



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.202 OF 2018

MEA LIMITES.....1ST APPELLANT

NITRON GROUP LIMITED..... 2ND APPELLANT

VERSUS

MULTISHIP INTERNATIONAL LTD.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. J. M. NANG'EA,

Chief Magistrate delivered on 10th September, 2018 in Mombasa

CMCC No.523 of 2017)

JUDGMENT

1. The Respondent **MULTISHIP INTERNATIONAL LTD** vide a **Plaint** dated **30th March, 2017** filed a suit being **Mombasa Chief Magistrates' Civil Case No.523 of 2017**, wherein it sought for orders that:-

- a) A declaration that the 1st and 2nd Appellants refusal to pay it outstanding balance of USD39,498.50 as well as Kshs.57,156.00 is in breach of its bagging contract between it and the 1st Appellant.*
- b) An order for payments to the Plaintiffs of Kshs.57,156.00 both within 30 days from the date of Judgment.*
- c) Costs of the suit.*
- d) Interest on (a) and (b) at commercial rates from date of filing suit, and;*
- e) Any other order the court may deem fit to grant.*

2. The **Plaint** was opposed by the joint defence of both the Appellants who also filed a **Counter-claim** dated **10th May, 2017**.

3. The Appellants pleaded that there was an undated contract between themselves which addressed the sale and other costs including demurrage. They contested the fact that the Plaintiffs did indeed adhere to the agreement between the 1st Appellant and Respondent. They concluded that because of the deviation from the stipulations of that contract, there was delay in discharging the ship hence demurrage charges. They filed a **Counter-claim** in which they alleged that the custom of the shipping industry is that;-

“once on demurrage always on demurrage”.

They claimed that the Respondent is liable to pay USD37,163.89 interest and costs of the suit.

4. The Respondent filed a reply to the defence and defence to the Counter-claim dated **25th May, 2018** in which it specifically denied the first allegations and stated that the ship had three (3) cranes instead of four (4) which slowed the process. It also denied that it was the undisclosed agent of the 2nd Defendant and by the 2nd Defendant making the payment, it was due to the instructions of the 1st defendant.

5. In its defence to the Counter-claim, the Respondent denied all allegations, in particular, that it is liable to pay USD37,176.89 as demurrage. Further, that it was not entitled to indemnify the 1st Appellant and prayed that the Counter-claim be dismissed with costs.

6. The case proceeded for hearing whereby the Respondent availed three (3) witnesses who testified on its behalf. PW1 adopted his written statement dated **30th March, 2017** and was cross-examined on it. He briefly narrated what the Plaintiffs' Company did and explained that the contract of bagging entered into between it and the 1st Appellant did not extend to demurrage. He also claimed that the 2nd Appellant is a stranger to them. He attributed the delay for time allocated to the ship to dock, to the delay in arrival, bad weather, and the ship itself, which had less cranes, that is three (3) instead of the contracted four (4) and the 1st Appellant's supply of defective and undersize bags. There was also delay caused by the haulage vehicles which were less in number on daily basis on which was not part of the contract with the 1st Appellant.

7. PW2 confirmed that he indeed worked on the defective bags and was paid a sum of Kshs.57,156.00.

8. The Defendants/Appellants called three (3) witnesses as well who testified on their behalf. DW1 was neither the one who prepared a statement of facts nor was he privy to the **Charter-Agreement**. He did not point out who may have caused the delay.

9. DW2 is the **General Manager** of **Transec Company Ltd** which was sub-contracted by **Seaforth** to offer clerical services.

10. DW3 told court that he was the **Logistics Officer** at 1st Appellant. He admitted that he was privy to the facts of the meeting held on **29th November, 2016**, which discussed the issue of demurrage. He told court that there was an agreement entered between the 1st and 2nd Defendants where it was agreed that the 2nd Defendant/Appellant would pay demurrage. He also told court that they did not file **Charter Agreement** between the 2nd Appellant and the ship-owner. Parties closed their respective cases and filed their written submission.

11. Before the lower court, the Respondent submitted on five (5) issues and concluded that by the contract dated **1st April, 2016**, it had discharged its obligations professionally and were not liable to demurrage charges. It also stated that they were entitled to full payment and refund of the amount paid for extra labour and costs of the suit. It placed reliance on the decision of the Court of Appeal in **National Bank of Kenya –vs- Pipeplastic Samkolt (K) Ltd [2001]eKLR**.

12. The Appellants on the other hand, in their undated written submissions filed in court on **17th August, 2018** submitted that the core thrust is that the Respondent breached the bagging contract with the result that it caused delay and demurrage paid by the 2nd Defendant. They concluded that the Respondent was liable as loss suffered by the 2nd Defendant is a direct result of the Respondent's breach of bagging contract.

13. In its **Judgment** delivered on **10th September, 2018**, after analyzing the evidence, the court concluded that the Plaintiff was not guilty of any breach of contract between it and the 1st Defendant. The court held that the 1st Defendant was liable to pay the Respondent and entered **Judgment** as follows:-

a) A declaration issues that the 1st Defendant's refusal to pay the Plaintiff outstanding balance of USD39,498.50 is in breach of the technical contract between them.

b) The 1st Defendant is ordered to pay the said sum of USD39,498.50 to the Plaintiff within 30 days of the Judgement.

c) The 1st Defendant will bear the costs of the main suit.

d) The suit as against the 2nd Defendant is dismissed with no orders as to costs as it was the 1st Defendant that involved it in the bagging exercise.

e) Interest shall be computed at court rates from the date of filing suit.

f) The Counter-claim is dismissed with costs to the Plaintiff payable by both Defendants jointly and severally.

14. This is what triggered the Appeal vide a **Memorandum of Appeal** dated **2nd October, 2018**. The same is predicated on six (6) **Grounds of Appeal** as follows:-

a) The learned Magistrate erred in law and in fact in finding that the 1st Appellant breached the bagging contract.

b) The learned Magistrate erred in law and in fact in refusing or failing to find that the Respondent breach express terms of the bagging contract.

c) The learned Magistrate erred in law and in fact in refusing or failing to find that the Respondent was responsible for the delay in discharging the vessel within the prescribed lay time and was therefore consequential demurrage.

d) The learned Magistrate erred in law and misdirected himself by failing to find that the Respondent was responsible for the losses suffered by the 2nd Appellant as a result of the demurrage as a result.

e) The learned Magistrate erred in law and in fact in finding that the Respondent had proved its case on a balance of probability against the 1st Appellant.

f) The learned Magistrate erred in law and misdirected himself by refusing or failing to allow the Appellants' Counter-claim against the Respondent.

The court was then asked to allow the Appeal and set aside the **Judgment** delivered on **10th September, 2018**, and award costs to the Appellant.

15. The Appellant filed the **Record of Appeal** on **6th November, 2020** and the court proceeded to admit the Appeal for hearing on **11th November, 2020**, whereby directions also issued that the same be canvassed by way of written submissions. Both parties filed their written submissions on **16th December, 2020** which they opted to rely upon in their entirety in support of their respective positions.

Analysis and determination

16. This is a first Appeal and hence the duty of this Court, as a first Appellate Court is to analyze and evaluate the evidence on record afresh and reach its own independent conclusion while being minded that it did not have an opportunity to see or hear the witnesses testify so as to appreciate their demeanour and give allowance. The Court of Appeal in the case of **PIL Kenya Ltd -vs- Oppong [2009]KLR 442**, stated that:-

“It is the duty of the Court of Appeal, as first a first Appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.

17. I have carefully read through the **Record of Appeal** and submissions filed herein. In consideration of the **Grounds of Appeal** in line with the proceedings of the Lower Court and the submissions filed by the Counsel for the parties in respect of the Appeal herein, I find the issues for determination being:-

a) Whether there is privity of contract between the Respondents on one side and the 1st Appellant on the other hand.

b) Whether the Respondent is liable on undated agreement between the 1st and 2nd Appellants.

c) Who is liable to pay demurrage charges.

18. In Kenya, the law on privity of contract is the one set down by the Court of Appeal in the case of **Agricultural Finance Corporation – vs- Lengetia Ltd & Jack Mwangi [1985]eKLR**, where the Court categorically states as follows:-

“As a general rule, a contract affects only the parties to it, and it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or make him liable to it. The fact that a person who is a stranger to the consideration of a contract stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

19. In this case, the court was faced with two contracts, one between the 1st Appellant and the Respondent dated **1st April, 2016** and another between the 2 Defendants dated **March 2011**. Applying the principle stated herein, only the 1st Appellant and the Respondent can sue each other for breach of any terms therein. The service that the Respondent was required to provide for were eleven (11) in number. The 12th one was turnover of 3000mt per weather working day (PWWD).

20. It was contended by the 1st Appellant that because the Respondent installed only three (3) machines instead of four (4), it had caused delay. However, it came out that there is evidence that several other factors caused the delay.

21. On the issue of the provision of three (3) bagging units, it was found as a fact that the ship was customized for three (3) cranes and as such there is nothing more that the Respondent could have done. In subsequent meeting held by the parties, the issue was acknowledged and variations were made. I equally find as did the trial court, that the material available does exonerate the Respondent.

22. Liability of demurrage charges is covered by the agreement for sale between the 1st and 2nd Appellants. It states as follows:-

Clause 9: Demurrage

“Cargo shall be discharged at the rate of 2,500 metric tonnes per weather working day of the consecutive hours, Sundays and Holidays excluded, even if used. Laytime commence 0800 hours of the following day a Notice of Readiness (NOR) is tendered. If NOR is tendered during office hours (0800 -17.00) in case vessel is longer detained, demurrage shall be invoiced to the Buyer at the rate specified in the Charter Party of the carrying vessel”

23. What is more clearer than the agreement specifying who is liable to pay demurrage! The rate can only be established if the Charter Agreement was availed to court. And just as the trial court, this Court arrives at the same conclusion as it did, and finds the 1st Appellant

liable to pay. The principle of privity of contract applies herein in its full intent and purposes. The Respondent was not a signatory to the agreement and cannot be held liable on that contract.

24. Having come to the same conclusion as did the trial court, the Appeal is dismissed with costs to the Respondent to be paid by the 1st Appellant.

25. In the end, the Judgment of the Lower Court be and is hereby upheld.

Orders accordingly.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MARCH 2021.

D. O. CHEPKWONY

JUDGE