



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 80 OF 2019

NILE HAULIERS LIMITED.....APPELLANT

VERSUS

PADAM ENGINEERING WORKS LIMITED.....RESPONDENT

[An appeal arising from the Judgment of the Senior Principal Magistrate, Kisumu

delivered on 4th June 2019 in Kisumu CMCC No. 58 of 2015]

JUDGMENT

On 4th June 2019, the learned trial magistrate delivered his judgment in which he awarded to the Plaintiff the sum of

Kshs 644,820/= in respect of the cost of the repairs of the Trailer **ZB 6169**; Kshs 200,000/= in respect of storage charges; together with Interest and costs of the suit.

1. The trial court also dismissed the Defendant's counterclaim, which was for the sum of Kshs 9,899,040/=.
2. The costs of the said counterclaim were awarded to the Plaintiff.
3. Finally, the trial court ordered the Plaintiff to immediately release the trailer to the Defendant.
4. Being dissatisfied with the judgment, the Defendant, **NILE HAULIERS LIMITED**, lodged an appeal to the High Court.
5. In its Memorandum of Appeal, the Appellant raised the following four issues;

“1. The learned magistrate erred in law and fact by:-

1.1. completely disregarding paragraph 4 of the Plaint which expressly indicated thereat that it was an implied term of the contract of supply and services that the Defendant would ensure that the services rendered are effectively paid for the Plaintiff by the Defendant upon completion of and delivery of the trucks to the Defendant, and

1.2. finding that the Plaintiff had proved its case on the principle sum of Kshs 644,820.00 even

when the learned magistrate found, contrary to paragraph 4 of the Plaint, that delivery of the trucks by the Plaintiff was never done;

2. The learned magistrate erred in law by failing to recognize that when the Plaintiff elected to sue for the services rendered by the Plaintiff to the Defendant, the common law repairer's lien was lost forthwith since there remained no further legal justification for holding on to the trailer, and as such storage fees would not suffice;

3. The learned magistrate erred in law by awarding a global figure of Kshs 200,000.00 in storage charges which were not contractually agreed, without any legal justification whatsoever as to how that figure was arrived at, and without strict proof thereof by the Plaintiff as is required by law;

4. The learned magistrate erred in law and fact by completely disregarding the evidence tendered by the Defendant in support of its counter-claim, thereby dismissing the same with costs against the weight of evidence produced in support thereof as required by law.”

6. As this is the first appellate court, I have an obligation to re-evaluate all the evidence on the record, and to draw my own conclusions. However, I must remain alive to the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they were testifying.

7. Each of the parties called one witness.

8. **SHUKDEV SINGH PADAM** testified on behalf of the Plaintiff, whilst **MIKE KIMELI SETIM** testified on behalf of the Defendant.

9. It was common ground that the parties had had a long relationship.

10. Mike described the Plaintiff as a partner, who used to carry out repairs on the Defendant's tractors and trailers.

11. It is common ground that the Defendant delivered a trailer, registration number **ZB 6196** to the Plaintiff, for repairs.

12. Shukdev testified that the trailer was delivered to the Plaintiff in December 2013, and that the repair-work, which commenced in January 2014, was completed in February 2014.

13. On the other hand, Mike testified that the trailer was delivered to the Plaintiff in March 2014. He said that ordinarily, repairs used to be carried out over a period of between one and three months.

14. In this particular instance, Mike said that he visited the Plaintiff's workshop, where he found that work had not commenced, even as late as July 2014. In his Witness Statement, Mike said that the work took more than 5 months.

15. If the Plaintiff had not yet commenced the repairs by July 2014, as asserted by Mike; and if the trailer had been delivered to the Plaintiff's workshop in April 2014, it is not clear how the Defendant could have come to the conclusion that there was a delay of over 5 months.

16. Between March 2014 and July 2014 the period is 4 months.

17. At any rate, Mike's contention about the alleged delay of 5 months is not in conformity with the Defence and Counter-claim.

18. In the said pleading, at paragraph **7B**, the Defendant said;

“Notwithstanding delivery to the plaintiff of the haulage trailer as aforesaid, no repair work was

commenced thereon until May 2014, with the plaintiff stating as its reason for its inability to commence repair work that it had ‘other orders to work on’”

19. In other words, if there was any delay, it was for 2 months, not 5 months.

20. That is consistent with the calculations of the Special Damages claimed by the Defendant. The Defendant asserted that the repaired trailer had been detained for 480 days, between the period from May 2014 and September 2015.

21. Considering that Mike testified that repairs ordinarily lasted between 1 month and 3 months, I find that the period between March and May 2014 was well within the generally acceptable period for repairs to be carried out by the Plaintiff, on the Defendant’s trailer. In effect, there was no delay on the part of the Plaintiff; if the court utilizes the case presented by the Defendant.

22. In the Plaintiff the Plaintiff asserted that;

“4. That it was an implied term of the contract of supply and services that the Defendant would ensure that the services rendered are effectively paid for to the plaintiff by the Defendant, upon completion of and delivery of the trucks to the defendant.”

23. During cross-examination Shukdev said that the Plaintiff never delivered the truck.

24. If, (as the Plaintiff specified in the Plaintiff), the trailer was supposed to be delivered to the Defendant, it follows that the Plaintiff did not discharge its obligation of delivery.

25. As it was the obligation of the Plaintiff to deliver the trailer, after it had been repaired, I find that the continued retention of the trailer by the Plaintiff cannot give to the Plaintiff a right to claim storage charges.

26. Meanwhile, it is clear that the Defendant admits that the cost of the repairs carried out by the Plaintiff is Kshs 597,320/=. Therefore, I find that the Defendant is liable to settle that sum.

27. The Defendant acknowledged that there had been a delay in settling the “*contractual amount.*”

28. However, the reason given, at paragraph 5 of the Defence, for the delay is Not that the Plaintiff had failed to deliver the trailer to the Defendant: the reason is expressed thus;

“The payment due for the sum aforesaid has been delayed on account of the fall in revenue experienced by the defendant following the prolonged closure of its principal client, Mumias Sugar Company Ltd. The defendant shall apply to the court for leave to pay the debt by such instalments as are appropriate.”

29. The Defendant, once again, acknowledged its indebtedness to the Plaintiff.

30. But more significantly, the Defendant explicitly stated that it had experienced a fall in revenue, because Mumias Sugar Company Limited had closed down for a prolonged period of time.

31. In the light of the said prolonged closure of the Defendant’s principal client, which led to a fall in the Defendant’s revenue, I find that the Defendant’s claim of losses at the rate of Kshs 20,623/= per day, was untenable.

32. Mike said that the Defendant had 10 trailers.

33. If each trailer was earning Kshs 20,623/= per day, it defies logic why the Defendant would have made it so clear that it had no capacity to pay the sum of Kshs 597,320/=: except through appropriate instalments.

34. In any event, the documents produced by the Defendant did not prove the alleged losses.
35. Exhibit **4A** shows that on 16th March 2016 the Defendant received payment totaling Kshs 2,493,320.85.
36. Exhibit **4B** shows that on 1st October 2014 the Defendant received payment totaling Kshs 1,511,368.80.
37. The said exhibits are Cane Transporter Payment Detailed Statements for the Defendant.
38. The court is unable to tell, (from the documents and from the evidence tendered by Mike), which kind of trailers were in use by the Defendant during the period covered by the Statements.
39. In my considered view, the Defendant should have provided details of all the payments earned through the usage of the trailer in issue, for the period prior to the date when it was delivered to the Plaintiff.
40. If the Defendant then provided accounts to show a reduction of its overall income, during the period when the trailer in issue was retained at the Plaintiff's workshop, and if the reduction was comparable to what the trailer used to generate, it may have been possible to attribute the reduction in revenue to the fact that the trailer was not in use.
41. Of course, the Defendant would also have needed to show that any reduction in revenue was not attributable to other factors, such as the prolonged closure of Mumias Sugar Company Limited.
42. I find that the Defendant did not specifically plead the particulars of the loss and damage allegedly sustained, nor did the Defendant prove the same.
43. The irony in this case is that the Plaintiff, who asserted that there was an implied term that it would be paid after the repairs were completed and after the trailer was delivered, sought payment before the trailer was delivered.
44. On the other hand, the Defendant, who insisted that the Plaintiff could only be paid after delivery of the trailer, led evidence to show that;
- “For this truck, we took it and took away the earlier repaired one.”***
45. In other words, from its conduct, the Defendant did, on occasion, collect trucks after they had been repaired.
46. Notwithstanding that testimony, the Plaintiff cannot wiggle out from its own pleading, as parties are bound by their pleadings.
47. I find that even though the Defendant could have gone to collect the trailer, it had no obligation to do so, under the contract herein.
48. The claim for storage charges was a claim for Special Damages. Therefore, it ought to have been specifically pleaded and thereafter strictly proved.
49. I find that the learned trial magistrate erred in law, by awarding a *“global figure of Kshs 200,000/=.”*
50. Accordingly, the said award cannot be sustained.
51. Meanwhile, as regards the cost of the repairs, I find that the sum is Kshs 587,320/=, as shown on the Invoice dated 21st March 2014.

52. The trial court was thus incorrect when it awarded to the Plaintiff the sum of Kshs 644,820/=, in respect to the cost of repairs.

53. From the letter dated 3rd November 2014, the Plaintiff made it clear that the sum of Kshs 644,820/= was inclusive of “*storage charges*”, which had been calculated at the rate of Kshs 2,500/= per day, from 16th October 2014 until 3rd November 2014.

54. In the final analysis, the appeal is successful, to a limited extent. The judgment sum is reduced from Kshs 844,820/=, to Kshs 587,320/=.

55. The said sum shall attract interest at Court Rates from the date when the Respondent delivered the trailer to the Appellant.

56. As regards the counter-claim, I hold that the learned trial magistrate was right to have dismissed the same, with costs to the Respondent.

57. The costs of the suit stand awarded to the Respondent.

58. Meanwhile, as each of the parties to the appeal are partially successful, I order each party to meet its own costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU This 27th day of July 2020

FRED A. OCHIENG

JUDGE