Further, a reading of the **Act** states that the affirmation that goods are counterfeit can only be made by a court and not a complainant and that as per **section 28(2)** of the **Act**, it is only after a person is convicted of that offence, that the

court may order that any goods seized and detained in relation to or in connection with which such offence was committed shall be forfeited to the Government for destruction at the expense of the person so convicted. In the absence of such a conviction, the Appellant's prayer for forfeiture and destruction of the seized goods cannot be granted.

23. Having reached the conclusion that there was no reason for the Appellant to hold the toner and ink cartridges in its possession, it must return the goods in its possession and pay for the value of the damaged cartridges. Although the Appellant disputes the value of the seized goods, their value was agreed upon when the parties signed the inventory and confirmed the goods seized and their value. Following the interlocutory judgment, the Appellant is entitled to full indemnity for the amount paid to the 1st Respondent from the 2nd Respondent.
24. Although the Appellant has succeeded in the appeal, the net result is that it is still liable to the 1st Respondent. I therefore order that each party shall bear its own costs.

Disposition

25. I set aside the judgment of the Subordinate Court to the extent the trial court awarded the 1st Respondent the full value of the seized goods. I therefore order as follows:
- (a) The Appellant shall release to the 1st Respondent the seized goods in its custody and possession.**
 - (b) The parties shall agree on the value of damaged goods based on the inventory form whereupon judgment shall be entered for the said amount with interest from the date of filing suit until payment in full. In this regard the parties shall appear before the Deputy Registrar on a date fixed for directions on the matter.**
 - (c) For avoidance of doubt, the Appellant is entitled to full indemnity for the judgment from the 2nd Respondent.**
 - (d) Each party shall bear its own costs.**

DATED and DELIVERED at NAIROBI this 22nd day of FEBRUARY 2024.

D. S. MAJANJA
JUDGE