



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 210 OF 2017

PIL (K) LIMITED.....APPELLANT

VERSUS

AFROFREIGHT FORWARDERS LIMITED.....RESPONDENT

J U D G M E N T

1. By a suit instituted by way a plaint dated 24/8/2006, the plaint sought the recovery for the defendant a sum of Kshs.4,186,853.70 plus costs and interests at 20% p.a. with the plaint was filed two witness statements, a list of documents dated 23/8/2010 , the copies of such documents were however not availed in the Record of Appeal, and a supplementary list of documents dated 25/11/2013.

2. According to the plaint, witness statements and the bundle documents, the sum claimed was the balance of sums due pursuant to a contract for railage at the defendant's **Inland Container Deport (ICD)** as well refundable container deposits. The sum was made up of Kshs.1,386,703.70 for railage services and Kshs.2,782,150.00 for refundable container deposit. The said balance was pleaded to have resulted from the business dealings between the parties stretching from 1996 to December 2003.

3. In resisting the claim in the plaint the defendant filed a statement of defence dated 11.01.2010 in which the plaintiff's claim was denied together with the particulars given. It was asserted that the claim was exaggerated without supporting documents and that the defendant being an agent for a disclosed principle the plaintiff's suit against it was unfounded. The defendant also filed a witness statement and list of documents and further list of documents. The lists are dated 17/11/2004 and 28/10/2016 respectively. At trial the plaintiff called two witnesses while the defendant called only one witness.

Evidence by the plaintiff

4. PW 1 told the court that for the period parties dealt, the total value of business transacted on railage was Kshs.11,219,005.95 out of which the defendant paid Kshs.9,832,302.25 leaving a balance of 1,386,703.70. The witness produced documents in that regard marked EXP 4 as well as documents for container deposit paid as exhibit at pages 220 – 442 of the bundle Exh. P5.

5. The witness then added that they made a demand for payment and the defendant engaged in negotiation but no settlement was arrived at as the defendant contended to have paid but could not avail the same. He said the dispute centered on some Kshs.538,910.60.

6. On cross examination the witness said he was in administration and did not sit in accounts department and that the deposit was to secure the return of the containers within a stated period and on default demurrage would be charged. He further admitted that after the suit was filed there were meetings held to reconcile the accounts.

7. He said the plaintiff had a coordinator who conducted the dealings with the defendant and that the coordinator would give evidence. When shown letter dated 26/9/2008 he acknowledged that there were accounting issues to be resolved with the defendant alleging being owed by the plaintiff. In re-examination the witness confirmed that the guarantees executed were for the return of the containers and that all containers were returned. On issues raised on the letter of 26/9/2008 the witness said the same were never resolved hence the suit.

8. The evidence by PW 2, the operations coordinator, was to the effect that some of the containers would be delayed longer than anticipated on account of factors beyond them. However they would ensure the containers were returned but the defendant never refunded the deposit paid hence the claim. He thus sought and prayed for judgment as prayed in the plaint.

9. Upon cross examination, the witness said he did not have the railage contract in court. On their relationship with the defendant he confirmed that a delay in refunding a container would attract demurrage fees. He admitted that owing to unforeseen incidences there were delays but did not give instances of such delay. He said the understanding is that if a container is not returned the deposit is not refunded. He confirmed that he did not have my letter by the defendant on waiver.

Evidence by the Defendant

10. Mr. Jim Mwangi, said that there were meetings between the parties and the sum agreed on railage of Kshs.1,330,000 was settled by cheque and balance offset from storage bills due to Kenya Ports Authority. He then referred to letters dated 20/11/2006, 5/7/2006 and 26/9/2006 and the court to the bank statements and in particular on entry of 18/1/2001.

11. For railage, the witness said that after payment of 794,903.77 the balance of 539,000.00 was offset against the sum due from the plaintiff. For container deposit, the witness said they were paid the deposits by the plaintiff in bundles. The 152 bunch of Kshs.1,420,000/= and on it the plaintiff incurred demurrage of 382,588/= which was offset and balance paid to the plaintiff using two cheques No. 907737 and 907776 in full settlement.

13. The second bunch was a payment of Kshs.1,129,150 which incurred demurrage of Kshs.1,583,109 exceeding the sum deposited hence nothing to refund. The third deposit was for Kshs.240,000/= whose containers incurred demurrage of Kshs.698,184/= hence nothing to remain for refund. Then there was a lost container whose value was 179,170 but which incurred demurrage of 354,240 making a total sum due to the plaintiff to be Kshs.533,410.

15. On cross examination he said he worked for the defendant between 1999 and 2002 then broke for studies. He said that even for the period he was not working for the defendant the transaction were well documented. He said there was no agreement to pay demurrage by the defendant on behalf of the plaintiff but rather the plaintiff to so pay.

16. He then said re-examination that he resumed from studies in 2002 and was present during the reconciliation of the demurrage charge and that the same was accurate.

17. I have delved into the evidence led at trial in depth as part of the courts mandate to reappraise and re-evaluate the entire record with a view to coming to own conclusions.

18. Having considered the evidence in light of the judgment of the trial court, I have come to the realization that the manner in which the court dealt with the disputed fact of whether or not any sum was due and owing was captured at page 209 of the Record of Appeal where the court said:-

“I have considered the pleadings herein, the evidence tendered by both the plaintiff and the defendant. I have also considered the bundles of documents filed in court. Finally I have considered the submissions by the counsel for the plaintiff. It is not in dispute that there was an agreement between the plaintiff and the Defendant that plaintiff do facilitate clearance of containers on behalf of the Defendants clients for port of Mombasa. It is salsa not in dispute that the plaintiff shall arrange for transport of defendant clients containers to Inland container Debts and also to Uganda. The plaintiff was also pay container deposits to the Defendant which amount was to be refunded. Several documents were produced to support the plaintiffs claim.

The main issue in dispute is whether there is outstanding amount in respect to the aforesaid services provided by the plaintiff to the Defendant. I have perused the documents availed. The core dispute is on the reconciliation of the account held by the plaintiff in respect of the services rendered. The plaintiffs witness availed before the court all the necessary documents. The Defendants witness was at the time not in Defendants employment. He relied on documentation prepared by other person other than him. The defendant did not disapprove the plaintiffs claim. I am satisfied that the plaintiff has proved its claim against the Defendant and I do hereby enter judgment to the plaintiff as prayed in the plaint”.

(Emphasis provided)

19. I have underlined the phrase I consider should be the fulcrum of my determination. It is not in dispute that there was privity between the parties. The only dispute as explained by both PW 1 and DW 1 was one on accounts.

20. While the plaintiff witnesses were content to assert being owed without a comment on the defendants documents particularly the invoices and bank statements showing cheques paid to the plaintiff, the defendant witness went into depth of how the accounts were settled. I do find that the trial court failed in its mandate by failing to fully appraise the documents provided by the defendant. I have in mind the exhibits at pages 119-131. Those exhibits seen to have escaped the attention of the court. I say so noting that by own letter, the plaintiff said at page 119 to 121 that there were deep issues of accounting to be settled.

21. One of the issues raised was whether some cheques had been in fact issued and paid. A look at pages 124, 125 and 126 shows that there were in fact payments of Kshs.794,903 as well as Kshs.1,000,787 vide cheque nos. 907850 and 90777 respectively. In fact I find the evidence by the DW 1 at page 201 to have fully explained and rebutted the plaintiffs claim. In his evidence the witness said and explained in details how the railage charges were settled as much as how the container deposit was accounted for. That evidence was never challenged in cross examination. The trial court was thus mistaken for asserting that the defendant failed to disprove the plaintiff evidence.

22. The documents were in fact produced without protest or objection. They were exhibits and proof received and accepted by the court. It was thus an error in principle when the trial court commented that the defendants witness relied on documents prepared by others. That was an error because even the plaintiff's witnesses did not assert having personally prepared the document they relied on. If such document were accepted by court for the plaintiff there was no reason to dismiss the defendant's documents by the court.

23. I do find that on evidence adduced, the plaintiffs claim was sufficiently and wholly displaced and that there was no basis to enter judgment as the trial court did. I do set aside that judgment and in its place substitute a judgment dismissing the suit.

24. The last issue on interest rate of 20% becomes moot now that the claim has failed. However the law is that a court of law would award interest at a rate different from court rates only where there is a contract to that effect. The Court of Appeal in **Alba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR** quoted with the decision in **Societe Internationale De Telecommunication Aeronautiques vs. Twiga Properties**, where Ringera, J. expressed himself thus with regard to award of interest rates:

“I accept the defendant’s submission that the general principle of law is that interest on debt is only payable at court rates and as from the date of filing suit unless there is agreement to the contrary or a trade custom otherwise dictates. In this case, the plaintiff did not prove any agreement for the payment of interest at the rate of 24% per annum from 8th July or any trade custom in support of its claim. It is accordingly entitled to interest at court rates from the date of filing suit.” (emphasis added)

25. In this matter there was no evidence on how the rate of 20% was chosen and no basis was laid by the trial court to enter judgment for that rate of interest as prayed. The entry of judgment for the sum sued on with interest as prayed in the plaint was thus equally erroneous.

26. Accordingly I do find merit in the appeal which I allow in whole with the effect that the judgment of the trial court is set aside and in its place substituted a judgment dismissing the suit with costs to the Appellant as defendant then.

27. I also award the costs of this appeal to the Appellant.

Dated and delivered at Mombasa on this 31st day of May 2019.

P.J.O. OTIENO

JUDGE