East Global (K) Limited v Daks Couriers Limited (Civil Appeal E096 of 2023) [2024] KEHC 16935 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16935 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E096 OF 2023

F WANGARI, J

DECEMBER 19, 2024

BETWEEN

EAST GLOBAL (K) LIMITED ..... APPELLANT

AND

DAKS COURIERS LIMITED ..... RESPONDENT

(Being an Appeal against the Entire Judgement/Decree of the Hon. J.B. Kalo (CM) in Mombasa CMCC No. 1471 of 2017, Daks Couriers Limited =Vs= East Global (K) Limited delivered on the 6th day of April, 2023)

JUDGMENT

1. This is an appeal from the judgement of the Learned Chief Magistrate Hon. J.B. Kalo in Mombasa CMMC 1471 of 2017 delivered on 6th April, 2023.

2. The Appellant being dissatisfied with the said judgement preferred the present appeal and raised seven (7) grounds of appeal which are set out as follows: -

    a. The Learned Trial Magistrate erred in law and in fact by failing to consider the evidence and submissions by the Appellant thereby arriving at a wrong decision;

    b. The Learned Trial Magistrate erred in law and fact by cursorily considering the exhibits, particularly the contract between the Appellant and the Respondent, which guided the mechanisms of solving the issues between the parties herein and hereby entering into the arena to find that the said contract was terminated when in essence there was no document placed before to substantiate the same;

    c. The Learned Trial Magistrate erred in law and fact by not considering the documents placed before and therefore arriving at the wrong conclusion that it was the Appellant to collect the containers from the Respondent's yard while converse was the true position;

d. The Learned Trial Magistrate erred in law and fact by concluding that the Appellant was not entitled to compensation for demurrage charges when in his evidence, the Appellant satisfactorily explained that the contract expressly provided for set-off in the circumstances of the case;

e. The Learned Trial Magistrate erred in law and fact by dismissing the Appellant's counter-claim without considering the overwhelming evidence adduced and documents produced;

f. The Learned Trial Magistrate erred in law and fact by concluding that the containers were in the custody of the Appellant when it is a clear fact from the Appellant's evidence that after transporting the containers to Kampala, Uganda, it was the responsibility of the Respondent to return the same back to Mombasa and handover the same to the Appellant; and

g. The Learned Trial Magistrate erred in law and fact in concluding that the Respondent's client, who was a stranger to the contract between the Appellant and the Respondent, was responsible for refund of costs associated with the 12 containers, which finding amounted to rewriting the contract for the Appellant and the Respondent.

3. The Appellant thus prayed that the appeal be allowed, the judgement/decree of the Trial Magistrate be set aside and substituted with an order dismissing the Respondent's suit and entering judgement for the Appellant as prayed for in the counter-claim and that costs of the appeal, the Respondent's suit and the counter-claim.

4. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd [1968] EA 123 and Peters vs Sunday Post Limited [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

6. In Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

> In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that
>
> : "[A]n appeal to this Court from a trial by the High 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 allowances in this respect"

7. This is a case founded upon a contract for clearing and transportation of containers from the Port of Mombasa to Kampala, Uganda and back as can be discerned from the pleadings. From the record, it is not in contest that both parties called one (1) witness each in support of their respective claims. The court shall thus proceed to re-analyse the evidence before the Trial Court.

Respondent's Case

8. David Kasingwire, the Respondent's director testified as PW1. He adopted his witness statement dated 22nd August, 2017. He also produced a list of documents and a further list of documents as a bundle collectively identified as Plaintiff's Exhibits 1 – 22. In brief, he stated that the Respondent was a clearing, forwarding, warehousing, distribution and transportation company. It sub-contracted the Appellant to clear twenty-two (22) containers from Mombasa and transport them to Kampala and then return the empty containers back to Mombasa.

9. The agreed price for the whole work was USD 62,450 which it duly paid in two (2) batches of USD 50,000 and USD 12,450. The witness stated that ten (10) containers were transported as per the agreement but twelve (12) got a problem and were not sent. According to him, the Appellant wanted to change the contract which change would increase transportation cost. It was the witness' testimony that its client was one Bestshomy Investments Uganda. Because of the disagreement due to the 12 containers, it involved its client who opted to come to Mombasa to confirm the overweight allegations. It introduced the client to the Appellant. The two parties met and agreed to proceed directly without its (Respondent's) involvement.

10. It was okay with the arrangement and its contract with the client was terminated. It agreed that the client would pay the Appellant directly for the 12 containers. From the arrangement, the Appellant was to be paid by the client for the 12 containers while the costs for the ten (10) containers would be retained and the extra amount paid be refunded to it since it had already pre-paid.

11. It denied that it was not its duty to handle the empty containers and that its dealings with the Appellant terminated while the client and the Appellant started dealing directly. Therefore, it could not be held responsible for empty containers. According to this witness, it was the Appellant's duty to return the empty containers and that the reason it sub-contracted the Appellant was due to the fact it did not have any lorries. It was PW1's position that it was not refunded the USD 33,000 even after it issued a demand. He reiterated that its contract with the Appellant terminated in May, 2017.

12. He made reference to the Appellant's invoice and according to him, it was issued long after their relationship had ended. His position was that it did not have the 10 containers and that it did not know where they were. He confirmed that demurrage charges are charged for delayed containers and that the shipping line charges replacement value for containers not returned. He stated that the Respondent was not liable to pay the Appellant since it was not the transporter and prayed for judgement as per the plaint

13. On cross examination, PW1 confirmed that it sub-contracted the Appellant and that the contract was terminated on 24/5/2017. Referred to the plaint, the witness confirmed that the Appellant was paid USD 33,000 by Besthomy way after prepayments. He also confirmed that its quotation to the Appellant did not take into account overweight.

14. It was his testimony that the charges for the extra weight was paid for by Besthomy to the Appellant. He further stated that the truck carrying the container with goods is expected to return the empty container. He denied knowing the terms of the agreement between Besthomy and the Appellant and that it was not claiming the sum of USD 33,000 on behalf of Bestshomy.

15. On re-exam, he stated that it paid USD 62,450 for 22 containers and that when the problem arose, Besthomy took up the contract with the Appellant. He stated that the payment of USD 33,000 was in addition to what it had paid. Referred to the email dated 24/6/2017, the witness stated that the Appellant had agreed to refund USD 33,000 and reiterated that he was in court on behalf of the Respondent and not Besthomy. That marked the close of the Respondent's case.

Appellant's Case

16. Mehboob Virji, the Appellant's director testified as DW1. He confirmed that the Respondent was its client for a certain containerized consignment in 2017. He then adopted his witness statement as his evidence in chief and produced a list and two (2) further lists of documents collectively identified as Defence Exhibits 1 – 24. He also confirmed that the Appellant had filed a counter-claim. It was his testimony that the Respondent had asked for quotation for clearing and transporting containers to Uganda on behalf of a client.

17. The Appellant provided its rates structure indicating maximum weight terms and non-dropping of empty containers. The Respondent confirmed the terms and issued two (2) Bills of Lading, one for ten (10) 20-feet containers and the other for twelve (12) 20-feet containers. He stated that the weights declared in the Bills of Lading were different from the actual weight. He confirmed that there was an overpayment of USD 33,000 because it refused to handle 12 containers based on weight misdirection and that it was to deduct any demurrage from the overpayment after the empty containers were returned.

18. He stated that the Respondent failed to return 5 containers to Mombasa on time. The said containers incurred total demurrage of USD 1,209.60 while the other containers were returned on 30/11/2017 and incurred USD 17,040. It was given 40% by the shipping line and ended paying USD 11,799.20 as demurrage to PIL Shipping Line. He confirmed that it wrote to the Respondent that it would deduct this cost from the overpayment and refund the balance. For the last 5 containers, he paid a sum of USD 5,880 for the period 12/10/2017 to 30/11/2017. He stated that the Appellant was to pick the containers and charge the demurrage and that the containers could only be picked if released to them by the Respondent.

19. On cross examination, he confirmed that the Appellant was a clearing, forwarding and transporting company and its duty was to clear and transport the containers to Kampala. The Respondent was to clear the containers in Kampala and provide the containers to the Appellant to transport them back to Mombasa. He confirmed that the consignee was the owner of the goods and was supposed to be responsible for the weight. He stated that the Respondent might have not known the weight of the containers and that he did not deal with the consignee directly. He confirmed that it did not transport the second lot of 12 containers.

20. On payment to the shipping line, he stated that it was necessary to do so since it has a standing order with the shipping line. He confirmed that the Appellant paid demurrage totalling USD 11,994.55 and that it was holding USD 32,255 of the Respondent's money. He also confirmed that the Appellant was owing the Respondent a sum of USD 20,455.80 and the same had not been paid due to the fact that the Respondent took it to court thus incurring legal charges.

21. On re-exam, he stated that the amount indicated in the plaint was not paid since a case was filed leading to incur legal fees. That marked the close of the Appellant's case. Parties filed submissions and the court thereafter proceeded to render the impugned judgement which precipitated this appeal.

22. Directions were taken that the appeal be canvassed by way of written submissions. Both the Appellant and the Respondent duly complied by filing detailed submissions and cited various decided cases in support of their rival positions. Prior to the Record of Appeal being filed, the Respondent filed its initial submissions which were dated 4th January, 2024. Similarly, the Appellant filed its submissions dated 11th January, 2024.

23. Upon the Record being filed parties proceeded to file another set of submissions. The Appellant's submissions are dated 3rd May, 2024 while the Respondent's submissions are dated 14th May, 2020.

Appellant's Submissions

24. The Appellant isolated two (2) issues for determination being whether the Trial Magistrate disregarded the contract between the parties and whether the Trial Magistrate was right in dismissing the Appellant's counter-claim. On the first issue, the Appellant made reference to the Trial Court's judgement and specifically quoted a specific paragraph at page 296 of the Record. The Appellant submitted that by disregarding the contract between the parties, the Trial Court had no any other material to rely on in resolving the issue between the parties.

25. It further contended that the Trial Court's observations on the issue of contract amounted to it writing the contract for the parties thus descending into the disputants' arena. Several cases were cited on courts not re-writing contracts for parties were cited among them Husamuddin *Gulamhussein Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 others, Civil Appeal No. 330 of 2003* and Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR.

26. According to the Appellant, the contract was never terminated at any time. Having found that the contract stood terminated, it is the Appellant's position that the Trial Court ought not to have moved any further but dismiss the Respondent's case. In support of this position, the case of Housing Finance Company of Kenya Limited v Gilbert Kibe Njuguna (Nrb) HCCC No. 1601 of 1999.

27. On the second issue, the Appellant submits that it is related to the first one since once the Trial Court disregarded the written contract, it had no material to guide it in finding that the Appellant had a merited counter-claim. Some paragraphs at pages 286 and 287 of the Record were quoted in extenso. Reference was also made of clauses 13 and 15 of the contract found at page 80 of the Record. The Appellant concludes that the appeal has merit and the same be allowed.

Respondent's Submissions

28. The Appellant has identified the same issues as those proposed by the Appellant. Its submissions begin with a restatement the role of this court on appeal and cited various decided cases elucidating the position among them Peterson Ndung'u v Stephen Gichanga Gituro & 4 Others which cited with approval the case of Abok James Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.

29. On the first issue, the Respondent makes reference to page 77 of the Record and it is its position that there the initial contract is the one dated 21st April, 2017. It goes ahead to state that a reading of the email therein is a quote and not a contract. The Respondent submits extensively on the contents of pages 280, 281 and 15 of the Record and submits that upon the client meeting the Appellant, the contract was terminated on 24th May, 2017.

30. According to the Respondent, the Appellant cannot rely on the contract which it frustrated its implementation by dealing with the client directly. On the issue of frustration, the Respondent cites the decision in Jomo Kenyatta University of Agriculture & Technology v Kwanza Estate Limited

which decision made reference to the case of Five Forty Aviation Limited Erwan Lanoe [2019] eKLR, Halsbury's Laws of England (3rd Edition) Volume 8 page 185 (i) and Davis Contractors Limited v Fareham U.D.C (1956) AC 696.

31. The Respondent further submits that the contract was terminated by conduct of the Appellant and consignee and that the Appellant and the Respondent accepted the changed circumstances. Making reference to the email dated 24th July, 2017, the Appellant submits that it accepted all the terms as laid out by the Appellant. The case of Kenya Airways Limited v Satwant Singh Flora is relied upon.

32. On the second issue, the Respondent draws attention to the letter dated 24th May, 2017 at page 15 of the Record. It submits that there are no subsequent emails or correspondence on the issue of containers being returned. It also makes reference to the Appellant's witness' admission at page 288 that it is holding the Respondent's money to the tune of USD 20,455.80. According to the Respondent, the Appellant's refusal to pay back the amount owed was not because of containers that were to be returned but due to being taken to court.

33. It is the Respondent's position that it proved its case on a balance of probabilities. It places reliance in the case of Whispering Palms Hotel Limited v Computech East Africa Limited. In conclusion, the Respondent submits that the Appeal be dismissed and the Trial Court's decision be upheld and that it be awarded costs for the appeal.

Analysis and Determination

34. I have considered the appeal lodged, the submissions filed both for and against, the authorities cited as well as the law and I discern the following issues for determination: -

    a. Whether there existed any contract between the parties herein;

    b. If the answer to (a) above is in the affirmative, whether the Trial Court erred when it held that the same was terminated;

    c. Whether the Respondent was entitled to the sum of USD 33,000;

    d. Whether the Appellant's counter-claim ought to have succeeded; and

    e. Who bears the cost?

35. On the first issue, though the Respondent submits that the same is not a contract but rather a quotation, I hold a different view. This is clearly evidenced at pages 77 to 80 of the Record. The subject reads as follows: "Renewal of Contract – terms of business and rates." Furthermore, the Respondent at paragraph 4 of its plaint clearly averred that it "sub-contracted" the Appellant. Therefore, a party cannot plead that it sub-contracted if no contract existed. I therefore return a finding that the document at pages 77 to 80 of the Record is what guided the parties' relationship.

36. Turning to the second issue, having found that there was a contract between the parties herein and it being the primary document as relates to the parties' business, was the Trial Court correct to hold that the same was terminated when the Appellant dealt directly with the client? In answering this question, I am alive to the principle that where there is a written document guiding parties' dealings, no extrinsic evidence should be introduced to vary what parties expressly agreed. This was held by the Court of Appeal in the case of Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR where the court held as follows: -

> "...So that where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence,

whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it..."

37. The subject matter in the present dispute is clearance and transportation of containers to Kampala and return of the empty containers to Mombasa. The terms of the parties' arrangement in terms of who was to do what and when cannot be extracted from anywhere else other that the document at Pages 77 to 80 of the Record. Clause 13 of the terms and conditions specifically provided for the return of containers and the consequences of dropping down the containers and delay in return. Similarly, clause 15 provided for container demurrage and when the same would be payable.

38. Further to the foregoing, there is an email dated 28th April, 2017 under the subject "Daily Update." The other is Mehboob Virji and the recipients are Martin Mugisha, Christine Wanjiku and Charles Okwonga. The same is copied to David Kasingwire, Herbert and lydiaakwenyi@gmail.com. Part of it reads as follows: -

> "...Please ensure that trucks when they arrive Malaba border – clearance on Uganda side is done immediately to the CFS and containers should be returned empty back to Mombasa on the same trucks. PIL is not accepting empties in Kampala..."

39. This email is in consonance with the contract and clearly confirms what parties agreed. There is no privity of contract between the Appellant and the client, Besthomy Investment Uganda. The only parties who could vary the contract were the Appellant and the Respondent. I am not persuaded that the email dated 24th May, 2017 at page 15 of the Record terminated the parties' relationship and that the Respondent was relieved of its duties under the contract.

40. I say so because of two things. First, the author is Mehboob Virji and sent at 1510hrs. The contents therein are ambiguous. It appears as though the author was in a soliloquy. On one part, he appears to raise a concern and goes ahead to answer himself. An example is item no. 1. It reads as follows: -

> "...They will pay us all extra charges for 10*20 foot containers directly – Overweight surcharge/ empty return/port storage/ container demurrage – believe you have not received this money – From Yusuf please confirm – as he has already collected the funds from the client – Not Yet Received – we will collect from the consignee no problems...

41. Secondly, it makes reference to other containers not among those the parties agreed on. Other than 10*20 and 12*20 foot containers, there is another set indicated as 11*20 foot containers. Looked at collectively, one cannot authoritatively determine from this document what the parties meant. If the parties' intention was to terminate the contract, nothing would have been easy than to state so in the subject email. At page 16 of the Record, David Kasingwire writes an email at 3:01 p.m. to Mehboob and copies to several other people. The only statement therein is that he was in agreement.

42. No light is shed on what he was agreeing to and I therefore hold that the email dated 24th May, 2017 could not have terminated the contract between the parties. Even if I was to hold otherwise, the contents of Mehboob's email leaves no doubt that the Respondent was still to ensure that the

containers were empty and ready for collection. This was a condition before he could release anything from his end.

43. I have said enough to demonstrate that indeed the Trial Court erred in finding that the direct dealing between the Appellant and the client terminated the contract between the Appellant and the Respondent. This amounted to the court re-writing the contract for the parties. I say so because if the contract was terminated, how was the Appellant to recover its containers from a party it had no contract with? The Court of Appeal in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR rendered itself thus: -

> "...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved..."

44. To further demonstrate the above position, there is a demand letter dated 1st August, 2017 authored by Magezi, Ibale & Co. Advocates demanding for a sum of USD 37,233 from Besthomy Investments Uganda Ltd (page 65 of the Record). It is written on behalf of the Respondent herein. Some of the amounts indicated include USD 31,800 paid to the Appellant. At page 66 of the Record, the demand is responded to by a letter dated 11th August, 2017 authored by Alaka & Co. Advocates.

45. In the response, the client (Besthomy) denies any contractual relationship with the Respondent. It also demonstrates that the Respondent did not undertake any works for it due to its (Respondent's) incapacity. Still from the said letter, the Respondent sub-contracted the Appellant without the client's prior knowledge or approval but despite so, it proceeded to pay for the services. In conclusion to the second issue, what the Trial Court held on the termination of the contract is a reversible error which this court proceeds to correct it by holding that the contract between the Appellant and the Respondent was not terminated and subsisted all through until parties performed their respective obligations.

46. On the third issue, from the plaint dated 22nd August, 2017 and particularly paragraph 6 thereof, the Respondent clearly confirmed that the USD 33,000 it was claiming was paid by Besthomy Investments Uganda Limited. The only party who could seek a refund of this amount was Besthomy Investments. Indeed, when PW1 testified, he confirmed that it was not suing on behalf of Besthomy.

47. The Respondent did not set out the basis of how it arrived at the sum of USD 33,000. It paid the Appellant USD 62,450. How it deducted the said amount to arrive at USD 33,000 is only known to the Respondent. Equally, the Respondent did not plead that the sum of USD 62,450 it paid the Appellant had been received from Besthomy. If that was so, any overpayment made would have only been recoverable from the Appellant by Besthomy because it is the party which would have lost USD 95,450.

48. Both the Appellant and the Respondent are clearing and forwarding companies and the court takes judicial notice that these companies operate on a cash and carry basis. This is augmented in the *Merchant Shipping Act* as well as the Merchant Shipping (Maritime Transport Operators) Regulations, 2011. As such, they could not have executed the work before any payment. It is the duty of a party to plead its case in the best way possible since it binds them unless amended.

49. In Daniel Otieno Migore v South Nyanza Sugar [2018] eKLR, A.C. Mrima, J held as follows: -

> "...It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence

adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded..."

50. This position reaffirmed the Court of Appeal decision in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> "...It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..."

51. In Independent Electoral and Boundaries Commission (Supra), the court then went ahead to conclude as follows: -

> "...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation..."

52. It was the Respondent who was under an obligation to prove its case on a balance of probabilities since it was the party who would fail if no or no sufficient evidence was tendered in support of its claim. The Respondent did not at all lay a basis for its demand for USD 33,000 and as such, I find that the Respondent failed to prove its case to the requisite standards and its case ought to have failed. Before I conclude on this issue, I note that the Appellant through its witness admitted owing the Respondent a sum of USD 20,455.80.

53. Having found that there was not basis for the Respondent to claim the sum of USD 33,000, the Appellant's admission notwithstanding falls by the way side.

54. On the counter-claim, the Appellant sought for a liquidated sum of USD 17,942. However, having gone through the initial list of documents, further list of documents and the additional further list of documents, there is no evidence that indeed the Appellant paid the pleaded sums. It is trite that a party claiming a liquidated amount is under a duty to specifically plead the amount and strictly prove the same. The closest I have seen are documents at pages 168 and 169 of the Record.

55. However, the said documents show that what the Appellant issued to PIL Shipping Line were cheques which clearly indicated at the foot that they were subject to realization. Without a statement showing that the cheques cleared or were realized, I am hesitant to hold that the Appellant discharged its burden in respect to the counter-claim. The other documents referred to are invoices which have been held not to be evidence of payment. In Great Lakes Transport Co (U) Ltd –vs- Kenya Revenue Authority (2000) eKLR 720, the Court of Appeal settled this matter as follows: -

> "...What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word "paid" on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt..."

56. Therefore, just as the Trial Court, the counter-claim was not merited and the court was correct to dismiss it.

57. On the issue of costs, a careful reading of Section 27 indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540. It is, that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party. The appeal has only succeeded partly and I order each party to bear own costs.

58. Flowing from the foregoing, I proceed to make the following orders: -

    a. The appeal only succeeds to the extent that the Respondent/ Plaintiff suit before the Lower Court stands dismissed;

    b. Each party to bear own costs for the appeal and the court below;

    c. The amount held in an escrow account or deposited in court be released to the Appellant through his Counsel;

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 19TH DAY OF DECEMBER, 2024.

.....

F. WANGARI

JUDGE

In the presence of:

Okata Advocate for the Appellant

Ojigo Advocate for the Respondent

Brian, Court Assistant