**Coco Travel Limited v Wilken Aviation Limited (Commercial Appeal E015 of 2022) [2023] KEHC 2745 (KLR) (Commercial and Tax) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2745 (KLR)

**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX**

**COMMERCIAL APPEAL E015 OF 2022**

**DAS MAJANJA, J**

**MARCH 29, 2023**

**(FORMERLY CIVIL DIVISION CIVIL APPEAL NO. 141 OF 2020)**

**BETWEEN**

**COCO TRAVEL LIMITED ..... APPELLANT**

**AND**

**WILKEN AVIATION LIMITED ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon.P. N. Gesora, CM dated 13th February 2020 at the Nairobi Magistrates Court, Milimani in CMCC No. 9554 of 2018)***

## JUDGMENT

1. This is an appeal against the judgment of the subordinate court awarding the respondent USD 197,226.88, costs of the suit and interest thereon. Since the respondent was the plaintiff, i shall refer the parties in their capacities before the subordinate court unless the context otherwise admits.

2. By way of background and according to the amended plaint dated July 15, 2019 filed in the subordinate court, the plaintiff was the owner of an aircraft; Cessna Caravan C208 registration number 5Y-LEX ("the aircraft"). It stated that by a contract dated December 24, 2013, it leased the aircraft to the defendant on terms contained therein ("the contract"). It states that it had delivered the aircraft to the defendant on December 10, 2011. Its claim against the defendant was that it failed to pay USD 197,226.88 on account of lease payments despite various demands.

3. In its statement of defence dated December 21, 2018, the defendant denied the claim and in particular that it owed USD 197,226.88. It also denied that it entered into the contract and specifically denied its authenticity. It denied the delivery of the aircraft as alleged by the plaintiff and stated that it did not make sense that the aircraft was delivered before the contract. The defendant pleaded in the alternative

that if indeed there was a contract as alleged, then it expired according to its terms and hence there can be no claim thereafter. It also pleaded in the alternative that the contract was frustrated by eruption of civil war in South Sudan which made it unfavourable for aircrafts to operate.

4. At the hearing of the suit, the plaintiff called its director, Newton Omondi Osiemo (PW 1) as its witness while the defendant called its director Peter Mukhebi (DW 1) as its witness. Thereafter, the trial magistrate rendered judgment in favour of the plaintiff.

5. In the judgment, the trial magistrate found that the plaintiff leased out the aircraft for the period 2011 to 2013 which DW 1 conceded and that DW 1 admitted that it owed the plaintiff money. The court held that despite demand being sent to the defendant, it failed to respond to the said demand and since the defendant admitted that the aircraft had a tracking device, it was doing business hence it was indebted. The trial court held that the plaintiff had proved its case against the defendant on the balance of probabilities. It is this judgment that has precipitated this appeal.

6. The appellant's grounds of appeal are set out in the memorandum of appeal dated March 12, 2020. The appeal was canvassed by way of written submissions which I have considered

7. This is a first appeal from the subordinate court. The court is guided by the established principle set out in several decisions including that the first appellate court is entitled to review the record before the trial court and come to an independent conclusion as whether the findings of the trial court are correct but at all times making allowance for the fact that it never heard or saw the witnesses testify so as to assess their demeanour (see *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocatess*[2013] eKLR and *Selle and another v Associated Motor Boat Company Limited and others* [1968] EA 123).

8. Although the appellant set out 8 grounds of appeal in its memorandum of appeal. In its submissions, it condensed them into a single broad ground, which is whether the respondent proved its case on the balance of probabilities. This was the issue before the trial court and now before this court.

9. Although the appellant denied the contract and the relationship between it and the respondent, DW 1 admitted in cross-examination that the defendant operated the aircraft between 2011 to 2013 and that although it made some payments, it was not clear how much. DW 1 confirmed that a meeting was held on May 8, 2013 and the parties were to reconcile accounts. DW 1 also stated that the defendant would pay the outstanding amount once it got back into operations. DW 1 admitted that, "We had arrears but not what is claimed herein." In addition, DW 1 agreed that he executed the contract and that when it expired, the defendant did not return the aircraft.

10. From DW 1's admissions, a substantial part of the defendant's defence was put to rest and the trial magistrate was correct to hold that the defendant was indebted to theplaintiff. The question is by how much? The trial magistrate did not explain in the judgment how the amount prayed in the amended plaint was made up or arrived at. The question then is whether the respondent proved its case on the balance of probabilities.

11. In determining this appeal, the key principle is that a plaintiff bears the burden of proving that it is owed the amount pleaded in the plaint. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. This is reflected in section 107(1) of the *Evidence Act* (chapter 80 of the Laws of Kenya), which provides:

    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.

12. Further, the evidential burden is cast upon any party with the burden of proving any particular fact which he desires the court to believe in its existence and is captured in section 109 of the Act as follows:

> 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.

13. The well-known phrase, "he who asserts must prove" was underlined by the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* Nyr CA civil appeal No 342 of 2010[2013]eKLR as follows:

> We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides 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." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

14. Apart from the burden of proof, I agree with appellant that the respondent's claim is in the nature of special damages and as our courts have stated special damages must be pleaded and proved. For example, in *Bangue Indosuez v D J Lowe and Company Ltd* Msa CA civil appeal No 79 of 2002 [2006] eKLR, the Court of Appeal held as follows:

> It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.

15. During the trial, the plaintiff produced the contract which shows at clause 3.2 that the defendant was required to make a deposit of USD 48,000.00 and USD 6,000.00 to continue operations. The leasing rate and cost at clause 3.1 was agreed at USD 800 per flight hour with a minimum of 60 flight hours per month and after 80 bloc flying hours, the appellant was required to pay a rate of USD 750.00. It appears that the defendant defaulted causing the plaintiff to issue a letter dated February 5, 2013 demanding USD 136,432.13 being arrears as at January 31, 2013.

16. In an email dated May 8, 2013, the plaintiff referred to a meeting held by the parties on the same day to resolve the debt. It appears that the debt was not resolved as the defendant was to avail credit notes. In the follow up communication dated August 16, 2013, the plaintiff expressed concern over non-payment over the debt of USD 122,888.00.

17. There is also a letter dated August 16, 2013 written by the plaintiff to the defendant under the reference "follow up on request for account settlement – USD 122,888". The plaintiff followed up on the previous meetings and stated the amount was made of lease instalments of USD 88,098.00 and the

cost of positioning the aircraft amounting to USD 34,790.00. The letter referred to a current account balance of USD 183,987.00. It confirmed that it would issue credit notes of USD 61,009.00 subject to presentation of documents.

18. The plaintiff also produced a demand letter dated October 3, 2013 addressed to the defendant demanding USD 208,204.00. In a demand letter dated February 25, 2015 from its advocates to the defendant, it demanded USD 208,204.77.

19. Based on the testimony and documents, did the respondent prove that the appellant owed it USD 197,226.00? I have considered the totality of the evidence and I find that the plaintiff did not demonstrate how the amount was made up. In as much as the appellant admitted that it owed some money, it was incumbent on the respondent to prove how much it was owed. The respondent produced disparate documents showing varying amounts as I have outlined above. None of the documents demanded or showed how the USD 197,226,00 was made up. The respondent did not make any reference to the contract as a basis for calculating the lease payments. The respondent did admit to owing a specific sum. I hold that a general admission of indebtedness does not amount to proof of specific debt. The correspondence; the letters and emails show disparate amounts claimed by the respondent hence the court is lost on how much of the debt was proved. The following observation by Lord Goddard CJ, in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 which has been cited in many cases with approval including *Lalji v Toka* MsaCA civil appeal No 46 of 1980 [1981] eKLR remains correct:

> plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying "this is what I have lost, I ask you to give me these damages'. They have to prove it.

20. In conclusion, I hold that the trial magistrate failed to analyse the evidence and explain how the amount claimed was made up. The respondent simply produced a multiplicity of documents showing various amounts owed by the appellant. They did not amount to proof of the debt it claimed. The respondent therefore failed to discharge its burden of proving that the appellant owed it USD 197,226.00.

21. For the reasons I have set out above, I allow the appeal on the following terms:

    (a) The judgment of the subordinate court dated February 13, 2020 is set aside and substituted with a judgment dismissing the suit before the subordinate court.

    (b) The appellant is awarded costs of the suit before the subordinate court.

    (c) The respondent shall pay costs of this appeal assessed at Kshs 60,000.00 only.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2023.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango.**

Mr Odoyo instructed by Kipkenda and Company Advocates for the Appellant.

Mr Osiemo instrucred by Odero Osiemo and Company Advocates for the Respondent.