



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 227 OF 2018

HELIAS HAULIERS LIMITED.....APPELLANT

-VERSUS-

EAST AFRICA CARGO LOGISTICS LIMITED.....RESPONDENT

(An Appeal from the judgment of Hon. Julius M. Nang'ea, Chief Magistrate, delivered on 15th October, 2018 in

Mombasa Chief Magistrate's Court Civil Case No. 1521 of 2015).

JUDGMENT

1. The claim against the respondent (the defendant in the lower court) was for the sum of USD 21,800.00 allegedly due and outstanding to the appellant in respect of transportation and logistical services rendered by the appellant at the respondent's request and instance sometime in the year 2014. The appellant stated that the respondent in purported part discharge of the aforementioned sum issued in favour of the appellant a cheque No. 000083 dated the 19th January, 2015 for a sum of USD 21,000.00 which was dishonored upon presentation to the bank for payment
2. The respondent filed its statement of defence and counter-claim dated 17th September, 2017 which was later amended on 25th August, 2017, where it admitted having received transport services from the appellant but claimed that it fully paid for the same. The respondent denied being indebted to the appellant and averred that it issued a cheque for the sum of USD 21,000.00 to the appellant on the understanding that it would be banked once funds were deposited into the respondent's bank account by a third party, City Link Limited, to whom the appellant had offered transport services
3. The respondent further averred that the appellant directly contacted the said third party and obtained USD 14,900.00 and then proceeded to deposit the said cheque fully aware that the third party had not deposited the funds into the respondent's bank account. It was further stated that even after issuing the cheque for USD 21,000.00 which was dishonored, the respondent continued trading with the appellant and paid it further sums of USD 25,400.00 on 5th February, 2015 and USD 8,100.00 on 10th February, 2015. The respondent's requirement was for the appellant to produce particulars of the services whose payments were not made by the respondent.
4. In its counter-claim, the respondent averred that it is a clearing agent and it contracts with third parties to transport cargo to its respective clients. It was stated by the respondent that on numerous occasions, it contracted the appellant to transport cargo belonging to the respondent's clients on the terms and conditions contained in respective transport agreements. The respondent further averred that in breach of the said agreements, the appellant illegally detained container No. MSKU 9746721 on account of non-payment when it had received the full contractual price, container No. CLHU 9071558 on account of non-payment, yet the alleged non-payment was owed by a different clearing agent and the cargo belonged to a different importer and container Nos. BOMU 4463561 and EISU 9193045. The respondent alleged that the detention amount owed was paid directly to the appellant yet it was still claiming detention charges from it. It was also alleged that the appellant was claiming detention charges from the respondent for container No. EISU 9402778 when the appellant's agent had already directly obtained USD 200.00 from the client for the same detention.
5. The respondent averred that it was a common trade usage in the clearing and forwarding industry for transporters not to get paid by the clearing agent's clients but by the clearing agent, thus the appellant's actions were in breach of the common trade usage. The respondent claimed that as a result of the foregoing, it lost the opportunity to clear other containers for respective clients thereby losing business opportunities of approximately USD 5,400.00 per container at a conservative estimate of 20 containers for one year.
6. The respondent averred that in the year 2014, the appellant incorporated a sister company trading as G.M.K Agencies Limited dealing in clearing and forwarding and it had been trying to get business for its clearing and forwarding arm by making malicious representations against the respondent, causing it to suffer general damages

7. The appellant filed a reply to the statement of defence and a defence to the counter-claim dated 20th November, 2015, where it denied all the allegations contained in the respondent's counter-claim. It averred that any payment received directly from the principal client was with prior knowledge and concurrence of the respondent. The appellant further averred that G.M.K Agencies Limited was a separate legal entity from it, carrying on different business from the appellant.

8. In the lower court, judgment was entered in favor of the respondent whereby the appellant's suit was dismissed with costs to the respondent and in the counter-claim, the respondent was awarded half of the damages for loss of business opportunity at USD 5,400.00 per container at a conservative estimate of 20 containers for one year plus interest at commercial rates of 20% from the date of filing suit until payment in full and costs of the counter-claim.

9. The appellant was dissatisfied by the decision of the Trial Magistrate and on 9th November, 2018, it filed a memorandum of appeal raising the following grounds of appeal-

(i) That the learned Magistrate erred in law and fact in finding that the plaintiff had not proven its claim in the main suit on a balance of probabilities yet the plaintiff had placed uncontroverted oral and documentary evidence before the Court to demonstrate how the claim sum of USD 21,800.00 accrued and became payable by the defendant;

(ii) That the learned Magistrate erred in law and fact in finding that the defendant was not at all indebted to the plaintiff when there was uncontroverted evidence on record clearly showing that the defendant had committed in writing to pay the plaintiff the claim sum severally prior to the filing of the suit before the Court;

(iii) That the learned Magistrate erred in fact and law in failing to appreciate and make a finding on the material fact that both parties produced in evidence the same statements of accounts that unequivocally and consistently demonstrated the same transactions between the parties and attested to the amount of USD 21,800.00 being properly due and payable by the defendant to the plaintiff;

(iv) That the learned Magistrate erred in law and fact in failing to appreciate and make a finding on the material evidence of the defence witness admitting and confirming that no payments were made by the defendant to the plaintiff outside the amounts reflected in the congruous statements of accounts produced before the court;

(v) That the learned Magistrate erred in law and fact in finding that the plaintiff's claim under prayer (a) of the plaint for a sum of USD 21,800.00 was not properly pleaded yet there was uncontroverted evidence that had been placed before the Court to clearly demonstrate that the defendant held a running account with the plaintiff and which account remained active until sometime in 2015;

(vi) That the learned Magistrate erred in law and fact in failing to appropriate (sic) and make a finding that both parties led evidence of transactions and outstanding payments arising between them in 2015 and to that extent the transactions and payments due and payable in respect of the year 2015 by reason of the evidence of both parties became an issue properly and available for due determination by the Honourable Court;

(vii) That the learned Magistrate erred in law and fact by dismissing the plaintiff's claim substantively informed by matters of technicalities as opposed to determining the claim on its proper merit and in rendering substantive justice by being appropriately guided by the contents and spirit of the provisions of Article 159 of the Constitution of Kenya, 2010;

(viii) That the learned Magistrate erred in law and fact in finding that the defendant had proven its claim in the counter-claim as against the plaintiff when there was no evidence whatsoever placed before the Court to demonstrate that the defendant had suffered any loss of business as alleged and that the said loss if at all, was occasioned by the plaintiff;

(ix) That the learned Magistrate erred in law and fact when he proceeded to award the defendant half of the amount claimed for loss of business even after analyzing the evidence and properly finding that the defendant had not placed any evidence before Court to demonstrate that it was indeed the plaintiff that had occasioned the alleged loss of business;

(x) That the learned Magistrate erred in law and fact in failing to appreciate and make a finding that the defendant did not adduce any evidence and/or produce any material books and financial statements at least to demonstrate its income from transit containers handled in given past (sic) financial years;

(xi) That the learned Magistrate erred in law and fact in making reference to evidence that was not in issue and/or in relating to evidence that was calculated on the part of the Court to justify the grant of the counter-claim; and

(xii) That the learned Magistrate erred in law and fact by misdirecting himself in failing to fully consider the oral and documentary evidence on record and in failing to consider and appreciate the witness statements filed by both parties, the written submissions filed by the plaintiff and the relevant case law cited therein.

10. The appellant's prayer is for this Court to allow the appeal with costs, an order for the judgment of the lower court with all the consequential decree or orders to be set aside, for the suit filed by the plaintiff to be allowed and for the defendant's counter-claim to be dismissed with costs to the plaintiff.

11. The appeal herein was canvassed by way of written submissions. On 30th October, 2020, the law firm of Sherman Nyongesa & Mutubia Advocates filed written submissions on behalf of the appellant. The respondent's submissions were filed on 15th January, 2021 by the law firm of Gikandi & Company Advocates.

12. Ms. Naliaka, learned Counsel for the appellant submitted that the claim before the Trial Court was for a sum of USD 21,800.00 which had accrued on account of a running account for the entire period within which the parties transacted in the years 2014 and 2015 as asserted by Benson Mwangi Gumo (PW1). She stated that the said witness had produced a statement of accounts which was similarly produced by the respondent corroborating the assertion that the sum of USD 21,800.00 remained unpaid as at the 31st December, 2015.

13. She submitted that the respondent had severally committed in writing to pay the appellant the aforementioned sum and as such, it was precluded from denying the existence of the said debt. She further submitted that the respondent's witness in her evidence confirmed that indeed payments which were made were reflected as per the invoices made. She also stated that auditing was done regularly and that the statement of accounts showed that as at 31st December, 2015 the sum of USD 21,800.00 was pending payment.

14. Ms. Naliaka stated that the appellant did not plead the fact that the claim related to the sums accruing and which fell due and payable in the year 2015, but the appellant led evidence and produced documents to support the fact that the claim spanned to the year 2015. She submitted that parties are bound by their pleadings and a Court is called upon to pronounce itself only on the pleadings before it unless the issues have by way of evidence been raised and evidence led by the parties, would the Court pronounce judgment on an issue not pleaded. She cited the case of **Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others** [2014] eKLR.

15. The appellant's Counsel submitted that in the respondent's defence and counter-claim dated 17th September, 2015, the respondent prayed for special damages for loss of business opportunity at USD 5,400.00 among other prayers but there was no sufficient evidence placed before the Trial Court to prove breach of contract culminating in the loss of business suffered as alleged by the respondent. She further submitted that a claim for breach of contract has to be certain, specifically particularized and proven. She also submitted that the witnesses on behalf of the parties to this appeal confirmed in the lower court that the two companies had traded for an extended period of time and it was customarily agreed that certain clients such as City Link, would make payments directly to the appellant.

16. Ms. Naliaka contended that the respondent's witness stated on oath that the respondent did not protest to the appellant's direct dealings and that they would authorize the appellant as a matter of practice to collect storage charges from the respondent's clients and charge delay charges before offloading the consignments. She stated that the appellant did not breach its contract with the respondent in anyway and a claim for loss of business could not stand in the absence of breach of contract.

17. She submitted that just like a claim for breach of contract, a claim for loss of business must be certain, specifically pleaded and proved. She stated that no evidence was led to prove the specific amount pleaded and neither was evidence led to show how much the respondent earned for a specific container and for a specific client, to prove the allegation for loss of revenue. To support her submission in that aspect, she relied on the case of **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited** [2016] eKLR.

18. Ms. Naliaka was of the view that the appellant's case before the Trial Court was proved on a balance of probabilities. She urged this Court to set aside the decision by the Trial Court and allow the appeal herein since the said Court decided the case based on the wrong principles of law.

19. Ms. Murage, learned Counsel for the respondent submitted that the appellant's claim was for a sum of USD 21,800.00 for transportation and logistical services rendered to the respondent sometime in the year 2014 but the statements of accounts tendered by the appellant in its evidence covered claims for the years 2014 and 2015. She stated that the appellant in its evidence confirmed that although the plaint showed that the appellant's claim was in respect of services rendered to the respondent in the year 2014, the claim also covered the period extending to the year 2015. She pointed out that the claim captured at page 97 of the Record of Appeal in the appellant's statement of accounts in the sum of USD 13,500.00 was for the period 2nd May, 2015 to 2nd September, 2015, which was not pleaded in paragraph 3 of the plaint.

20. Ms. Murage further submitted that parties are bound by their pleadings and that any evidence led by any of the parties which was inconsistent with the averments of the pleadings must be disregarded. Reliance was placed on the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others** [2014] eKLR, where the Court of Appeal held that in the adversarial system of litigation 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.

21. It was submitted by the respondent's Counsel that after issuing the cheque for the sum of USD 21,000.00 on 19th January, 2015 which was dishonored, on 5th and 10th February, 2015, the respondent paid to the appellant USD 25,400.00 and USD 8,100.00 respectively, thereby making a total payment of USD 33,500.00 which was essentially for the purposes of reducing the then outstanding debt and that the said evidence was not rebutted by the appellant. She further submitted that under Sections 107 and 108 of the Evidence Act, the legal burden rests with the plaintiff to prove its claim, as such, the appellant was under a duty to place before the Court evidence to sustain the averments in its plaint as the respondent tendered evidence to show that it was not indebted to the appellant. She stated that at that point, the evidential burden shifted to the appellant.

22. Ms. Murage relied on the Court of Appeal decision in **Munyu Maina v Hiram Gathiha** [2013] eKLR and submitted that where a party fails to rebut the evidence of another, the fact in issue is deemed as proved on the basis of that available evidence.

23. She submitted that the respondent led evidence by way of the email dated 31st October, 2014 to prove that the appellant had directly contacted the respondent's client by the name Taishan demanding truck detention charges for container EISU9402778. It was contended that the foregoing was contrary to the common trade usage that existed between the appellant and the respondent whereby ordinarily, the appellant was not supposed to demand detention charges directly from the respondent's clients unless with express authority in writing from the respondent. She further submitted that as a result of the appellant directly engaging its clients, it caused the respondent loss of business.

24. She also submitted that in support of its claim for loss of business opportunity at USD 5,400.00 per container at a conservative estimate of 20 containers for 1 year, the respondent relied on its statement of accounts which capture the average business transactions that the appellant carried out with the respondent between the years 2013 and 2015. She was of the view that the Trial Magistrate was justified in

finding that the respondent had proved its counter-claim on a balance of probabilities. Ms Murage urged this Court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

25. This being a first appeal, this Court is enjoined to analyze and re-examine the evidence adduced before the lower court afresh and reach its own conclusion, while bearing in mind that it neither saw nor heard the witnesses testify and make an allowance for the said fact. In **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates** [2013] eKLR, the Court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

26. An appellate court will only interfere with the decision of the Trial Court if the said Court misdirected itself on the facts adduced and based its decision on wrong principles of law. That was the holding by the Court of Appeal in **Mkuba vs Nyamuro** [1983] LLR, at 403 where **Kneller & Hannox Ag JJA** held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

27. The issues for determination in this appeal are-

(i) Whether the appellant proved its claim on a balance of probabilities; and

(ii) Whether the appellant breached its contract with the respondent, occasioning it loss of business thus entitling the respondent to USD 5,400.00 per container at a conservative estimate of 20 containers for one year.

Whether the appellant proved its claim on a balance of probabilities.

28. The appellant's claim was for payment of USD 21,800.00 which was due and outstanding from the respondent in respect of transportation and logistical services rendered by the appellant at the respondent's request sometime in the year 2014. On the face of the pleadings in this matter, it can be easily discerned that the appellant's claim before the Trial Court was for special damages. In accordance with the law, special damages must not only be specifically pleaded but must also be strictly proved.

29. In the Court of Appeal decision in **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd** [2013] eKLR, the Court stated as follows with regard to special damage claims -

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case:

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:

“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

30. The statements of accounts which the appellant relied on as evidence in the lower court, cover claims for the years 2014 and 2015, particularly the claim between 2nd May, 2015 and 2nd September, 2015 adding up to the sum of USD 13,500.00 which was not pleaded in the appellant's plaint. The respondent further submitted that since parties are bound by their pleadings, any evidence led by any of the parties

which is inconsistent with the averments of the pleadings must be disregarded.

31. From the record, the appellant's witness testified that the appellant had a running account with the respondent whereby it would provide logistic and transport services for payment. He also stated that it had been allowed to receive payments directly from the respondent's client, City Link Company. He stated that the respondent owed the appellant USD 21,800.00 and in an attempt to pay the said sum, the respondent issued it with a cheque dated 19th January, 2015 for USD 21,000.00 which was dishonoured for insufficient funds. Thereafter, through an email dated 19th March, 2015, the respondent sought for more time to pay the outstanding amount.

32. During cross examination, the said witness indicated that there were claims in the statement of accounts for the period 2015 and even after the cheque dated 19th January, 2015 was dishonoured, the appellant continued doing business with the respondent. The appellant's witness acknowledged receipt of money from City Link Company, one of the respondent's clients and stated that it received an email dated 19th February, 2015 from the respondent's Accountant, authorizing the said company to pay the appellant directly.

33. The respondent's witness confirmed that it issued the appellant with a cheque for USD 21,000.00 which was dishonoured and that its client City Link Company irregularly paid the appellant USD 14,900.00 after the said appellant dishonestly contacted it for the payment. She stated that subsequent to that payment, it made payments on 5th February, 2015 and 10th February, 2015 of USD 25,400.00 and USD 8,100.00 respectively, to the appellant, hence the total sum of USD 33,500.00 exceeded the debt owed to the appellant.

34. It is noteworthy from the statement of accounts produced by the appellant that as at 1st November, 2014, the respondent owed the appellant USD 8,300.00 and the said debt continued to accumulate and as at 2nd September, 2015, the debt was at USD 21,800.00. The respondent went ahead and acknowledged owing the appellant USD 19,000.00 and Kshs. 2,100,000/= as can be seen from an email dated 19th March, 2015 where it was stated that the said money would be cleared on or before 19th April, 2015. Also looking at the statement of accounts produced by the respondent it is clear that as at 31st December, 2015, there was an outstanding debt of USD 21,800.00 owed to the appellant by the respondent. The said statement also shows that the appellant and the respondent continued trading on behalf of the respondent's clients other than just City Link Company.

35. There are numerous authorities to the effect that parties cannot raise matters that are not in their pleadings. See the case of **Mahamud Muhumed Sirat vs Ali Hassan Abdirahman & 2 others** [2010] eKLR & **IEBC & Another vs Stephen Mutinda Mule & 3 others**, Civil Appeal No. 219 of 2013, where the Court of Appeal emphasized that parties are bound by their pleadings consequently limiting the issues upon which a Trial Court may pronounce itself. Similarly, in the case of **Gandy v Caspair** [1956] 23 EACA 139, Sinclair V-P held that:

“as a rule relief not founded on the pleadings will not be given”.

36. However, there are equally a considerable number of judicial authorities to the effect that where parties have raised an issue and left it for the decision of the Court, it can determine the issue even though it was not pleaded. This was the position held by the Court in **Odd Jobs vs Mubia** [1970] EA 476, where it was held that:

“A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”

37. Similarly, in **Herman P. Steyn v Charles Thys**, Civil Appeal No. 86 of 1996, the Court of Appeal when dealing with the issue of parties being bound by their pleadings observed as follows-

“First, it was submitted that the learned trial judge erred in failing to appreciate that there was no evidence on which he could find the plaintiff's case proved as pleaded and so also was the finding of the judge that the plaintiff had advanced to the defendant the claimed sums of money in Dollars overseas. It is true that the finding was an obvious and fundamental departure from the pleadings without any amendment of the same. But in our view the appellant himself introduced the unpleaded issue into the evidence, led evidence thereon, cross examined the plaintiff vigorously in relation thereto and acquiesced into the unpleaded issue being canvassed and left to the court for a decision. In addition, the defendant also called witnesses in support of his assertion that the money was loaned in Tanzanian Currency. Written submissions followed in which the advocates for both the parties dealt with this issue in detail. In these circumstances, the determination of that issue became an issue at the trial with neither party objecting and both parties fully participating in it. This ground of appeal, therefore, must fail.”

38. In **Uganda Breweries Ltd v Uganda Railways Corporation**, Civil Appeal No. 6 of 2001, the Supreme Court of Uganda adopted a similar view when it stated as follows-

“To my mind, the question for decision under ground 2(i) of the appeal appears to be whether the party complaining had a fair notice of the case he had to meet; whether the departure from pleadings caused a failure of justice to the party complaining..., or whether the departure was a mere irregularity, not fatal to the case of the respondent, whose evidence departed from its pleadings.”

39. Also see the case of **Richard Nchapi Leiyagu v IEBC & 2 others** (supra) on parties adducing evidence on an unpleaded issue, where the Court of Appeal held that although the issue of the opened ballot box was not pleaded in the petition, parties addressed it in the evidence that they led and in their submissions. The Court of Appeal went on to state that therefore the issue was placed before the learned judge without any objection from the 3rd respondent, and the said judge pronounced himself on the issue and made findings on it.

40. The Record of Appeal shows that the issue that the debt of USD 21,800.00 accrued in the years 2014 and 2015 was not pleaded in the plaint but both parties addressed it in the evidence that they led and produced statements of accounts that showed the existence of the said debt. The parties proceeded as if the said issue had been pleaded by the appellant in its plaint. It is therefore this Court's finding that the respondent had a fair notice of the case it had to meet thus the failure by the appellant to specifically plead that the debt complained of accumulated between the years 2014 and 2015 was not prejudicial to the respondent and not fatal to the appellant's case. In **Mutiso v Mutiso**, [1988] KLR 846, the Court held that;

“...even though the issue of a resulting trust had not been pleaded in the plaint, it nevertheless was a live issue throughout the trial and it had become an issue upon which the trial court could properly make a finding. Moreover, the Court also found that in the circumstances of the case the party who was complaining had not suffered any prejudice.”

41. It is this Court's finding that the Trial Magistrate erred in concluding that a part of the plaintiff's claim based on the statement of accounts produced relates to business transacted in 2015, while the plaintiff in paragraph 3 only referred to services rendered in 2014. The said Hon. Magistrate also held that the evidence was at variance with the claim. This court's finding is that the appellant proved its claim before the Trial Court on a balance of probabilities.

Whether the appellant breached its contract with the respondent, consequently occasioning it loss of business thus entitling the respondent to the said USD 5,400.00 per container at a conservative estimate of 20 containers for one year.

42. It is evident that through an email dated 19th February, 2015 the respondent's Accountant authorized City Link Company to pay the appellant directly. Thus the respondent cannot cry foul by stating that contrary to trade practice, the appellant dishonestly demanded payment directly from the said client thus being in breach of contract which led to loss of business from the said client.

43. As was held in **Richard Okuku Oloo v South Nyanza Sugar Co. Ltd** (Supra) special damages must not only be specifically pleaded but also proved. The respondent in its counter-claim averred that it is a common trade usage in the clearing and forwarding industry, that transporters do not get paid by the clearing agent's client but by the clearing agent thus by virtue of the appellant demanding payment directly from the respondent's clients, it was in breach of the common trade usage. The respondent claimed that as a result of the actions of the appellant, it lost the opportunity to clear other containers for respective clients thereby losing business opportunities of approximately USD 5,400.00 per container at a conservative estimate of 20 containers for one year.

44. The respondent further averred that in the year 2014, the appellant incorporated a sister company trading as G.M.K Agencies Limited dealing in clearing and forwarding and has been trying to get business for its clearing and forwarding arm by making malicious representations against the respondent, causing it to suffer general damages. It is evident that all the respondent did in an attempt to prove its case against the appellant was to throw words and figures at the head of the Trial Court without any justification or proof to warrant an award of the sums claimed. Section 107 of the Evidence Act Cap 80 Laws of Kenya 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.”

45. In light of the analysis made of the evidence before the Trial Court, this Court finds that the respondent did not prove how the appellant breached its contract, there was no independent evidence either orally or written from the said clients confirming that the appellant had solicited for business from them. The respondent did not adduce any evidence to show that the said clients are no longer willing to do business with them.

46. In an attempt to prove the amount claimed by the respondent in its counter claim, it relied on the appellant's statement of accounts which capture the numerous business transactions that the appellant carried out with the defendant between the years 2013 - 2015. No explanation was given as to why the respondent chose to rely on the said span of time despite the fact that it had been in business with the appellant for over seven years before that. It is noteworthy that the said statement of accounts is also in relation to other respondent's clients and not just one client.

47. The Trial Magistrate in the judgment granted the respondent half of the damages claimed for loss of business as there was no evidence that the plaintiff was responsible for loss of business that was being offered by the second client. This Court holds that the said finding by the Trial Court was contradictory as having found that there was no evidence that the appellant was responsible for loss of business, he could not have gone ahead to award the sums claimed by the respondent in the counter-claim. It is obvious that the **Hon. Magistrate erred in fact and law when he reached the wrong conclusion** that the respondent had proved the counter-claim on a balance of probabilities.

48. This Court's finding is that the appeal herein is merited and it is hereby allowed. The finding made by the Trial Court is hereby set aside and the respondent's counter-claim is dismissed with costs to the appellant. I therefore enter judgment for the appellant in the following terms-

(i) The respondent shall pay the appellant USD 21,800.00 with interest at court rates from the date of filing of the suit until payment in full; and

(ii) The appellant shall have costs of the lower court case and the costs of this appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF MAY, 2021. IN

VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Wafula for the appellant

Ms Murage for the respondent

Ms Bancy Karimi – Court Assistant