REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 14 OF 2017

CROWN FOODS LIMITED.....APPELLANT

VERSUS

GENERAL CARGO SERVICES .....RESPONDENT

J U D G M E N T

Outline

1. This Appeal challenges the decision of the trial court dated 9/12/2016 in which the court found for the Respondent against the Appellant by declining to strike out the suit for failure to file a resolution allowing the filing of the suit with plaint and on the basis that the verifying affidavit was sworn before the plaint. The Appeal also faults the trial court for finding for the Respondent, when that Respondent had failed to discharge its burden of proof to the requisite standards.

2. The Memorandum of Appeal has 11 grounds but in their written and oral submissions the counsel opted to group them all into two grounds; **ground 1 & 2 together while the grounds 3 – 11 were also lamped together**. That re-organization can be summarized to seek answers to the following questions:-

> i. Whether the trial court erred in failing to find that the suit before him was fatally defective for failure to get sanction by the Board of the Company and for failure to comply with Order 4 Rule 1 (4) Civil Procedure Act.
>
> ii. Whether the trial court erred in law and fact in entering judgment for the respondent with sufficient evidence being led to the requisite standards.

3. I will seek to determine the appeal by seeking and providing answers to the two questions in a seriatim manner. The first question is in the technical realm challenging the competence of the suit while the second is on merits.

The Pleadings

4. The cause of action as pleaded was for the recovery of the sum of Kshs.361,780.20 on account of transport services rendered by the respondent to the Appellant between the year 2011 and 2012. With the plaint was filed a witness statement as well as a list and copies of documents to be used as evidence at trial.

5. The documents included a demand letter, invoices and consignment notes and a statement of running accounts kept by the respondent on the dealings between the parties.

6. When served with the pleading the defendant did file a statement of defence in which the substantive defence put forth was that there having been the pleaded contract between the parties all the services provided were duly paid for.(see paragraph 3 & 4 of the statement of defence. The Appellant also filed a witness statement by its procurement officer. That statement reiterated the pleading that all services provided had been paid for them opened a new line of defence to the effect that the plaintiff was expected to provide, not only invoices, but also loading sheets and transport confirmation sheets and that the documents provided by the plaintiff did not confirm that my sums were owed as due.

7. It is then sought to challenge the respondent's documents by stating that some of the invoice were never signed by the appellant as received, fails to bear the Respondent's name and not having been signed by the plaintiff. There was however no document filed and produced at trial to support the defence filed.

8. There was also a defence that the suit was defective and the defendant reserved right to raise a preliminary objection at an opportune time.

9. To the said statement of defence the Respondent filed a Reply in which the Respondent joined issued with all the allegations at paragraphs 3, 4, 5, 6, 7 & 8 of the Defence with a reinstatement that the Appellant was truly indebted in the sum claimed.

10. At trial both parties called one witness each with the plaintiff's witness adopting his witness statement and producing all the documents filed without any objection. Even the defendants witness adopted the witness statement filed as evidence in chief and was briefly cross examined.

11. The summary of the evidence by the plaintiff was that for the period the parties dealt there were three invoice that were never settled and these were identified as invoices for Kshs.145,143 No. 50135 of 31/12/2011 for Kshs.124,487.75 and No. 50330 of 30/4/2012 for Kshs.92,150.40. The witness equally matched the invoices to the delivery/consignment notes whose originals he said was with the appellant. He also produced a statement of running account showing the sum outstanding to be Kshs.361,780.20.

12. On cross examination, the witness confirmed having signed the verifying Affidavit and that some of the documents did not have the names of the parties to the suit. He however denied having had a document in court authorizing him to represent the respondent in court.

13. For the Appellant, the witness having adopted the witness statement, upon cross examination, confirmed that the documents called loading and transport confirmation sheets belonged to the Appellant and that the appellant had infact procured the transport services from the Respondent during the period 2011 and 2012. He added that he would sign the original invoice upon being delivered to him.

Analysis and determination

14. This being a first appeal, the court is mandated and obligated to proceed by way of re-hearing and thus has to re-evaluate and re-appraise the entire record at trial with a view to coming to my own determination. With that mandate and latitude in mind I shall proceed to provide answers to the two questions/issues posed.

Competence of the suit at trial

15. There was a pleading at paragraph 8 of the statement of defence that the Appellant would at an opportune time seek to have the suit struck out for being incompetent. The specifics of the incompetence were never not pleaded. One may ask whether that pleading met the legal requirement at Order 2 Rule 4 Civil Procedure Rules which require mandatorily, that a party shall specifically plead any fact that makes the claim of the opposite party not maintainable. NO details were given of what make the plaint untenable and infact no objection was raised preliminarily before the trial commenced by production of evidence. It was only in the cause of cross examination that the question was feebly and vaguely raised when the Respondents witness was led to say – **"I have authority to represent the plaintiff. I do not have any document to that effect".**

16. Clearly the question of non-compliance with the provisions and requirements of Order 4 Rule 1(2) and 4 was never specifically pleaded as required by the rule and should not have been the basis to defeat the suit without the court casting for itself a picture of being defeatist and allowing parties to depart from explicit pleadings by entertaining matters not specifically pleaded. That goes against the need for specific pleadings as a bastion for fair hearing without ambush.

17. However even if there had been specific pleading, as the law mandates, the Appellant had reserved its right to raise the question of the competence of the suit an opportune time. To this court, the Appellant gave notice of intention to raise a preliminary objection. The law remains that a preliminary objection, unless it gets to jurisdiction of the court should be raised at the earlier opportunity [1]. The rationale for that rule is to facilitate access to justice so that a party whose suit may get struck out on a technical stand gets to exercise the right effect the remedial action in time before the matter is caught up with limitation. In this case, even the Appellants agree that the requirements of Order 4 Rule 1(2) & 4 are capable of compliance with even after an objection is raised without the suit being defeated. That is what this court get from reading the decisions in ***Microsoft Corporation vs Mitsumi Computer Garage Ltd [2001] eKLR***, **Kenya Commercial Ltd vs Stage Coach Management Ltd [2014] eKLR** and **Peeraj General Trading & Contracting Co. Ltd vs Mumias Sugar Co. Ltd [2016] eKLR**.

18. I do find that had the matter been raised prior to the taking of evidence, the respondent would have had the chance to take the remedial action to achieve the purpose of the court in finally and effectually determining the suit on the merits. Now that the objection was never raised even when vaguely and feebly pleaded, it can only be said that the Appellant did not meet its duty to court to help and assist attain the overriding objectives of the court.

19. I may only add that when raised, the matter had been dealt with on the merits and thus the suit could not at that time be struck out on the technicalities raised. To that extent, and even on the merits, I would agree with the trial court that the contention by the Appellant before it, raised more of technical issues rather than substance. To distinguish between technicality and merits a court always addresses its mind to the question of what prejudice would be visited upon and suffered by the side alleging non-compliance with the rules of procedure. For this court no prejudice was alleged both at trial and in this appeal and therefore there would be no need to accede to the objection by the appellant.

20. The last reason, I cannot uphold the appellants challenge for the trial courts decision on the competence of the suit is that to uphold it at this juncture would be to ignore the evidence by parties going to the merits and preferring to exalt an objection that was never properly invoked. Therefore do find no merit on the challenge to the competence of the suit at trial and I do dismiss that ground of appeal. I do find that the trial court was perfectly within the law to find as it did that the challenge was unmerited.

Did the trial court comply with the law in its decision now challenged?

21. The standard of proof expected of the Respondent was that within a balance of probabilities. It was pleaded by the respondent and admitted by the defendant that there existed a business relationship between the parties. The only dispute was over some three invoices which the Respondent said had not been paid but which the Appellant asserted had been paid. In those circumstances the plaintiff was only expected to set out the unsettled invoices thus shift the burden upon the Appellant to prove that payment had been done.

22. The evidence let by the respondent did prove to the requisite standard that three invoices were never settled. In law it was this duty of the Appellant to prove payment. Instead of proving his defence of full settlement, the Appellant opted to introduce a defence not pleaded to the effect that the invoices were not supported by other documents.

23. The law does not allow that fashion of civil litigation. The Appellant had no liberty to adduce evidence in variance with the pleadings on record. The law confined the Appellant to lead evidence limited to what it had pleaded that there had been payment in full. I find this to be the law set by the ***Court of Appeal in Raghbir Singh Chattle vs National Bank of Kenya Ltd [1996] eKLR*** where the court said:-

> **"The Defence as framed as such is a bad defence. Defendant, if he indeed received the overdraft should admit so in his defence and then put forward a positive defence that he has fully repaid the overdraft. The defence as framed is evasive and does not put forward any positive defence on which issues can be framed for trial…**
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> **In a suit for a liquidated demand where the facts are clearly set out in the plaint as in the present appeal, a general denial is of no use and demonstrates not only a reprehensible lack of candidness in defence but also that the defence discloses no reasonable defence which can be the basis for an application to strike out the defence either under 0 6 r 13(1)(a) or 0.35".**

24. The second reason I find that the Appellant failed in its duty in law is that the fact of full payment if it existed was within the special knowledge of the appellant as the person asserting that fact. If within his special knowledge then Section 112 of the Evidence Act, places the burden of proving the same upon him.

25. The record of the court show that the defendant totally failed to discharge his shifted burden and thus the plaintiffs evidence remained unchallenged. Remaining so on challenged, it meet the standard of proof within a balance of probabilities and thus the trial court cannot be faulted on its finding.

26. Finally, the decision by the trial court was upon analysis of facts leading to a factual finding. The law is that an appellate court should not freely and slightly interfere with a factual decision of the trial court unless it be shown to be perverse or otherwise contrary to the evidence led and thus contrary to the law.

27. The upshot is that this appeal lacks merit and the same is dismissed with costs to the Respondent.

Dated and **delivered** at **Mombasa** this **27th** day of **September 2019**.

P.J.O. OTIENO

JUDGE

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[1] Owners of motor vessel "Lilian S" [1989] eKLR