



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO 59 OF 2016

HARBOUR VESSEL CONTRACTORS CO LTD.....PLAINTIFF

VERSUS

INCHCAPE SHIPPING SERVICES KENYA LIMITED.....DEFENDANT

J U D G E M E N T

1. By a plaint dated 8th June 2016, the Plaintiff filed a suit, claiming general damages and an order of specific performance of a contract entered into with the Defendant and an order against the Defendant to reimburse wage disparities amounting to Kshs. 22, 893, 696.50/= costs of the suit and interest. The basis of the case as pleaded was that sometimes in the month of September 2012, parties entered into a contract a contract they called lashing and unlashng service agreement at an agreed consideration of Kshs 13 per metric ton for a period of two years whereafter the wage disparity of Kshs 27 per ton would be reimbursed. The dispute arose when after the initial two years the defendant failed to effect the reimbursement ton the plaintiff calculates at Kshs as at 11.05.2015. It was pleaded further that instead of meeting its obligations to the plaintiff, the defendant on 5.5.2015denied the plaintiff's agent access to a vessel for purposes of performing the contract on the basis that the plaintiff lacked authority and proceeded to contract a third party for the same work in frustration of the contract between the parties.

2. Together with the plaint, the plaintiff filed a witness statement and a bundle of documents including the service level agreement, bundle of invoices and correspondence exchanged between the parties.

3. The Defendant filed its defense on the 26th June 2016 denying the Plaintiff's claim ad asserting that the contract between the parties were clear and invited strict proof of the allegations at paragraphs 5,6,7 and 8 of the plaint pleading expressly that the claim would be contrary to Clause 7.5 and 4.1 of the suit contract. In effect the defendant took the position that the contract was never permanent and exclusive, was subject to orders by other users of the port and could be terminated on its terms. The allegations of breach were denied as much as the claim for specific performance. In conclusion it was asserted that the claim was accentuated by malice and that on its own terms the contract ousted the jurisdiction of the court.

4. The defendant also filed two-witness statement and a copy of the same service level agreement.

5. After the pleadings closed, a conference was held on the 21.3.2017when trial directions were issued and the matter then proceeded to hearing when each side called a witness a piece and the production of evidence in the matter closed.

6. PW1, Baya Kambi Chea, testified that he is the Managing Director to the Plaintiff Company and had been duly authorized as such by the Company to bring the claim. He relied on his witness statement, produced the bundle of documents as exhibit and said that he participated in the negotiation of the suit contract and was conversant with the facts. He said that his liquidated claim is grounded on the invoices produced. He prayed for the liquidated sum and that the contract be reinstated.

7. On cross examination, the plaintiff's witness said that the agreement was captured not only on the service level agreement but also on earlier letters and that it was never intended to be exclusive but depended on orders received. Even the rate of payment, he admitted was not expressly agreed, but was to be charged on case to case basis and that invoices were raised on 30 days' basis, some at Kshs 40 per ton and while others at Kshs 13 per ton. He confirmed that all the invoices tendered were settled and that he did the same at Kshs 13 per ton without any written reservations on the advice of the defendant. Critically the witness confirmed that there was no document confirming retention of the Kshs 27 per ton, that there was no contract to make a demand after two years and lastly that he had never sent an invoice to the sum claimed in the plaint. He said that as he gave evidence there was no invoiced rendered that remained unpaid.

8. In re-examination, the witness said that his last invoice was the one dated 11.5.2015 which had no relationship with the agreement of 26.5.2015 and that the sum claimed was the difference between the sum charged and the sum due to be charged. When asked a question by the court, the witness confirmed that there is no invoice charged at Kshs 27 per ton.

9. For the defendant, DW1, Bwanacheri Lali, the Defendant's Port operation manager, gave a testimony by relying of the witness statement and stated that the Company entered into a service level agreement with the Plaintiff's which agreement at clause 7.3 limited liability of both parties to direct damages and never consequential losses. He said that the plaintiff would provide services or request and would be paid on case to case basis per vessel. He said that all invoices submitted for work done and at the rate agreed were all paid and none remains outstanding as unpaid. The witness insisted that the agreement was executed and performed on its terms without any breach by the defendant and prayed that the suit be dismissed with costs.

10. In cross-examination by the advocate for the plaintiff, the witness confirmed that the letter at page 9 of the plaintiff's bundle was indeed written and it promised a permanent employment and confirmed there being no dispute on the law applicable and the place of suing in terms of clause 14 of the agreement

11. In re-examination, the witness said that the letter at page 9 was with specific reference to a particular shipping line which no longer operated in Mombasa.

Submissions offered

12. In the submissions filed on 13.08.2018 delineates four issues for determination asking the questions; if the court has jurisdiction, whether the service level agreement produced by both parties was the operative agreement between the parties; if there existed another enforceable agreement between the parties and if there was any unpaid sum due to the plaintiff.

13. Aligning his submissions to the said issues, counsel submitted that the court's jurisdiction had not been ousted because the cause of action arose prior to the agreement said to contain the exclusion clause. On what agreement governed the dealings between the parties and if there ever existed an enforceable contract between them.

14. The plaintiff took the position that both sides agree that the contract exhibited was executed well after the last invoice had been rendered and that the contract was not the subject of the dispute. He also submitted that the dealing between the parties was governed pursuant to an oral agreement made in the 2012 which is evidenced by a letter dated 2.1.2015 whose contents the defendant had not controverted or denounced. To support that position, the decision in **Abdulkadir Sharriff Abdirahim vs Awo Sharrif Mohammed, Nbi CACA No. 1 Of 2008** for the restatement of the law that it is not mandatory that a contract be in writing. On the last issue if the plaintiff is entitled to the remedies sought, it was submitted that there was evidence that there had been payment at the rate of Kshs 40 per ton as originally agreed. Reliance was put on the two sets of invoices to show that some money was retained.

15. For the defendant, the submissions filed on the 27.8.2018 asserted that the plaintiff's suit was bad for being inconsistent in pleadings; that the burden of proof was never discharged and as far as proof of the contract of 2012 was concerned and that being in the nature of special damages the same had not been sufficiently particularised. It was emphasized that it was not clear whether the plaintiff was relying on the agreement of 2012 and pleaded to have been a yearly relationship of the agreement dated the 2. 5. 2015. On contradictory pleadings and the a party is bound by own pleadings the decisions in **IEBC vs Seven Mutinda (2014)eklr** and **Jones vs National Coal Board (1957)2QB 55** were cited while **section 107, 108,109 and 112 of the Evidence Act** as applied by the Court Of Appeal in **Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi(2013)eklr** were relied on for the proposition that it is the duty of the plaintiff as the person approaching the court to prove the facts material to the case. Other decisions being **Siree Ltd vs Lake Turkana El Molo Lodges (2000)2 EA 521**, **National Social Security Fund vs Sifa International Ltd (2016)eklr** **John Omukura vs Nimesh Bhimji (2008)** and **John Okuku Oloo vs South Nyanza Sugar Co Ltd (2013)eklr** were all cited for the nature, need and manner of pleading special damages it being asserted that as pleaded and evidence let the special damages were not due for being awarded.

Issues, analysis and determination

16. Even though the court had directed parties on the 21.3.2017 to settle and file a set of agreed issue that was never done. Only the plaintiff filed its version of the issues on the 20.3.2017 and identified some 6 issues. That document however in my view does not capture the issues as pleaded by the parties and does not even agree with the issues raised in the submissions. It therefore rest the obligation of isolating such issues upon the court.

17. From a reading of the pleadings filed the facts of dealings between the parties is a common ground. The dispute is about what were the terms of their engagement and whether the defendant breached such terms as alleged by the plaintiff. That is my understanding of the entire dispute. Accordingly, therefore, I take the view that the only substantive issues that arise for determination, once the objection on jurisdiction is dealt with are; what were the terms of the contract between the parties? Was there a breach by the defendant? Is the plaintiff entitled to any remedy as prayed or at all?

18. While there is a written agreement between the parties admitted and exhibited by both, that agreement came into being on the 23.6.2015 and in his own evidence, PW1 was affirmative that the last invoice he rendered was dated the 11.5.2015 before the exhibited agreement was signed. It is therefore my finding that on the dispute pleaded and the evidence given, the agreement dated 23.5.2015, was never in place when the dispute arose and it can thus not be the source of the agreed terms between the parties in this dispute. It is that agreement that provided in clause 14 for the applicable law and forum for dispute resolution to be the exclusive High court of England. If not in force at the accrual of the dispute then none of its terms can be applicable to the dispute and I accordingly find that that agreement has not ousted the jurisdiction of the court in this matter, I do find that the court is properly vested with jurisdiction and that that objection was improperly taken and pursued. Improperly pursued, and I think halfheartedly, because the law mandates that the objection as to jurisdiction be taken at the earliest opportunity. In the circumstances of this case, a genuine belief in the substance of the objection, should have demanded that it be dealt with before evidence was taken. Had it been upheld after the entire case was heard, both parties and the court would have stood guilty of inefficient application and employment of judicial resource in time.

19. On the merits, having found that the written agreement does not govern the dispute, I am cognizant of the law that an agreement can be oral or gleaned from the conduct of the parties or a series of document evidencing a meeting of minds. An agreement must therefore not be in

writing unless the law so demands like in cases of a contract to transfer an interest in land. In this case other than the invoices, which are said by both parties to have been settled in full when presented and as presented, there is nothing more to show what the rate of reward for the service and the duration of that relationship was to be. In fact, even if one was to take it that there was always a written and renewed contract on a yearly basis, a matter that could have been easily established by showing such copies, the written agreement itself has no rate of remuneration.

20. It is therefore my finding that the agreement between the parties was on case to case, assignment to assignment basis and that the same would be remunerated on a monthly basis and piecemeal upon presentation of an invoice. I do find that, it is such understanding that reigned all along and informed the earlier rate of Kshs 40 per ton and subsequent Kshs 13 per ton. I have been unable to find anything to suggest and prove that there was an agreement to retain any sum, leave alone the Kshs 27 per ton for a period of two years or that such sum would be due to the plaintiff for payment. Having come to court on the basis that there was an agreement to pay Kshs 40 per ton and that a portion of that sum was withheld, it was the plaintiffs duty and ever present obligation to prove every fact to support its claim.

21. In conclusion I do find that the plaintiff failed to prove his case on a balance of probabilities for which reason the same cannot succeed but I order it dismissed with cost.

Dated, signed and delivered at Mombasa this 22nd day of May 2020

P J O OTIENO

JUDGE