Apex Steel Limited v Tata Steel International (UK) Limited (Civil Appeal 205 of 2020) [2022] KEHC 14300 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 205 OF 2020

DAS MAJANJA, J

OCTOBER 21, 2022

BETWEEN

APEX STEEL LIMITED ..... APPELLANT

AND

TATA STEEL INTERNATIONAL (UK) LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. N. Gesora, CM dated 30th April 2020 at the Nairobi Magistrates Court, Milimani in Civil Case No. 1808 of 2018)

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal filed by the Appellant that is grounded in its Memorandum of Appeal dated 26th May 2020 where the Appellant seeks to set aside the judgment and decree of the Subordinate Court dated 30th April 2020 awarding the Respondent USD 75,060 with interest thereon.

2. The facts giving rise to the suit in and this appeal are common ground and can be gleaned from the record. At the material time, the parties had a business relationship where the Respondent would supply the Appellant with goods namely steel billets from time to time.

3. Between August and September of 2014, the Respondent supplied the Appellant with goods worth USD 1,660,000.00 through two sale contracts referenced as PCS1700673 and PCS1700660. In October 2014, the Respondent further supplied the Appellant with goods worth USD 407,790.88 through the contract referenced as PCSHM00048-B. When the Appellant complained that the goods supplied were defective, the Respondent agreed to discount the original value price for the two initial contracts and issued the Appellant with two credit notes totaling USD 301,550 meaning a sum of USD 261,287 remained payable on the two initial contracts. The Appellant paid USD 186,227 leaving a balance of USD 75,060 which formed the basis of the Respondent's suit before the Subordinate Court.

In its Plaint, the Respondent sought, inter alia, USD 75,060 together with interest at the commercial rate of 14% from 6th January 2016 until payment in full.

4. In its response to the suit, the Appellant stated that all the goods in respect of all the three sale contracts were defective and that the Respondent was to issue it with three and not two credit notes. The Appellant stated that a further credit note worth USD 75,000 was to be issued against the third sale contract and as such, the Appellant applied the credit against the balance of USD 261,287 in making the payment of USD 186,227. The Appellant thus averred and admitted that it only owed the Respondent USD 60 which it has always been willing to pay. The Appellant also sought to counterclaim and or set off USD 75,000.00 on account of the credit note on the third contract which the Respondent failed to issue.

5. The Respondent denied the Appellant's claim and averred that all the three contracts were different and distinct from each other and that the third contract did not have any defect and as such, no credit note was to be issued against it. The Respondent further denied agreeing to issue a credit note of USD 75,000 to the Appellant.

6. The matter was set down for hearing with each of the parties calling witnesses, producing evidence and filing submissions in support of their respective positions. After considering the pleadings, evidence and submissions filed by the parties, the learned trial magistrate delivered the judgment on 30th April 2020.

7. Since the first two contracts together with the credit notes thereon were admitted, the issue framed for determination by the court was whether there was a third contract and in so doing was called upon to determine the admissibility of communication by way of the 'WhatsApp' application relied upon by the Appellant as having formed the basis of the third contract. The learned magistrate did not find any evidentiary value in the communication on the ground that it did not meet the threshold set out in section 65(5) of the *Evidence Act* (Chapter 80 of the Laws of Kenya). In its evidence, the Appellant's admitted that it was holding USD 75,000.00 on account of the defects for set off. The trial magistrate therefore held that it would be untenable to accept the argument by the Appellant it was holding on to the USD 75,000 in anticipation of performance of a contract and that in any event, the contract provided for a mechanism of resolving any dispute by way of arbitration under the laws of Hong Kong. In sum, the subordinate court held that the admission by the Appellant that it was holding on to the Respondent's funds was clear proof of indebtedness and that there was no basis for such an action. As such, the learned magistrate found that the Respondent had proved its claim and entered judgment in its favour. It is this decision that the Appellant is dissatisfied with and is now the subject of the instant appeal which was canvassed by way of written submissions.

Analysis and Determination

8. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the *Civil Procedure Act* to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. As submitted by the Respondent, this principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

> [An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...

9. With the above in hindsight, the court is to determine whether the subordinate court arrived at the correct conclusion both in law and fact in its finding that the Appellant had admitted indebtedness and the Respondent had proved its case against the Appellant. Whereas the subordinate court determined whether or not there was a third contract, I find that its existence was not in dispute in the first place as the Respondent explicitly pleaded and admitted in its Reply to the Appellant's Defence and Counterclaim that there were three contracts including the third one referred to by the Appellant. The points of departure were whether the supply under this third contract was defective and if so, whether the Respondent promised or was to issue a credit note of USD 75,000 against it.

10. In its Defence and Counterclaim, the Appellant stated that all the goods supplied under the three contracts were defective and that the Appellant had agreed to issue credit notes on account of the said defects including a credit note of USD 75,000 for the third contract. The Respondent denied that the third contract had any defects or that there was any agreement, oral or otherwise to issue a third credit note of USD 75,000 on account of the third contract. Since it was the Appellant who introduced the issue of the third contract, the alleged defects of the supply and the alleged credit note of USD 75,000, it was incumbent upon it to prove those claims as sections 107 and 108 of the *Evidence Act* provides that he who asserts must prove. Further a person has the burden of proving facts that are peculiarly within its knowledge as provided by section 112 of the *Evidence Act* which states that, "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

11. The Appellant relied on communication transcripts from a messaging application known as 'WhatsApp' between representatives of the parties to demonstrate its averments above. Whereas the Subordinate Court held that the said transcripts offended section 65(5) of the *Evidence Act* which required certain conditions for computer print-out evidence to be admitted, I note that the same was produced by the Appellant without any substantive objection from the Respondent and thus, no prejudice was occasioned on the Respondent as it was even able to cross-examine the Appellant's witnesses on the same. In any event, I have gone through the said communication transcripts and I do not find anything specific about the third contract, its connection to the initial two contracts or any agreement or commitment by the Respondent to issue any credit note, let alone one for USD 75,000. The conversations or chats between 14th October 2014 to 17th September 2016 are of a very general nature and do not assist the court.

12. I therefore agree with the learned magistrate that the said communication has little or no probative value to the Appellant and does not demonstrate any connection between the three contracts or any admission of liability for defects on the part of the Respondent or any agreement for the setting off of the amount due in the previous contracts through a credit note of USD 75,000.00.

13. It is for this reason that I find that from the evidence, the Appellant withheld paying the Respondent the balance of USD 75,060 from the two initial contracts without any justification and that the learned magistrate arrived at the correct conclusion in finding in favour of the Respondent.

Disposition

14. For the reasons I have given I now dismiss this appeal with costs.

conclusions

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.

J. SERGON (DR)

JUDGE

----------instructed by Hamilton, Harrison and Mathews Advocates for the Appellant.

----------instructed by Muma Nyagaka and Company Advocates for the Respondent.