Four By Four Solutions Limited v Tawaman Holdings Limited (Commercial Case E334 of 2024) [2024] KEHC 15321 (KLR) (Commercial and Tax) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15321 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E334 OF 2024

MA OTIENO, J

NOVEMBER 28, 2024

BETWEEN

FOUR BY FOUR SOLUTIONS LIMITED .... APPELLANT

AND

TAWAMAN HOLDINGS LIMITED .... RESPONDENT

(An appeal from the Judgment and Decree of Honourable P.K Kinyua (RM) delivered on 24th November 2023 in the Milimani SCCCOMM No. E7340 of 2023)

JUDGMENT

Introduction

1. This an appeal from the Judgment in the Milimani Small Claims Court (SCCCOMM) case No. E7340 of 2023 delivered on 24th November 2023 in which the trial court dismissed the Appellant's claim for Kshs. 500,000/- against the Respondent.

2. The background of the matter is that the Appellant who is a motor vehicle dealer, by an agreement dated 31st May 2021 sold to the Respondent motor vehicle registration No. KDC 3003L, but the Respondent remitted to the Appellant the purchase price less a sum of Kshs. 500,000/-. According to the Respondent, this balance represented what had been agreed between the parties as the cost of repairs of the defects, then existing in the subject motor vehicle. The Appellant took a contrary view, hence the suit by the Appellant in the lower court.

3. On 24th November 2023, the lower court rendered its judgment on the matter and dismissed the Appellant's claim on the basis that the Appellant did not, in the suit, establish any breach by the Respondent.

The Appeal

4. Aggrieved by the trial court's Judgment, the Appellant lodged this appeal vide its Memorandum of Appeal dated 8th September 2023 and raised the following as the grounds of appeal; -

   i. That the Learned trial Magistrate erred in law and in fact and misdirected herself on the standard of proof in civil cases.

   ii. That the learned trial magistrate erred in law and in fact and misdirected herself on the burden of proof and the shift thereof in civil cases.

   iii. That the learned trial magistrate erred in law and in fact and misdirected herself on the issues for determination contrary to the express admissions and submissions of the parties.

   iv. That the learned trial magistrate erred in law and in fact and misdirected herself on the probative value of the evidence adduced, their believability and the implications thereof.

   v. That the learned trial magistrate erred in law and in fact in failing to interpret the issues in controversy in its stead engaged in a frolic to interpret issues not in issue.

   vi. That the Honourable learned magistrate erred in law and in fact in failing to consider the merits of the material issues placed before the honorable court.

5. The appeal was canvased by way of written submissions. The Appellant filed its submissions dated 8th August 2024 whilst the Respondent did not file any submissions in this appeal despite this court's order of 24th June 2024.

6. In determining this appeal, the court will therefore rely only on the Appellant's submissions filed herein as well as the material in the record of appeal.

7. In its submissions, the Appellant argued that the trial court misdirected itself when it stated in the judgment that no sale agreement relating to the subject motor vehicle had been produced as evidence before the court. According to the Appellant, it was not necessary that the sale agreement be produced since both parties had in their pleadings admitted the existence of a contract between them in respect of the subject motor vehicle.

8. It was further the Appellant's submission that the Respondent having admitted that an amount of Kshs. 500,000/- was due under the contract, it was not open for the Respondent to withhold payment of the same, even where there was a breach of warranty by the Appellant as alleged. The Appellant asserted that the remedies for breach of warranty by a seller are those found under section 53 of the Sales of Goods Act and that withholding the balance of the purchase price, in the manner that the Respondent did, is not one of those instances provided in the Act.

9. The Appellant maintained that under the agreement, it was justly entitled to the Kshs. 500,000/- since it had procured the sunroof which was the only defect in the subject motor vehicle, immediately the Respondent brought to the Appellant's attention the existence of the defect in the motor vehicle's sunroof.

10. The Appellant also submitted that by issuing two cheques of Kshs. 250,000/- each (Cheque Nos. 772 and 773 of 15th May 2015 and 31st May respectively) in respect of the outstanding amount, the Respondent had acknowledged its indebtedness to the Appellant. According to the Appellant, it was therefore unnecessary for the trial court to question why the cheques had not been cashed.

11. Further, it was the Appellant's submissions that the claim by the Respondent that it used the entire outstanding amount of Kshs. 500,000/- on the repair of the alleged defect was not substantiated at trial. The Appellant took the position that the Respondent did not produce in evidence any assessment report nor did it table any proof of the actual expenditure it incurred in rectifying the alleged defect.

12. The Appellant therefore urged this court to set aside the trial court's judgment in its entirety, and in its place allow the Appellant's claim for breach of contract in the sum of Kshs. 500,000/-. The Appellant also prays for the costs of this appeal.

Analysis and determination

13. This is an appeal emanating from the Small Claims Court. Section 38 of the *Small Claims Court Act* clothes this court with Appellate jurisdiction on matters arising from that court and provides as follows; -

> " 38.
>
> (1). A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final."

14. It therefore follows that appeals originating from the Small Claims Court to this court can only be on the points of law in terms of Section 38(1) of the Small Claims Act. Consequently, this court cannot, in appeals emanating from the Small Claims Court, entertain an invitation to interfere with the factual findings of the trial court.

15. The duty and jurisdiction of this court when dealing with an appeal from the Small Claims Court is comparable to that of the Court of Appeal when dealing with a matter on a second appeal. In Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR the Court of Appeal, distinguishing between matters of law and matters of fact stated as follows: -

> " First, this is a second appeal. In a first appeal, the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it, and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analyzed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters, they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

16. Again, in Charles Kipkoech Leting v Express (K) Ltd & another [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That it should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding

or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated as follows; -

> "This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

17. Before delving into the substantive questions as framed by the Appellant in its memorandum of appeal, it is imperative for this court to first consider whether or not the issues raised and framed in the memorandum of appeal are matters of law and therefore fall within the jurisdiction of this court bestowed under section 38 of the Small Claims Act.

18. I have considered the grounds of appeal as presented by the Appellant. I note that the major complaint by the Appellant is that the trial court erred in law in failing to find that there was a breach of contract by the Respondent in failing to pay the Kshs. 500,000/-, being the balance of the purchase price of the subject motor vehicle. That the trial court erred in failing to appreciate that the Appellant had proved its case against the Respondent to the standards required in law for civil cases, that is, on a balance of probability.

19. Burden of proof is indeed a legal concept that in the Kenyan legal system is generally anchored under Sections 107, 108, and 109 of the *Evidence Act* Cap. 80 Laws of Kenya. In the case of Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) Mativo J (as he then was) stated the following regarding the burden of proof; -

> "26. "Burden of Proof" is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or "standard" in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides

whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact."

20. Shifting of the burden of proof in a trial essentially involves the changing of responsibility of proving or disproving a point, by way of evidence, from one party to the other. The question of who bears the burden of proof and circumstances under which the burden of proof may be shifted and on what conditions, is undoubtedly, a question of law.

21. In the premises, I therefore find and hold that the question of the burden of proof, the standards applicable, and the shifting thereof as raised in the Appellant's memorandum of appeal dated 8th December 2023 are clearly questions of law and therefore fit within the ambit of Section 38 (1) of the *Small Claims Court Act*. Consequently, this court has jurisdiction to entertain this appeal.

22. Having established that this court has jurisdiction to entertain this appeal, I will then proceed and examine the substance of the appeal with a view of establishing whether the trial court erred in failing to find that the Appellant had proved its claim against the respondent to the required standards.

23. It is an established principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107, 108, and 109 of the *Evidence Act* are unequivocal on this and provide as follows: -

> " 107. . Burden of proof.
>
> 1. 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
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
>
> 108. Incidence of burden.
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of a particular fact.
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person."

24. In this case, the burden to prove that the Kshs. 500,000/-, being the balance of the purchase price in respect of the motor vehicle in question was owed by the Respondent was on the Appellant. However, I note that the Respondent in his pleadings admitted the Appellant's claim. The Appellant was therefore deemed to have proved his case against the Respondent, on a balance of probabilities.

25. The Respondent having admitted the Appellant's claim, the evidentiary burden thereafter shifted to the Respondent, being a defendant, to demonstrate, to the required standards (again, on a balance of probability), why the said amount had not been remitted to the Appellant.

26. From the record of Appeal, I note that the Respondent in its defense and witness statement dated 29th September 2023 stated that upon transfer of the vehicle and during the warranty period, the vehicle was noted to be missing various electrical accessories, which included a defect on the sunroof. The

Respondent told the trial court that it was mutually between the parties that the Kshs. 500,000/- would be utilized by the Respondent to repair the defects.

27. To corroborate his evidence of the mutual agreement between the parties, the Respondent stated that it was agreement that the Appellant agreed, during the period of the warranty, not to surrender for encashment the two cheques (Cheque Nos. 772 & 773) for Kshs. 500,000/- which the Respondent had issued to the Appellant for the payment of the balance of the purchase price.

28. Again, I note from the record of appeal that the Appellant admitted in the lower court that there were indeed some defects with the sunroof of the subject motor vehicle at the time of the sale and that Respondent had brought the same to the attention of the Appellant within the warranty period, and that it had been agreed between the parties that the defect would be repaired at the cost of the Appellant.

29. The Appellant having admitted that there was a defect on the sunroof of the subject motor vehicle and that the said defect was to be repaired at the expense of the Appellant, the only outstanding issue then would be, the actual cost of the repair and whether the Respondent, was to withhold and utilize the balance of the purchase price (Kshs. 500,000/-) to meet the cost of the repair/replacement, or whether the Respondent was first to pay the balance to Appellant, who would then undertake the repair/replacement.

30. I have carefully reviewed the pleadings and proceedings in the lower court. Like the trial court, I do not understand why the sale agreement was not produced in court. It is the position of this court that it is only from the sale agreement that the duties and obligations of the parties would be discerned. Without a sale agreement, it becomes extremely difficult for any court to interpret and give effect to the parties' rights and obligations.

31. In this case, it is clear from the proceedings in the lower court that there was a written sale agreement between the parties. In fact, the Appellant in its witness statement dated 29th August 2023 stated that the parties executed a "Motor Vehicle Sale Agreement" on 31st May 2021. The Claimant however for some undisclosed reason (s) chose not to produce the agreement in court in evidence.

32. In the absence of the sale agreement, this court, like the trial court, is unable to establish whether the agreement between the parties was that the balance of the purchase price of Kshs, 500,000/- was to be withheld by the Respondent and be applied towards the repair of the defect, or whether the money was first to be paid to the Appellant, who would then undertake the repairs.

33. Before I pen off, I wish to point out that I find the failure by the Appellant to present the two cheques for payment quite telling. While it is evident from the proceedings and the Appellant's documents filed before the lower court that the Respondent issued two cheques (Cheque No. 772 & 773) for Kshs. 500,000/- way back in May 2021, the Appellant did not present the cheques for encashment neither did the Appellant disclose to the trial court why the cheques were not presented for payment.

34. The failure by the Appellant to furnish any explanation as to why they did not present the cheques for encashment, in my view, only serves to lend credence to the Respondent's allegation that there was an agreement between the parties that the cheques were not to be presented for payment and that the amount of Kshs. 500.000/- was to be withheld by the Respondent for the purposes of repairing the defects in the subject motor vehicle.

35. For the reasons set out above, the appeal herein fails and the same is hereby dismissed.

36. No orders as to costs since the Respondent did not participate in this appeal.

37. It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant

............for the Appellant.

.... for the Respondent.