

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CA – 0019 – 2017

(Arising from KAS – 00 – CV – CS – 028 of 2017)

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KASESE HOSPITAL LTD.....APPELLANT

VERSUS

SOLENE PHARMACY LTD.....RESPONDENT

10 **BEFORE: HIS LORDSHIP HON. MR WILSON MASALU MUSENE**

Judgment

This is an appeal against the decision of His Worship Matenga Dawa Francis, Chief Magistrate at Kasese delivered on the 30/11/2017.

Background:

15 The Respondent Solene Pharmacy Ltd instituted a Summary Suit against the Appellant Kasese Hospital Ltd for the recovery of UGX 10,819,650/=, interest of 10% per month from the date of judgment till payment in full, and costs of the suit.

The Appellant applied for unconditional leave to defend the suit which was granted and a written statement of defence was filed and the Appellant denied having been supplied with
20 drugs worth that sum of money in April 2016.

Judgment was delivered in favour of the Respondent and the Appellant being dissatisfied with the decision of the trial Magistrate lodged the instant appeal whose grounds are;

1. That the learned trial magistrate failed to and did not properly or at all evaluate the evidence on record and as a result he came to a wrong and erroneous decision thereby
25 occasioning miscarriage of justice.

2. That the learned trial magistrate erred in law and fact when he held that the Appellant admitted nine million in a self mediation.
3. That the learned trial Magistrate erred in law and fact when he failed to consider the fact that the Respondent failed to prove that the items/drugs in the invoices were requisitioned, supplied and delivered.
4. That the learned trial Magistrate erred in law and fact when he held that the Appellant was indebted to the Respondent when there was no proof.

Representation:

M/s Masereka C. & Co. Advocates and M/s Masereka, Mangeni & Co. Advocates jointly appeared for the Appellant and M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates appeared for the Respondent. By consent both Counsel agreed to file written submissions.

Resolution of the Grounds:

Counsel for the Appellant withdrew Ground 1 for offending the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules he only submitted on Grounds 2, 3 and 4.

Ground 2:

That the learned trial magistrate erred in law and fact when he held that the Appellant admitted nine million in a self mediation.

Counsel for the Appellant submitted that though the Respondent claimed to have on several occasions tried to settle the debt with the Appellant, it was in vain. However, the Appellant denied ever being in any mediation meetings with the Respondent and the same Respondent did not adduce any evidence to prove his claim. It is on record that the matter went for mandatory mediation as per the mediation rules and the mediation failed due to the absence of the representative of the Respondent. Thus, it is surprising for the trial Magistrate to hold that the Appellant tried to reduce the liability to 9million and being the basis of the judgment was wrong, erroneous and had no basis.

I have perused the Court record and there is a letter dated 14th August 2017 addressed to both parties by Uganda Christian Lawyers' fraternity inviting them for a mediation scheduled for the 21st September 2017. However, there is no evidence as to whether there was ever any mediation carried out and no report of the outcome (if any) in that regard. It was therefore erroneous for the Trial Magistrate to hold that the Appellant had admitted liability to a tune of

UGX 9,000,000/= during mediation when there is no proof to that effect. This ground should therefore succeed.

Ground 3:

That the learned trial Magistrate erred in law and fact when he failed to consider the fact that the Respondent failed to prove that the items/drugs in the invoices were requisitioned, supplied and delivered.

Counsel for the Appellant submitted that the Appellant stated that whenever they needed drugs from the Respondent they would issue an LPO and the Respondent would supply and upon supply they would sign a goods received note or delivery note to prove that the drugs had been issued and later an invoice would be made. This procedure was confirmed by PW2.

Counsel for the Appellant added that the signature on the invoices was proof that the invoice had been received and not the drugs. The Appellant in its Written Statement of Defence and the evidence of DW1 contended that the said drugs were never delivered to the Appellant a fact the Respondent failed to prove. That DW1 in his witness statement stated that the drugs that the Respondent delivered were paid for and copies of the cheques were attached. Therefore it was wrong for the learned trial Magistrate to hold that the Respondent supplied drugs which she failed to prove and that the same should be paid by the Appellant without proof of delivery.

PW1 in her testimony told Court that the items were delivered and the nurse who took the drugs was Betty whose signature was at the bottom of the documents. Invoice No.s 551, 155, 185, 186, 189, 190 were all signed by the said Betty Invoice No. 156 was not signed and Invoice 190 was signed by somebody else. The Appellant denied receiving the drugs yet the signature of Betty is appended on the above Invoices. The Appellant however, did not deny the said Betty as being one of their nurses. It was the Appellant's evidence that the procedure of procuring drugs is that the pharmacist determines drugs needed then they issue an LPO for supply of drugs when they receive the drugs together with a delivery note upon verification an invoice is granted by the supplier and payment done.

In my opinion the Respondent produced the invoices under which they claimed the Appellant's indebtedness and from the Appellant's evidence these would only be extracted upon supply/delivery and verification. I therefore find that indeed the Appellant is indebted to the Respondent and the trial Magistrate was correct to hold so.

Ground 4: That the learned trial Magistrate erred in law and fact when he held that the Appellant was indebted to the Respondent when there was no proof.

Counsel for the Appellant submitted that the Respondent departed from his pleadings when he filed additional invoices totalling to UGX 95,675,237/= in addition to the ones that were attached to the summary suit totalling to UGX 4,000,000/=. That Court accepted them yet they were not referred to in the plaint.

Further, that an invoice is not proof that the items listed were requisitioned for and were supplied and delivered to the buyer. The Respondent in its evidence did not prove to this Honourable Court neither in its pleadings nor in the evidence presented to Court that the Appellant requisitioned for items/drugs stated in the said invoices and that the same items were delivered or supplied to the Appellant. That the invoices presented had inflated figures and others had different figures as a total and the Respondent's witnesses failed to explain both in the witness statements and cross examination how the figures were arrived at. Most of the invoices have wrong figures as totals; additions of items are wrong and have a lot of discrepancies. The trial Magistrate in that regard ruled that it was a mere technicality which was contrary to the provisions of the Evidence Act which provides that he who alleges must prove.

Counsel for the Appellant added that the invoices should not be taken as evidence to prove that the Appellant was indebted to the Respondent a sum of UGX 10,819,650/= because the figures and totals are wrong. That in Accounting Principles, an invoice is issued after delivery of goods and it is accompanied by delivery note of the goods supplied after issuing a local purchase order and the amount of the items requisitioned for by a person but it is not proof that the items in the invoice were requisitioned for and were supplied and delivered to the buyer. That the Respondent in the instant case failed to prove in its pleadings and the evidence on record supporting its case that the items worth UGX 10,819,650/= referred to in the plaint were ordered/requisitioned for, supplied and delivered to the Appellant.

Counsel of the Respondent on the other hand submitted on Grounds 2, 3 and 4 jointly under the issue of;

Whether the Appellant is indebted to the Respondent for a liquidated sum of Shs. 10,819,650/= arising out of a contract of supply of drugs.

Counsel for the Respondent submitted that there is abundant evidence on record and it was never disputed that the parties had a long standing business relationship of demand and supply of drugs. That the transaction would be initiated by the Appellant raising a Local Purchase Order “LPO” detailing the drugs required, following which the Respondent would
5 record the goods and issue an invoice, accompanied by a delivery note on which the Appellant would acknowledge receipt of goods. The Appellant would make part payments to the Respondent on a reducing balance.

Counsel for the Respondent went on to submit that it was not true that the trial Magistrate relied solely on the admission made during mediation. That there was ample evidence from
10 PW1 and PW2 in Court which proved the Appellant’s indebtedness to the Respondent for a liquidated sum of UGX 10,819,650/= and the trial Magistrate put this evidence into consideration plus the documentary evidence as tendered in Court.

Further, that DW1 failed to furnish Court with the record of goods received, could not confirm the quantity of drugs that were supplied and could not deny receipt of drugs yet on
15 the other hand admitted and confessed that he did not know the quantity of drugs supplied. The Appellant therefore failed to discharge the burden required and bestowed upon him by **Section 106** of the Evidence Act. The Respondent made the allegation that goods were ordered for, supplied and received and were not paid for, the Appellant on the other hand claimed to have paid for the drugs, the fact of payment was therefore within the knowledge of
20 the Appellant, and the Appellant had the burden to prove such payment.

Furthermore, that the annexures attached to the witness statement of PW1 were admitted and marked PE1 – 11 these exhibits prove a claim of UGX 10,819,650/=. PW1 mentioned that she delivered the goods whose receipt was signed by Dr. Benon and Nurse Betty. This claim was corroborated by PW2. The claim covered a period of 2015 – 2016. Part payment had
25 been done reducing the balance to UGX 10,819,650/=. Dr. Ben and Betty were not called by the Appellant to challenge the evidence of PW1 and PW2. DW1 who was called by the Appellant to support the case of the Appellant dismally failed to challenge the assertions of PW1 and PW2. This left the claim of the Respondent unchallenged and the trial Magistrate correctly found for the Respondent.

Counsel for the Appellant in rejoinder submitted that the Respondent had the burden to prove
30 to Court that he supplied drugs worth the amount of money claimed by proof of a delivery note or a document to prove that the drugs were supplied. That the amount on the invoices

exhibited in Court during the trial total to about UGX 95,675,237/=. The Respondent did not prove neither in her pleadings nor in the evidence presented in Court why she is claiming a sum of UGX 10,819,650/= yet her invoices total to UGX 95,675,237/=.

Counsel for the Appellant added that there was no proof presented in Court by the Respondent that the drugs were delivered or picked by the Appellant's agents other than relying on delivery of invoices. That the signature of Dr. Benard and Betty indicates that they received the copies of the said invoices signed not as proof that the drugs were supplied. That an invoice is a demand not a proof of delivery as claimed by the Respondent.

Further, that the Local Purchase Order presented does not tally with the invoices relied upon by the Respondent. That it would be unfair and unjust for Court to order that the Appellant pay for the drugs that she did not requisition for and was not supplied. Thus, the Respondent failed to prove that the items worth UGX 10,819,650/= were requisitioned, supplied and delivered to the Appellant.

I have addressed my mind to both submissions and from the perusal of the Court record the Respondent only attached only 3 invoices to wit Invoices no.s 155, 153 and 151 on her summary plaint. On the witness statement of Kyokunda Gladys there were Invoice No.s 551, 155, 185, 186, 189, 197, 190 and 156 attached.

The Appellant on the other hand submitted that the Local Purchase Orders as attached to the witness statement of Kyokunda Gladys No.s 313, 219, 220, 231, 234, 240 and 251 were paid as per the bank statements attached to the witness statement of Bwambale Toledi.

In my view much as the Appellant alleges that they do not owe the Respondent any money as per the bank statements attached, the payments reflected on the bank statements are way above the debt claimed by the Respondent and the bank statements do not indicate in regard to which orders the payments were being made.

The Appellant did not dispute the fact that upon delivery an invoice would be extracted and signed by Betty. The Respondent stated that Invoice No. 551 corresponds to LPO 251 totalling to UGX 850, 000/= dated 22/11/2016, Invoice No. 189 corresponds to the hand written LPO dated 22/10/2016, Invoice No. 197 corresponds to LPO dated 10/11/2016, and that invoice No. 190 has the same date as Invoice No. 189 but with different totals. According to the evidence of PW1, invoice No. 551, 155, 185, 186, 189, 190 were signed by the said Betty and these total to UGX 8,078,000/=.

In regard to Invoice No. 190 and 189 having same dates could have been an oversight on the Respondent's side because the items ordered there under are different and the totals also differ. As per the testimony of DW1 who said invoices are signed upon verification, I want to believe that the items there under had been ordered by the Appellant otherwise Betty would not have appended her signature on the same.

In my view, though the Appellant attached bank statements to prove that he paid off the Respondent, these statements do not reflect exactly what was paid off, the said bank statements cover a wide range of payments that are even beyond the Respondent's claim and the Appellant left it to Court to decide what payments were made in regard to what Invoice.

The Appellant merely printing out bank statements without detailing how the payments were made and in regard to what invoice does not help its case, alternatively the Appellant would have attached the said cheques as per the invoices they were being issued, I assume the Appellant does record keeping where records of transactions are usually entered.

In my view, though the Respondent's claim was to a tune of UGX 10,819,650/=, I will only consider the invoices that are attached on the witness statement of Kyokunda Gladys and signed by Betty. Some of the invoices have balances brought down and the same will not be considered. The Appellant is therefore indebted to the Respondent to a tune of UGX 7,663,000/= considering the amounts on Invoice No.s 551, 155, 185, 186, 189 and 190.

This appeal is accordingly hereby allowed.

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WILSON MASALU MUSENE

JUDGE

10/10/2018

