



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 130 of 2006

KENYATTAUNIVERSITY.....APPELLANT

VERSUS

GEORGE KAMAU GITHERE

T/A KOM STOCKISTS.....RESPONDENT

***(Being an appeal from the judgment of the learned Senior Principal Magistrate
A.N. Ongeru delivered on 1st February, 2006 in the Civil Suit No.4418 of 2004)***

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1. This appeal arises from a suit which was filed in the magistrate's court at Nairobi by George Kamau Githere t/a Kom Stockists (hereinafter referred to as the respondent). He had sued KenyattaUniversity, (hereinafter referred to as the appellant). The respondent's claim against the

appellant was for judgment for Kshs.816,551/70 being an amount due and outstanding in respect of an agreement of sale entered into between the appellant, and the respondent, for the purchase of computer equipments.

2. The appellant filed an amended defence and counterclaim, in which it admitted that there was a contract of sale between it and the respondent but maintained that the total amount of the contract was Kshs.5,920,000/= inclusive of VAT. The appellant further contended that the amount of Kshs.816,551/60 was lawfully deducted from the agreed price as VAT, which by law must be deducted from the net price. The appellant explained that it is registered as an agent to collect taxes on behalf of the Kenya Revenue Authority. The appellant claimed that the respondent did not fulfill part of the contract as it failed to supply some of the items. The appellant therefore counterclaimed special damages of Kshs.53,900/= being the price of the undelivered components. The appellant also claimed general damages for breach of contract. The respondent urged the court to dismiss the respondent's claim.
3. During the hearing before the trial magistrate, the respondent testified that pursuant to a tender advertised by the appellant in the year 2003, the respondent successfully tendered for the supply of computers. The respondent produced a copy of the quotation which he sent to the appellant and the appellant's response advising the respondent that his bid was successful. The respondent also produced a local purchase order from the appellant for the supply of personal computers, a delivery note and invoice for the computers supplied.
4. The respondent maintained that there was no agreement to alter the terms of the tender and that the invoice he issued corresponded with the goods supplied. The appellant later paid the respondent Kshs.5,103,498/30 leaving an outstanding balance of Kshs.816,551/70. The respondent denied being in breach of contract. He maintained that he supplied all the goods that he was contracted to supply and the appellant's officer certified that they had received all the goods. The respondent denied that the sum of Kshs.5,920,000/= which was quoted was inclusive of VAT. He denied having received any demand from the appellant for Kshs.53,000/=.
5. The appellant testified through its purchasing officer, Million M. Akoha. He confirmed that the appellant advertised for a tender and the respondent was the successful bidder. The witness stated that the respondent was required to supply 148 units of computers at Kshs.40,000/= making a total cost of Kshs.5,920,000/=. The witness maintained that the prices were inclusive of VAT. He produced the original quotation by the respondent upon which there was an endorsement indicating that all prices were VAT inclusive. The witness denied having seen the local purchase order produced by the respondent which showed that the prices were exclusive of 16% VAT.
6. He pointed out that that local purchase order was addressed to Kom Stockists and not to Kom Stockists Ltd. He maintained that they were dealing with the respondent as a representative of Kom Stockists Ltd which is a limited liability company. He produced a copy of a certificate of incorporation of Kom Stockists Ltd from the Registrar of Companies. The witness explained that they withheld the sum

of Kshs.816,000/= from the payments due to the respondent as government tax in respect of VAT.

7. Each party's counsel filed written submissions urging the trial magistrate to find in favour of his client. In her judgment the trial magistrate found that the letter of offer and the Local purchase order produced by the appellant indicated that the appellant made an offer to Kom Stockists and not Kom Stockists Ltd. She therefore rejected the appellant's defence that they were dealing with the representative of Kom Stockists Ltd.

8. The trial magistrate further found that the local purchase order issued by the appellant indicated that the price was Kshs.5,920,000/= exclusive of 16% VAT. She noted that if the inclusion of the exclusion of VAT was an error, the appellant should have produced written communication to the respondent correcting the error. However, no such communication was produced. The trial magistrate further found that no evidence was produced by the appellant in support of the counterclaim. She therefore dismissed the counterclaim and entered judgment in favour of the respondent as prayed in the plaint.

9. Being aggrieved by that judgment, the appellant has lodged this appeal raising 6 grounds as follows:

- (i) That the learned magistrate erred in law and in fact when she failed to find that the person who tendered to contract with the appellant was different from the respondent herein.
- (ii) That the learned magistrate erred in law and in fact when she failed to find that the price quoted in the quotation was inclusive of value added tax.
- (iii) That the learned magistrate erred in law and in fact, when she made a finding that the contract was between the appellant and the respondent herein.
- (iv) That the learned magistrate erred in law and in fact in giving the plaintiffs submission undue weight while disregarding the defendant's submissions.
- (v) That the learned magistrate erred in law and in fact in finding for the plaintiff which she ought not have done in the circumstances of the case and the evidence before her.
- (vi) That the learned magistrate erred in law in finding the case for the plaintiff whereas he did not prove his case on a balance of probabilities as required under the law.

10. In support of the appeal, Mr. T. J. Kuria who appeared for the appellant submitted that the various documents referred to showed that there were three parties involved in the transaction. He identified the parties as the appellant, Kom Stockists Ltd and the respondent. He referred the court to the quotation submitted to the appellant which was produced as defence exhibit 1 and noted that the quotation was made on the letterhead of Kom Stockists Ltd by the respondent as an agent of Kom Stockists Ltd. He maintained that the contract was between the appellant and Kom Stockists Ltd and therefore the respondent ought not to have been a party to the suit.

11. Mr. Kuria further noted that the price quoted by Kom Stockists Ltd indicated that all prices were VAT inclusive. He therefore submitted that the trial magistrate erred in finding that the price was exclusive of VAT. Mr. Kuria complained that the trial magistrate gave undue weight to the evidence tendered by the respondent. He argued that the burden of proof was not discharged and therefore the court should not have given judgment in favour of the respondent.
12. Mr. Mwangi who appeared for the respondent maintained that the contract in issue was between the appellant and the respondent. He referred the court to a certificate of registration under the business name which confirmed the existence of the respondent's firm. Mr. Mwangi pointed out that what constituted the contract was the letter of offer by the appellant, which was addressed to the respondent, pursuant to which a local purchase order was issued, delivery done and accepted and an invoice raised. It was noted that the local purchase order indicated that the price quoted was exclusive of VAT. The court was therefore urged to uphold the judgment of the trial magistrate.
13. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also given due consideration to the submissions which were made before the trial magistrate, and the submissions made before me. As regards the issue as to whether the respondent was a party to the contract subject of the suit, I do note that the initial quotation which was produced by the appellant in evidence, was not clear on who was the tenderer. This was because although the quotation was done on the letterheads of Kom Stockists Ltd, it was signed by George Kamau who endorsed as Kom Stockists. That notwithstanding, the appellant specifically addressed their letter of offer (exhibit 2) to the respondent, Kom Stockists. The local purchase order was similarly addressed to the respondent and the respondent delivered the goods as per the delivery note and issued an invoice. It is therefore clear that the appellant's transaction was with the respondent and the appellant is estopped from denying this fact.
14. As regards the issue whether the price quoted was VAT inclusive or VAT exclusive, the tender to the appellant which was the basis upon which an offer was made to the respondent had a handwritten endorsement showing that all prices were VAT inclusive. The local purchase order which was issued by the appellant indicated that the price of Kshs.5,920,000/= was exclusive of VAT. The local purchase order was duly signed by officers of the appellant. Although the appellant's witness denied knowledge of the document, it is clear that the document emanated from the appellant and that it was the basis of the delivery of the goods made by the respondent and accepted by the appellant. It is evident that the appellant clearly accepted the price quoted by the respondent as VAT exclusive. I have no reason therefore to fault the finding of the trial magistrate. Accordingly, I find no merit in this appeal and do therefore dismiss it with costs.

Dated and delivered this 1st day of March, 2010

H. M. OWENGI

JUDGE

In the presence of -

Kudu for the appellant

Lalulu for the respondent

Etc - Court clerk



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