**Rainbow Cargo Limited v Elsyee Plaza Management Limited & another (Civil Appeal E1000 of 2023) [2024] KEHC 8382 (KLR) (Civ) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8382 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1000 OF 2023**

**JK NG'ARNG'AR, J**

**JUNE 26, 2024**

**BETWEEN**

**RAINBOW CARGO LIMITED ..... APPELLANT**

**AND**

**ELSYEE PLAZA MANAGEMENT LIMITED ..... 1ST RESPONDENT**

**ERIC AGBEKO ..... 2ND RESPONDENT**

***(Being an Appeal from the judgment and decree of SRM, R. L Musiega issued on 1st September, 2023 in Chief Magistrate's Civil Suit No. 4117 of 2019 at Nairobi))***

## JUDGMENT

1. The appellant seeks to overturn the decision in CMCC NO. 4117 OF 2019, Nairobi rendered on 1/9/2023 by R. L Musiega on both facts and law. In the said case, the appellant had sued the respondent for Kshs. 4,808,000/= being the sum paid for clearing of two containers imported from the Team Power International Logistics Limited of China. It was the appellant's case that it had entered into a contract with the 1st respondent through the 2nd respondent for clearing the containers and upon providing such services, the respondents issued several bad cheques and the 2nd defendant was consequently charged in the Chief Magistrate's Court at Nairobi Criminal Case 2261 of 2018 and Criminal case 161/220/2018. The appellant thus sued for the monies paid and revenue that would have been received under the contract. The trial court found that the appellant had failed to discharge its evidentiary burden of proof and dismissed the claim with costs.

### Duty of a first appellate court

2. A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate

court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See Selle & another v Associated Motor Boat Co. Ltd.& others (1968) EA 123). As was held by the Court of Appeal for East Africa in Peters v Sunday Post Limited (1958) E.A. page 424: -

> " "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

3. It then follows that in a first appeal, the whole case is open for rehearing on questions of fact and law, such that the judgment of the appellate court must reflect the court's application of its mind and record findings supported by reasons on all the contentious issues. The parties thus have the right to be heard on both questions of law and fact, anything less is unjust as found in Kurian Chackp vs. Varkey Ouseph AIR 1969 Kerala 316. As provided for in Section 78 of the *Civil Procedure Act* Cap 21, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

**The pleadings**

4. In the plaint dated 13/5/2019, the appellant averred that it entered into a contract with the 1st defendant through the 2nd defendant for the clearing of two containers of building materials and furniture from the Team Power International Logistics Limited of China and successfully cleared the containers and handed them over to the defendants. That the appellant paid Kshs. 4,808,000/= for the said clearance. That the 1st respondent through the 2nd respondent drew five different cheques totalling to Kshs. 3,808,000/= which were dishonoured by the 1st respondent's bank due to insufficient funds. That the 2nd respondent was consequently charged in CMCC Nairobi Criminal Case 2261 of 2018 and Criminal Case 161/220/2018 with regard to issuing of bad cheques and the criminal case was pending for determination. It was thus averred that the appellant company lost the benefits of the said monies, lost the revenue it would have received thereunder and suffered loss and damage. The appellant thus sought payment of Kshs. 4,808,000/= plus interest and costs.

5. The respondents vide the joint statement of defence dated 31/7/2019 denied ever engaging the appellant to clear the goods as alleged and denied receiving deliveries from the appellant. The respondents admitted to drawing the cheques but averred that the same were drawn towards settling other services previously entered with the appellant and concluded earlier on. That the cheques were post-dated cheques relating to the previous business transaction and the appellant banked the cheques before maturity. That the criminal case arose from a different business engagement where the 2nd respondent had issued post-dated cheques to the appellant and the same were banked before maturity.

**The evidence**

6. The appellant called one witness, PW1, the appellant's company director who maintained the appellant's case as summarised above. He further testified that he deposited the cheques on the due date and they were returned unpaid. On cross-examination, he testified that the parties had a written contract and that the goods were delivered to the respondents though a delivery note was not filed nor the invoices. That the documents were delivered to the respondents by one Mr. Noor who received the cheques. That there was on record a debit note in the name of Winners Chapel, the 2nd respondent,

who was the owner of the containers and who he was dealing with and to whom delivery was done. That the nature of the contract between the parties was for delivery of the containers to the respondents who would then pay for the services. That the shipment was brought to his warehouse and he delivered the same and thus ought to have been paid.

7. The respondents also called one witness, DW1, the 2nd respondent herein and maintained the respondents' case as pleaded. He admitted to drawing the cheques produced by the appellant and testified that they were post-dated and they bounced. He however testified that there was no evidence that the cheques were to be banked at a future date. He also testified that the invoice produced as exhibit 1 was issued by the appellant. On re-examination, he testified that the cheque was with instruction that it be held as security for the container. That the cheque was issued to one Mr. Abdi who worked for the appellant.

8. In his judgment, the trial magistrate observed that the appellant never proved the contract or delivery, and that there was no proof that the appellant's representative one Mr. Noor delivered documents to the respondents and was issued with the cheques. The trail magistrate thus found that the appellant had not met its evidentiary burden and did not proof the claim of Kshs. 4,808,000/= or that any debt was owed to the plaintiff. That there was nothing to show whether the post-dated cheques were for the services in question or for previous business transactions as stated by the respondents. That there were no signatures by the respondents as envisioned under Section 30 of the Bill of Exchange and that though a dishonoured cheque was an admission of debt owed, the appellant failed to show whether the dishonoured cheques were in relation to the purported clearance or to other previous dealings. The trail magistrate thus proceeded to dismiss the appellant's claim with costs.

**The appeal**

9. Vide the memorandum of appeal dated 27/9/2023, the appellant seeks to overturn the judgment citing various grounds including that: - the trial court failed to consider the totality of the evidence on record; that the court erred in upholding the respondent's defence yet no evidence in support was adduced; that the court misapplied Section 30 of the Bill of Exchange Act; that the court erred in finding the cheques were not signed yet they were issued and signed by the respondents; that the court erred in finding that the appellant failed to proof the debt of Kshs. 4,808,000/=; that the trail court misinterpreted Section 108 of the *Evidence Act* despite proof of the claim on a balance of probabilities; that the trail court failed to appreciate that the respondents admitted that they issued the cheques and were flagged for insufficient funds and that the judgment was unsupported and failed to consider the relevant authorities on issuing of dishonoured cheques. The appellant thus prayed that the judgment of 1/9/2023 be set aside and the appellant's claim as prayed in the lower court be allowed with costs.

10. The appellant filed submissions dated 16/5/2024 in support of the appeal. The respondents' submissions were however not on record at the time of writing this judgment.

**Analysis of submissions and determination**

11. The main issue for determination is whether the judgment of 1/9/2023 ought to be set aside. I have considered the entire record before court. I note that the claim by the appellant is a civil claim. The standard of proof therefore is on a balance of probabilities. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction held thus: -

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence

advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not."

12. It is also trite that he who alleges must proof as provided for under Section 107 and 108 of the *Evidence Act*. The burden of proof thus lays with the appellant to proof its allegations against the respondent.

13. There was on record the debit note issued by Team Power International Logistics Limited which also bore the appellant's name. The same was addressed to the 2nd respondent/winner's chapel which collaborated PW1's evidence that the 2nd respondent was also known as 'Winners Chapel'. The same indicated that the furniture was coming from China to Kenya and the total charge was US$ 10,000. This then collaborated the appellant's aversion that it cleared the respondents' containers which included furniture as averred. There was also on record the statement dated 28/2/2019 issued by the appellant to the 2nd respondent. The same indicated various invoices with a total balance of USD 3,080 for the period between 31/10/2017-28/6/2018. There was also the statement dated 11/8/2018 indicating a clearance invoice for KES 3,500,000/= for the period between 10/8/2018-11/8/2018. DW1 admitted in his testimony that the invoices were issued by the appellant. Even without going further, it was evident that there was a clearance transaction between the appellant and the respondents and the goods were shipped from Team Power International Logistics Limited as alleged by the appellant. There was also evidence of a balance of Kshs. 3.5 million and USD 3,080.

14. I now turn my attention to the various copies of the cheques on record. I note the unequivocal admission by DW1 that the respondents indeed issued the cheques and the same were returned unpaid. Though the trial court found that the cheques were not signed, it was evident that there were signatures appearing on the cheques on record as well as the 2nd respondent's name and/or number on the back of the cheques. It was however the respondents' defence that the cheques were post dated and were banked before maturity and that the various cheques were in relation to other previous transactions other than the one before court.

15. I have already found that there was evidence on record indicating that the appellant offered clearance services to the respondents and there were outstanding balances. I have also found that it is trite that he who alleges must proof. It then follows that it was upon the respondents to proof that first, the cheques were post-dated, and secondly, that the cheques were in relation to a previous concluded transaction. Further, it was upon the respondents to proof that the criminal case against the 2nd respondent relating to issuing a bad cheque was in relation to a different transaction other than the one claimed by the appellants.

16. It is not clear to this Court why the trial magistrate shifted that burden to the appellant. It was not for the appellant to assist the respondents to proof their defence. The respondents alleged facts that ought to have been supported by evidence. There was no attempt to proof such assertions and the same remained mere aversions which could not be proofed by oral evidence only. Indeed, the respondents did not produce a single document to show that the cheques related to previous transactions. DW1 also admitted that there was no evidence to show that the cheques were to be deposited at a future date so as to proof that the cheques were post-dated and were prematurely banked by the appellants. There was no evidential basis to support the trial magistrate's conclusion that the cheques were post-dated.

17. The burden of proof ought not to have been shifted to the appellant. There was nothing to proof that the cheques were either post-dated, or that they related to other previous transactions. On the other hand, there was evidence proofing a business relation between the parties relating to clearance of imported goods, as well as evidence of outstanding balances. It is more probable that the appellant's indeed offered clearance services for furniture shipped from china through Team Power International Logistics Limited and the respondents issued bad cheques for the services thus the debt remained owed

to the appellants. Noting that the standard of proof was on a balance of probabilities and not beyond reasonable doubt, I do find that the appellant sufficiently discharged its evidentiary burden of proof.

18. I say so taking into consideration the dates when the cheques were issued including 10/7/2018 for Kshs. 308,000/=, 21/8/2018 for Kshs. 800,000/=. Kshs. 900,000/=, 21/8/2018 for Kshs. 800,000/ =and 21/8/2018 for Kshs. 900,000/=. It is clear that the cheques were issued for the same period that the invoices were raised by the appellant. This also supports the appellants aversion that the contracts were entered around 13/4/2018. There is enough collaborating evidence to support the appellant's side of the story. Having failed to adduce any evidence that the cheques related to different transactions other than that before court, the only logical conclusion ought to have been that the cheques were issued for the purposes of clearing the various invoices.

19. I now turn to the fact that the cheques were admittedly dishonoured by the 1st respondent's bank for reason that the accounts lacked sufficient funds. It was not a disputed fact that the five cheques were all returned unpaid. This was admitted by DW1. Our courts have held that dishonoured cheques amount to admission of debt. In Equatorial Commercial Bank v Wilfred Nyasimi Oroko Ml Hccc No. 224 of 2011 [2015] eKLR the court held that: -

> "A dishonoured cheque which was issued to the Applicant on a debt which is subject of the suit is also an admission of claim in the sense of the face of the above evidence, the court concludes that these cheques were issued by the Respondent to the predecessor of the Applicant and so they constitute an admission of the debt to the extent of the amount of the cheques."

20. Though the general position is that dishonoured cheques amount to admission of debt, the court does not enter judgment automatically. (See *ASL Credit Limited v Joyce Wangui Wachira T/A Paddy Distributors & another (Civil Case E129 of 2020*) [2022] KEHC 10483 (KLR) (Civ) (28 July 2022).) According to the Court of Appeal for Eastern Africa when dealing with Section 30 of the *Bills of Exchange Act* (Tanzania) which is in pari materia with our Section 30(2) of the *Bills of Exchange Act* (Chapter 27 of the Laws of Kenya) in the case of Hassanah Issa & Co v Jeraj Produce Store [1967] EA 55 it held that –

> "In this case in as much as the suit was upon a cheque and in as much as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled."

21. It then follows that the burden of proof laid with the respondents who admittedly issued the bounced cheques to give reasons why judgment should not be entered on the dishonoured cheques. The respondents' explanation that the cheques were post dated and related to a different transaction has already been rejected for lack of evidence to support those contentions. In light of the admission and the consequential cases filed against the respondents in Chief Magistrate's Court at Nairobi Criminal Case 2261 of 2018 and Criminal case 161/220/2018, I find that the respondents did not satisfactorily give reasons why judgment ought not to have been entered in relation to the dishonoured cheques. I

also find and hold that the admission of debt based on the respondents' pleadings and testimonies is clear, plain and obvious. There was no need to have a trial on a matter that was admitted and was not in dispute. As such, the issue of delivery was a non-issue where the debt had already been admitted.

22. In the circumstances, I find that the appeal is merited as submitted by the appellants.

23. The upshot is that the judgment and order of 1/9/2023 is hereby set aside and the appellant's claim as prayed in the Chief Magistrate's Court plaint in CMCC No. 4117 of 2019 Nairobi is hereby allowed with costs and interest at court rate from 1/9/2023 till payment in full. The appellant is also awarded costs of the instant appeal.

It is so decreed.

**DATED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JUNE, 2024.**

**.....**

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of:-

..... for the Appellant

..... for the Respondent

Court Assistant- Peter Ong'idi