



**Mediterranean Shipping Co SA v Safreight Limited (Civil Appeal
88 of 2015) [2023] KEHC 518 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 88 OF 2015
OA SEWE, J
JANUARY 30, 2023**

BETWEEN

MEDITERRANEAN SHIPPING CO SA APPELLANT

AND

SAFREIGHT LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. Kituku, Principal
Magistrate, delivered on 28th May 2015 in Mombasa CMCC No. 3562 of 2013)*

JUDGMENT

1. This appeal arises from the decision of the Principal Magistrate in Mombasa Chief Magistrate's Civil Case No 102 of 2012: Safreight Limited v Oceanfreight (EA) Limited and Mediterranean Shipping Company Limited, in which the respondent had sued the appellant and Oceanfreight (EA) Ltd (hereinafter, "Oceanfreight") for the following reliefs:
 - (a) An order for the unconditional surrender and/or release of 1 x 20 feet container No Gatu 006438/5 or the payment of US\$ 2500;
 - (b) The sum of Kshs 83,550;
 - (c) The sum of US\$ 4,500 or its equivalent in Kenya Shillings at the time of judgment or payment, whichever is higher;
 - (d) General damages;
 - (e) Costs of the suit
2. The respondent's cause of action was that, on or about 27th December 2007, it entered into an agreement with the Oceanfreight on terms that the respondent would pay to the appellant the sum of US\$ 2500 being the replacement value of 1 x 20 ft. Container No. Gatu 006438/5; and that, upon



receipt of the said replacement value the defendant would unconditionally surrender the said container to the plaintiff. It was further the assertion of the respondent that, in total breach of the said agreement, Oceanfreight failed to surrender the said container despite receiving its replacement value from the respondent.

3. At paragraphs 6, 7, 8 and 9 of the Plaintiff, the respondent further alleged that, on diverse dates between 6th October 2009 and August 2011 it acted as a clearing agent for the appellant and Oceanfreight; and that it was, as such agent, mandated to secure the refund of the container deposits paid by the various consignees. The respondent had averred that, in total breach of the contract between them and the consignees, the appellant and Oceanfreight refused to refund the container deposits amounting to Kshs 120, 810.66 and US\$ 5,000; hence the lower court suit.
4. In his Defence dated 13th July 2012, Oceanfreight denied the respondent's claim and contended that, as an agent of a disclosed principal, the respondent's suit against it was legally untenable. It further averred that the respondent had no proprietary interest in the sums claimed as alleged deposits which had been paid on account of specific principals. At paragraph 6 of the Defence of Oceanfreight, it averred that any sums deposited on account by the respondent were used to offset outstanding container demurrage charges; and that full particulars thereof were well known to the respondent.
5. On its part, the appellant contended, vide its Defence dated 13th July 2012, that the respondent's claim was based on a contract of carriage as per the terms of The *Carriage of Goods by Sea Act* and The Hague – Visby Rules, and therefore any claim in respect thereof ought to have been lodged within 12 months of the contract. He, consequently posited that the respondent's suit was time-barred. On a without prejudice basis, the appellant averred that the respondent had no proprietary interest in the deposits paid to Oceanfreight on behalf of Michael Musau, Paven Ramji Shah, Strategic Industries Ltd and Retina EA Medical.
6. Upon hearing the parties, the learned magistrate found in favour of the respondent in respect of prayers (b) and (c) of the Plaintiff; but declined the respondent's prayer for general damages for breach of contract. The lower court also dismissed the suit as against the Oceanfreight on the ground that as an agent of the appellant, a known principal, it was improperly joined to the suit.
7. Being aggrieved by the decision of the lower court, the appellant filed this appeal on 25th June 2015 on the following grounds:
 - (a) The learned magistrate erred in law and fact in coming up with figures of payments made contrary to the evidence presented in court;
 - (b) The learned magistrate erred in law and fact in allowing prayers (b) and (c) of the Plaintiff when there was no evidence to support such finding and or award;
 - (c) The learned magistrate erred in law in failing to appreciate that the genesis of the transaction was a shipping contract of which the provisions of The *Carriage by Sea Act* applied and his findings to the contrary was erroneous;
 - (d) The learned magistrate erred in law and fact in finding that the respondent had locus standi to sue on behalf of third parties who were not parties to the contract and thereby acted contrary to the doctrine of privity of contract;
 - (e) The learned magistrate erred in law and fact in failing to find that the respondent's suit was bad for misjoinder of parties and greatly prejudiced the appellant;



- (f) The learned magistrate erred in law and fact and issued contradictory and ambiguous judgment as, having found that the respondent had no cause of action against Oceanfreight the judgment against the appellant had no basis and therefore bad in law;
 - (g) The learned magistrate erred and misdirected himself in making a finding of payment allegedly paid without any evidence having been tendered as proof contrary to the *Evidence Act*, Chapter 80 of the Laws of Kenya;
 - (h) The learned magistrate erred in failing to analyze and synthesize evidence presented by the defendants and arrived at a judgment in favour of the respondent against the appellant which is patently erroneous.
8. Accordingly, the appellant prayed that the appeal be allowed with costs and the judgment of the lower court be set aside. The appeal was urged by way of written submissions pursuant to the directions given herein on 9th July 2019. Thereupon, Mr Wafula filed the appellant's written submissions on 16th July 2020 and isolated the contentious issue to be the issue whether the appellant and the respondent entered into an agreement for the payment of US\$ 2,500; and whether the respondent satisfied the burden of proof in this regard. Counsel relied on Section 107(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya and the decision of the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR for the proposition that 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.
 9. Mr. Wafula submitted that, just as the parties were bound by their pleadings, the lower court was bound to only determine the issues arising from those pleadings. He relied on *Galaxy Paints Company Limited v Falcon Gaurds Limited*, Civil Appeal No 219 of 1998 and *Independent Electoral & Boundaries Commission & another v Steven Mutinda Mule & 3 others* [2014] eKLR to support that assertion.
 10. Mr. Wafula also submitted that, since the lower court established that the respondent did not settle US\$ 10,360, any amount alleged to be owed to the respondent ought to be deducted and applied to settle the outstanding demurrage. Accordingly, counsel prayed that the judgment of the lower court be set aside and substituted with an order dismissing the respondent's suit. He further prayed, on the authority of the decision of the Court of Appeal in *National Social Security Fund Board of Trustees v Sifa International Limited* [2016] eKLR that judgment be entered for the appellant for USD 10,360 together with costs of the appeal and the lower court.
 11. On behalf of the respondent, Mr Bosire filed his written submissions herein on 8th October 2020. He proposed the following two issues for determination:
 - (a) Whether the respondent fulfilled its burden of proof on a balance of probability;
 - (b) Whether the Court should enter judgment for a matter not pleaded before the lower court.
 12. According to Mr Bosire, what was in contention before the lower court was the identification of the consignees of two Bills of Lading, namely, Bill of Lading No. MSCUFA 584611 for a 1 x 20 ft. Container No GATU 006438 and Bill of Lading No. MSCUFA 653537/2. He submitted that, since the respondent showed, during the hearing, that it had no other alternative but to take responsibility of the consignments since they were listed as the consignee and was invoiced accordingly, it was entitled to the sums awarded it by the lower court. He reiterated the assertion by the respondent that the sum of US\$ 2500, as payment for the replacement value of Container No. GATU 006438, was agreed upon by mutual understanding between the representatives of Oceanfreight (as agents of the appellant) and the respondent, and that the respondent having paid that amount, it was entitled to the orders granted



- by the lower court. Counsel relied on *Mbutia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR to support his argument that the respondent fully discharged its burden of proof; and that the evidence presented before the lower court by it was unrebutted.
13. On whether it is permissible for this Court to enter judgment in favour of the appellant for a claim that was never ventilated before the lower court, Mr Bosire reminded the Court of its role as an appellate court by citing *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 1223. He submitted that it would be unfair for the appellant to introduce new matters that were not before the trial magistrate and have the lower court's judgment overturned on some secondary grounds that were never included in the appellant's Memorandum of Appeal. He added that the sum now claimed on appeal was never pleaded before the lower court by way of a counterclaim or set-off in the manner provided for under Order 7 rule 3 of the *Civil Procedure Rules*. He relied on *County Government of Kilifi v Mombasa Cement Limited* [2017] eKLR; *Twaber Abdulkarim Mohamed v Independent Electoral & Boundaries Commission & others* [2014] eKLR and *Wachira v Ndanjeru* [1987] KLR 252, among other authorities. Mr Bosire then proceeded to distinguish the authorities relied on by counsel for the appellant and urged the Court to dismiss the appeal with costs.
14. This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was presented before the lower court and make its own conclusions thereon. Hence, in *Selle & another v Associated Motor Boat Co Ltd & Others (supra)*, it was held thus:
- “...this court is not bound necessarily to accept the findings of fact by the court below. An 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally...”
15. In the premises, I have given due consideration to the evidence adduced before the lower court. On behalf of the respondent, its managing director, Said Noor Nassim, testified on 18th February 2015. His evidence was that the respondent, a clearing and forwarding company, had a longstanding relationship with the appellant and its agent, Oceanfreight. In that capacity the respondent received a Bill of Lading No MSUFA 584611 addressed to it as the consignee. He explained that as a consignee, the respondent was under obligation to pay the replacement value of the container; and that after a meeting with the managing director of Oceanfreight, Issa Mushin, in his office, it was verbally agreed that the respondent would pay US\$ 2500, which PW1 proceeded to pay as per the receipt No 113614 (marked the Plaintiff's Exhibit 2).
16. It was further the testimony of PW1 that thereafter the respondent lodged a claim for refund of the deposit, but that Oceanfreight declined the claim because the Bill of Lading had been endorsed to the respondent for clearance, and not as the consignee. He insisted that the respondent had locus standi to claim the refund. PW1 also mentioned that because of the refusal by Oceanfreight to pay the container deposit, the consignment could not be cleared in time; and instead accrued demurrage charges of Kshs. 10,360/= for which he blamed Oceanfreight.
17. On behalf of the appellant, James Maluki, the manager of Oceanfreight testified on 25th March 2015 as DW1. He acknowledged that the respondent was one of clearing agents that Oceanfreight was doing



business with at the material time. He confirmed that the respondent signed a guarantee to return two containers but did not return one of them within the agreed period; and that as a result, the transaction attracted demurrage charges of Kshs 10,360, which the respondent had to pay. He denied that either Oceanfreight or the appellant was liable to refund US\$ 2,400 to the respondent.

18. It is common ground therefore that the protagonists herein have had a long term business relationship, such that the respondent had a running account with Oceanfreight, a shipping agent for the appellant. The two witness were in agreement as to the clearing process; namely, that a Bill of Lading once verified would be given to the respondent for purposes of the clearing process. In return the respondent would pay some deposit for the containers and sign a guarantee form to return the containers to Oceanfreight within the agreed period, usually 14 days; failing which the transaction would attract demurrage charges. It was also common ground that the importers would pay the deposit for the containers through the respondent, and that, as at the time of filing of the lower court suit, several of the importers were yet to receive their refunds because the containers were not returned in time.
19. What emerges from the evidence is that, in the course of their dealings, the respondent made some payment of US\$ 2500 on behalf of a consignee, but which Oceanfreight was yet to pay on behalf of the appellant. Thus the lower court ruled that, whereas the respondent had the locus standi to file the suit for recovery of the sums due to its clients on behalf of the contentious transactions, only prayers (b) and (c) of the Plaint, for Kshs 83,550 and US\$ 4500 (or its equivalent in Kenya Shillings) had been proved against the appellant.
20. foregoing being the summary of the evidence, the issues that arise for determination, granted the pleading and the written submissions filed herein are;
 - (a) Whether the Respondent had locus standi to institute the suit before the subordinate court; and,
 - (b) Whether the Respondent proved its case on a balance of probabilities.

(a) Whether the Respondent had locus standi to institute the suit before the subordinate court:

21. In the case of *Law Society of Kenya v Commissioner of Lands & 2 Others* [2001] eKLR, the court defined locus standi as follows: -

“...Locus-standi signifies a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law...”
22. The same position was taken in *Priscilla Nyokabi Kanyua v Attorney General & Another* [2010] eKLR thus:-

“...The Court emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The Court equally recognized that organizations have rights similar to that of an individual private member of the public. The court therefore clearly recognized representative approach by organizations...”
23. In the case before the court, the respondent demonstrated that it routinely acts as an agent of various principals. It was PW1’s testimony that the suit herein was instituted on behalf of its clients because the Appellant’s agent, Oceanfreight declined to handle any complaints from its clients, insisting instead that it would only deal with the respondent. The respondent produced a letter addressed to one Mr



Michael Musau dated 24th January, 2011 who was thereby directed to claim for his refund from the respondent.

24. It is noteworthy too that, at page 6 of the appellant's written submissions, it was reiterated that in the business of clearing cargo, the shipping agent and the shipping line do not deal directly with consignees, but with the clearing agents appointed on behalf the consignees. In this instance, there was no dispute that the respondent had a running account with Oceanfreight or that all deposits and payments due would be made on behalf of importers through that account. In those circumstances, the lower court cannot be faulted for finding that the respondent had locus standi to file the subject suit, the respondent having made the payment on behalf of the consignees.

(b) Whether the Respondent proved its case on a balance of probabilities:

25. The appellant has alleged, per grounds 1, 2, 6, 7 and 8 of the Grounds of Appeal, that the trial court did not consider the evidence that was produced and thus misdirected itself when it made a decision in favor of the respondent. The respondent's case, on the other hand, was that the appellant withheld container deposits paid by various importers on allegations that the respondent owed them the sum of USD 10,360 on account of Bill of Lading MSCUFA 647806. While conceding that it owed the appellant US\$ 10,360, the respondent contended that the same was offset by agreement; whereupon the appellant accepted the sum of US\$ 2500 instead.
26. From my appraisal of the evidence adduced before the lower court, the appellant herein did not refute the fact that it had been paid the sum of US\$ 2500. The respondent, through PW1, produced a letter dated 13th October, 2008, indicating that there was an agreement that the sum of USD 2500 was for the settlement of the Bill of Lading MSCFA647806. It is also noteworthy from the record, especially the Defences filed by both the appellant and Oceanfreight, that at no point did they allude to being owed any sums of money by the Respondent.
27. Order 7 rule 3 of the *Civil Procedure Rules* is explicit that:
- “ A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”
28. Thus, in the absence of a set-off or counterclaim, as was the case before the lower court, it was to no avail that DW1 made reference to certain debts owed to Oceanfreight by the respondent. Indeed, in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, the Court of Appeal made it clear that where an issue is not pleaded by the parties, the court has no right to make a determination thereon. The Court of Appeal quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” published in [1960] Current Legal problems, at P174 in which the author had stated;

“ As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot



be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

29. Even assuming that the indebtedness of the respondent to Oceanfreight were pleaded, the same had to be proved on a balance of probabilities. It is trite law that he who alleges must prove. Sections 107, 108 and 109 of the *Evidence Act* cap 80 Laws of Kenya are clear that: -

107(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 The burden of proof in a suit or proceeding lies in that person who would fail if no evidence at all were given on either side.

109 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.

30. Since it was the respondent’s case that they had no outstanding debts due to the appellant or its agent Oceanfreight, the burden thus shifted on the appellant to prove that it was owed such sums as claimed by it. The Court of Appeal in the case of *Mbutia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR held: -

“...The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence...”

31. The judgment of the lower court clearly shows that due attention was paid to the evidence adduced by both sides; and therefore to say that the trial court did not address itself to the evidence that was presented by the defence is far from true. I agree with the trial court that the appellant had no right to withhold the refunds due to the respondent’s clients. As matters stand, there is no proof that the appellant is owed the sum of US\$ 10,360 as alleged.
32. Counsel for the appellant also impugned the judgment of the lower court on the ground that it is contradictory and ambiguous. According to counsel, after finding that the respondent had no cause of action against Oceanfreight the lower court ought not to have made any adverse finding against the



appellant, whose agent Oceanfreight was. The rule of thumb is that where there is a disclosed principal, it is the principal that is responsible for the actions of the agent. Needless to say therefore that the deposits were taken by Oceanfreight on behalf of the appellant; and therefore as a disclosed principal, the appellant was the correct party to be sued for purposes of refund.

33. In respect of Ground 3 of the Memorandum of appeal, the appellant did not submit on the same; and since not much was said of it by the lower court, I find no reason to delve into the issue.
34. The upshot is that the appellant's appeal dated 23rd June, 2015 lacks merit and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JANUARY 2023.

OLGA SEWE

JUDGE

