**Dodwell and Company (EA) Limited & another v Kenya Orient Insurance Limited (Civil Appeal E220 of 2021) [2023] KEHC 27563 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 27563 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL E220 OF 2021**

**F WANGARI, J**

**MAY 30, 2023**

**BETWEEN**

**DODWELL AND COMPANY (EA) LIMITED ..... 1ST APPELLANT**

**SIVASUBRAMANIAN SAMBAMURTHY ..... 2ND APPELLANT**

**AND**

**KENYA ORIENT INSURANCE LIMITED ..... RESPONDENT**

***(Being an Appeal against the Judgement and Decree of Chief Magistrate Honourable Francis Kyambia delivered on 5th November, 2021 in Mombasa CMCC No. 2117 of 2015)***

## JUDGMENT

1. This is an appeal from the judgement of the Learned Chief Magistrate Hon. Francis Kyambia in Mombasa CMCC No 2117 of 2015 given on 5th November, 2021.

2. The Appellant raised a total of six (6) grounds of appeal in its memorandum of appeal dated 16th November, 2021 and lodged on 18th November, 2021. The grounds are follows: -

    a. That the Learned Honourable Magistrate erred in both law and fact in finding that the 1st and 2nd Appellants failed to account for all outstanding transactions despite the evidence on record to the contrary;

    b. That the Learned Honourable Magistrate erred in both law and fact in finding that the Respondent was right to remit the sum of Kshs 5,000,000/= to Kenya Revenue Authority despite the well-established provisions of section 109 (1) of the *East African Community Customs Management Act*, 2004 which clearly places the said obligation upon the Commissioner in the event of the alleged non-compliance;

c. That the Learned Honourable Magistrate erred in both law and fact by disregarding and or failing to consider the 1st and 2nd Appellant's counterclaim on record in the sum of Kshs 5,000,000/= being a refund by the Respondent of the security bond deposit plus interest thereon at the court's rates;

d. That the Learned Honourable Magistrate erred in both law and fact in failing to take into account the Appellant's evidence on record and in particular, the extracts from KRA online system showing the date of cancellation of bonds and or the outstanding transactions;

e. That the Learned Honourable Magistrate erred in both law and fact in disregarding the provisions of section 117 (2) and (4) of the *East African Community Customs Management Act*, 2004 which required the Respondent to refund the Appellants their security deposit in the sum of Kshs 5,000,000/= upon receipt of the letter dated 21st March, 2011 from Kenya Revenue Authority which showed that the Appellants had complied with the terms of Transit Bond GCSB 02071/2008; and

f. That the Learned Magistrate erred in both law and in fact in disregarding and or failing to accord the necessary consideration to the evidence tendered by the Appellants

3. The Appellants therefore sought for the appeal to be allowed and that judgement delivered on 5th November, 2021 be set aside and in its place, judgement be entered in favour of the Appellant as prayed in the plaint. The Appellants also sought for costs to be awarded to them.

4. This being a first appeal, this court is under a duty to re-evaluate and 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 v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v 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. I shall not reproduce the parties' pleadings before the Trial Court as they already form part of the record suffice to summarize the genesis of the claim. As per the amended plaint dated 2nd November, 2015 and amended on 21st September, 2020, the claim arose from a transit bond issued by the Plaintiff (Respondent herein) to the Commissioner of Customs in favour of the 1st Defendant (1st Appellant herein) for a sum of Kshs 20,000,000/=. It was guaranteed by a personal guarantee of the 1st Appellant's directors among them the 2nd Appellant.

8. It was averred that it was an express term of the bond that the Appellants would satisfy to the Commissioner of Customs that the 1st Appellant's goods would be duly exported. As a result of the 1st Appellant's failure and/or neglect to provide proof within the stipulated period that indeed the transit goods had been exported, the Respondent was compelled by the terms of the bond to remit a sum of Kshs 10,257,794/= to Commissioner of Customs. The Appellant managed to recover a sum of Kshs 5,000,000/= and was thus seeking to recover Kshs 5,257,794/= from the Appellants and thus the basis of the claim.

9. The claim was resisted through a statement of defence and counterclaim dated 10th December, 2015. In its defence, the 1st Appellant averred that it successfully exported the transit goods and the same was confirmed by the Kenya Revenue Authority (KRA) Customs Services Department through a letter dated 18th May, 2012. As such, it denied owing any money to the Respondent. The 1st Appellant proceeded to counter-claim for the sum of Kshs 5,000,000/=.

10. The matter proceeded to full trial and judgement was entered in favour of the Respondent against the Appellants while the Appellant's counterclaim was dismissed. The costs were awarded to the Appellant. It is this decision that precipitated the present appeal.

**Summary of the Respondent's case**

11. Jason N. Kithiga testified as the Respondent's sole witness. He adopted his witness statement dated 3rd August, 2020 and produced a bundle of documents paginated 1 – 42 in support of its claim. He was thereafter cross examined and re-examined. In brief, the witness contended that it was seeking to recover the amounts that KRA recovered from its bank account domiciled at Family Bank. According to the witness, had the 1st Appellant complied with KRA's letter dated 25th May, 2011 by complying with the conditions of Transit Bond No GCSB 02071/2008, the claim would not have arisen. That marked the close of the Respondent's case.

**Summary of the Appellants' Case**

12. The Appellants' called Mark Mboloi as its only witness. He adopted his witness statement dated 12th March, 2021 as his testimony in chief. He equally produced the Appellants' documents contained in the list dated 8th May, 2019 and the further list dated 20th June, 2021. He was thereafter cross examined and re-examined.

13. In summary, the only dispute was in relation to the amounts demanded by the Respondent. According to the Appellants, when it was issued with the letter dated 18th May, 2012, that was a confirmation that it had complied with the terms of the Transit Bond and was thus entitled to the amount of Kshs 5,000,000/= it had paid as security. That marked the close of the Appellant's case.

14. When the appeal came before this court, directions were taken that the same be canvassed by way of written submissions. Both parties duly complied by filing detailed submissions and cited various authorities in support of their rival positions. The Appellants' submissions are dated 20th February, 2024 while the Respondent's submissions are dated 5th March, 2023.

**Appellants' Submissions**

15. The Appellants identified two issues for determination. These are; whether the Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's evidence on record that proved that the Appellants complied with the terms of the Transit Bond GCSB02071 and whether the Learned Trial Magistrate erred in both law and fact in completely disregarding the Appellants' counterclaim for Kshs 5,000,000/=.

16. On the first issue, the Appellants submitted that there was ample evidence that they complied with the terms of the Security Bond GCSB02071 since the goods in respect of the said Security Bond were exported out of the country through the Busia Border. Upon complying with the security bond, KRA through its letter dated 21st March, 2011 cancelled the security bond GCSB02071/2008 for a sum of Kshs 20,000,000/=. However, KRA through its letter dated 25th May, 2011 informed the Appellants that the bond being cancelled was GCSB04593/2008 which is a supplement Security Bond to GCSB02071/2008.

17. The Appellants accused the Respondent for remitting the sum of Kshs 5,000,000/= which it had been deposited with it as security to KRA without affording them a fair hearing as enshrined in article 50 of the *Constitution* of Kenya. The Appellants contended that during the trial, they had produced online cancellation forms showing that the transit goods had left the country on 23rd May, 2011 and 9th June, 2011 and that they had complied with the terms of Security Bond GCSB02071/2008.

18. The Trial Magistrate's judgement was impeached on grounds that he had disregarded this piece of evidence when he held that the Appellants had not discharged the burden to show that they had accounted for all the outstanding transactions yet the burden of proof rested on the Respondent. To support their position on legal burden of proof, the Appellants cited sections 107 and 109 of the *Evidence Act* as well as *Halsbury's Laws of England*, 4th Edition, Volume 17 at paragraphs *13* and *14*.

19. Further reliance was placed in the case law of *Muriuki Kanoru Jeremiah v Stephen Ungu M'mwarabua* [2015] eKLR which cited with approval the decision in *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh*, Civil Appeal No 521 of 2019. The Appellants contended that it was the Respondent's duty to prove that the Appellants did not account for all the outstanding transactions that it was in error for the Trial Court to shift the burden of prove upon the Appellants.

20. Citing section 117 (4) of the *East Africa Community Customs Management Act*, 2004, the Appellants contended that as at the time KRA wrote the letters dated 25th May, 2011 and 5th February, 2013, all the outstanding transactions in Security Bond GCSB02071/2008 had been accounted for thus the Respondent ought to have refunded the security deposit of Kshs 5,000,000/=.

21. The Appellants opined that had the Trial Court addressed its mind on the evidence, it would have found that the Appellants had truly complied with the terms of the Security Bond GCSB02071/2008 and the Respondent ought not to have been entitled to Kshs 5,257,794/=. On this limb, they urged the court to reverse the Trial Court's findings on this ground.

22. On the second issue, the Appellants submitted that upon receipt of KRA's letter dated 21st March, 2011 which had initially cancelled Security Bond GCSB02071/2008, the Respondent was duty bound

to refund the Appellants the security deposit of Kshs 5,000,000/= as per the provisions of section 117 (4) of the *East African Community Customs Management Act*, 2004.

23. Without any justification, the Respondent retained the security deposit until May, 2011 when it remitted the funds to KRA without affording the Appellants a right to fair hearing. Later, KRA in their letters dated 24th and 25th June, 2013, it cancelled the Security Bond GCSB02071/2008 meaning that the Appellants had accounted for all the outstanding transactions in the security bond GCSB02071/2008 and ought to have been refunded the sum of Kshs 5,000,000/=. It was thus the Appellants' contention that it was wrong for the Trial Court to dismiss their counterclaim for Kshs 5,000,000/=. They thus prayed that the judgement entered on 12th November, 2021 be set aside and the counterclaim allowed.

**Respondent's Submissions**

24. The Respondent identified only one issue for determination which is whether the Learned Magistrate erred in law and fact by entering judgement against the Appellants for a sum of Kshs 5,257,794/= plus interests and costs as prayed in the amended plaint and dismissing the Appellants' counterclaim of Kshs 5,000,000/= with costs. The Respondent cited the decisions in *Selle v Associated Motor Boat Co* [1968] E.A 123 and *Kiruga v Kiruga & another* [1988] KLR 348 on the role of the court on first appeal.

25. Having delineated the role, the Respondent adopted its submissions before the Trial Court. According to the Respondent, it was common ground that a Transit Bond of Kshs 20,000,000/= was issued by the Respondent to the Commissioner of Customs on behalf and in favour of the 1st Appellant guaranteed by the 2nd Appellant. It was an express term of the transit bond that the 1st Appellant was to satisfy the Commissioner of Customs that the goods in respect of the transit bond would be exported and not consumed in Kenya.

26. What came out during the hearing was that for the Commissioner of Customs to be satisfied that the goods in question were duly exported, certain documents were to be supplied. These documents as per the Appellant's witness were KRA Simba System Exit Reports, Certificate of Export and C26 cancellation vouchers for each entry. According to the Respondent, these documents were never submitted to the Commissioner of Customs and because of this failure, the Appellants were charged Kshs 10,257,794/= since as far as Customs Department was concerned, the goods were never exported.

27. Having issued the Transit Bond in favour and on behalf of the 1st Appellant, the Respondent was liable to settle the outstanding charges and as such, Kshs 10,257,794/= was recovered by the Commissioner of Customs from the Respondent. Having settled the sum owed to the Commissioner, the Appellants were now owing the Respondent Kshs 10,257,794 which it recovered a sum of Kshs 5,000,000/= leaving a balance of Kshs 5,257,794/= which it sued and was awarded by the Trial Court.

28. It was further submitted that he who alleges must prove that the facts he so asserts to be in existence actually. The Appellants alleged that they complied with the terms of the Transit Bond and the same was then cancelled on 21st March, 2011. That fact meant they complied with the terms. The Appellants did not substantiate their allegation with proper documentation. There were no relevant compliance documents filed to the satisfaction of the Trial Court. Despite being served with a notice to produce dated 7th August, 2020, the Appellants never produced the relevant documentation to support their claim. The case of *Akiba Micro Finance Ltd v Ezekiel Chebii & 14 others* were cited in support.

29. On its part, the Respondent submitted that it proved that the terms of the Transit Bond had been breached. Reference was made to the letter dated 25th May, 2011 which addressed itself on the earlier letter dated 21st March, 2011. From the two (2) captioned letters, the Respondent stated that in

the letter of 25th May, 2011, KRA clarified that the cancellation of 21st March, 2011 was in error since the bond meant to be cancelled was GCSB04593/2008 which was a supplement bond and not GCSB02071/2008 which was the parent bond.

30. It was clarified that the parent bond could not be cancelled until all the outstanding transactions had been accounted for. The Respondent made reference to several other correspondences to show that there had been non-compliance by the Appellants. These are the letters dated 21st May, 2011, 7th January, 2013 and 5th February, 2013. According to the Respondent, the letter dated 21st May, 2011 informed the Appellants of the cancellation error occasioned by the letter dated 21st March, 2011.

31. The Respondent concluded its submissions by urging that the appeal be dismissed with costs for being unmeritorious. It equally sought for the funds held in the joint account of both Counsel at ABSA Bank be released to it.

**Analysis and Determination**

32. I have carefully considered the record of appeal, the supplementary record, the submissions filed both for and against which I have summarized as above, the authorities cited as well as the law. I discern two (2) issues for determination which are as follows: -

    a. Whether the appeal is merited; and

    b. Who bears the costs?

33. It is trite that the legal burden of proof lies with the person who alleges. The Plaintiff(s) bear the legal burden of proof to prove the claim against the Defendant(s). Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows: -

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

34. Once the Plaintiff(s) discharges the legal burden of proof, the burden is then shifted to the Defendant(s) to adduce evidence against the Plaintiff(s) claims. This burden is well captured under Sections 109 and 112 of the same Act as follows:

    Section 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 the fact shall lie on any particular person.

    Section 112

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

35. The above legal provisions are well captured in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334 and *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR.

36. The factual background leading to the filing of the case is pretty much not in contest as can be discerned at paragraphs *4* through to 8 of the amended plaint dated 21st September, 2020 as well as paragraphs *4* through 7 of the statement of defence and counterclaim dated 10th December, 2015. The point of departure is whether the Appellants complied with the terms of the transit bond and if so, if they are entitled to counterclaim the sum of Kshs 5,000,000/=.

37. The existence of the two transit bonds is not contest. These are GCSB 02071/2008 and GCSB 04593/2008. In resolving the first issue, the beginning point is the letter dated 21st March, 2011. The letter which appears at page 16 of the Record of Appeal cancelled the following bonds; PCSB 00850/2008 for Kshs 350,000/= and GCSB 02071/2008 for Kshs 20,000,000/=. PCSB 00850/2008 is not contested and as such, I shall refrain from making any reference to it.

38. The next port of call is the letter dated 25th May, 2011. To put the dispute into its correct context, I shall reproduce the contents of the said letter in extenso.

CSD/RDM/BOND/1

25th May, 2011.

Dodwell & Co. (E.A) Ltd.

Box 90194

MOMBASA.

Dear Sir/Madam,

RE: Security Bond Gcsb02071/2008

> Reference is made to our letter of even reference dated 21st March, 2011, with which the above security bond was returned to you as duly cancelled.
>
> Kindly note that the security bond that was being retired and returned to you and your guarantors is GCSB04593/2008, which is supplement bond to GCSB02071/2008 as per your application voucher No 31817 of 8th March, 2011.
>
> You are called upon to return the letters and original copy of bond No GCSB02071/2008 in order for us to issue you with the correct retirement letters and the original bond.
>
> We would like to advice you that the parent bond will only be retired once all the outstanding transactions are accounted for.
>
> We apologize for this error and thank you in advance for your understanding.

H.M. Kirigo,

Signed,

For: Deputy Commissioner – RDM

Cc. Kenya Orient Insurance Limited.

39. Though this letter was addressed to the 1st Appellant, it appears that it never responded on the same. However, an amount of Kshs 10,257,794/= was deducted from the Respondent's account having been the issuer of the transit bond. Upon noticing this deduction, it wrote a letter to KRA to clarify the deduction of the amount in issue through the letter dated 7th January, 2013. KRA responded to the same through its letter dated 5th February, 2013 and whose contents reiterated the contents of 25th May, 2011. The Respondent complied with the terms of the letter dated 5th February, 2013 through its letter dated 6th March, 2013.

40. Having complied, KRA through its letter dated 25th June, 2013 duly returned the cancelled bond No GCSB 02071/2008. The Appellants' witness on cross examination confirmed that the documents required to retire the bonds included KRA Simba System Exit Reports, Certificate of Export and C26

cancellation vouchers for each entry. Having reviewed the Appellants' exhibits before the Trial Court, I note that none of the said documents were produced.

41. The Respondent having discharged its burden of having paid a sum of Kshs 10,257,794/= to KRA, it behooved the Appellants to prove that indeed it had complied with the bond terms as at 21st March, 2011 to entitle them a refund of Kshs 5,000,000/= which had been deposited with the Respondent as security and also show that it acted on KRA's letter dated 25th May, 2011 so as to disentitle the Respondent the sum of Kshs 5,257,794/= levied as a result of the agency notice. In *Mbuthia Macharia v Annah Mutua & another* [2017] eKLR, the Court of Appeal had the following to say on burden of proof: -

> "...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? In this case, the incidence of both the legal and evidential burden was with the appellant..."

42. The agency notices were issued as a result of failure to return the transit bond retired and cancelled erroneously. This was communicated to the 1st Appellant within a period of two (2) months of the erroneous cancellation. Having not discharged its burden of showing that the transit goods were exported out of the country through the required documentation, I am afraid that I cannot impeach the Trial Court's findings both in allowing the Respondent's claim and dismissing the counterclaim.

43. The Trial Court had the advantage of seeing the witnesses and observing their demeanor. This court lacks that advantage and as various decisions of this court and the other Superior Courts above have decreed, a court sitting on appeal must and should be slow to interfere with a Trial Court's findings of fact unless and only if those findings are perverse. In *Peters v Sunday Post Ltd* [1958] EA 424, it was held thus: -

> "...Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

44. I have said enough to show that the present appeal lacks merit and the only order lending itself is one for dismissal.

45. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* 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.

46. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it

can be shown that they acted unreasonably. The *Halsbury's Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

47. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & others v Tarlochan Rai & others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows:

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

48. I have said enough to show that award of costs is intertwined with the court's exercise of discretion. In the absence of any evidence that the same was not exercised judiciously or in the converse, exercised capriciously, I see no reason to interfere with the Trial Court's exercise on its discretion on award of costs. It is obvious that costs can be determined from the award and I see no dispute on this aspect. I thus affirm the Trial Court's award on costs.

49. The Respondent having succeeded in defending its award, it is awarded the costs of this appeal.

50. Flowing from the above, I proceed to make the following disposition: -

    a. The appeal herein lacks merit and is hereby dismissed.

    b. The Respondent shall have costs of this appeal as well as costs of the court below.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 30TH DAY OF MAY, 2023.**

**.....**

**F. WANGARI**

**JUDGE**

In the presence of:

Banji Advocate for the Appellants

Abaja Advocate h/b for Mogaka Advocate for the Respondent

Barille, Court Assistant