



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 26 OF 2014**

**BETWEEN**

**PRAFULLA ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**DUNGA WHOLESALERS LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. L. Gitari, CM dated 4<sup>th</sup> March 2014 at the Chief Magistrates Court at Kisumu in Civil Case No. 127 of 2004)*

**JUDGMENT**

1. Before the subordinate court, the respondent, Dunga Wholesalers Limited (“Dunga”) filed a plaint dated 10<sup>th</sup> February 2004 and amended on 24<sup>th</sup> November 2007 claiming the following reliefs against the appellant, Prafulla Enterprises Limited (“Prafulla”):
  - a. The sum of Kshs. 1,956,518.22 together with interest thereon at Court rates with effect from 21<sup>st</sup> July 2000 till payment in full.
  - b. Costs of the suit and interest thereon at Court rates
  - c. Any other or further relief as this Honourable Court may deem just and fit to grant.
2. Dunga claimed that Prafulla agreed clear its cargo in Nairobi and deliver it to its doorstep in Kisumu. The cargo comprised 100 pieces of new alternators, a new generator and a second hand power saw. Dunga stated that due to Prafulla’s fault, the cargo was destroyed and or lost in transit. Thereafter Prafulla requested Dunga to sell or consider the cargo as having been sold to it at an agreed price of Kshs. 2,081,215.00/-. Dunga’s claim was Prafulla neglected to pay the agreed amount and instead delivered the second hand power saw which it accepted and gave it credit for its value leaving Kshs. 1,956,518.22 which it claimed in the plaint.
3. Although Prafulla denied the claim against it in the further amended written statement of defence dated 30<sup>th</sup> November 2007, it pleaded in the alternative that it agreed to clear and deliver Dunga’s cargo to Kisumu. It admitted that some of the cargo was damaged and or lost in transit and the parties agreed that Prafulla would have the damaged goods repaired by its insurer, Kenindia Assurance Company Limited. Since Prafulla was insured for losses, it agreed to assist Dunga claim for the lost goods from the insurer. Prafulla also claimed that the damaged goods were repaired by its insurer and that it delivered them Dunga who accepted them unconditionally without claiming payment.
4. After hearing the matter, the trial magistrate, delivered judgment on 4<sup>th</sup> March 2014, ordering Prafulla to pay Dunga Kshs. 1,956,518.22/- as prayed in the plaint. The trial magistrate concluded that, *“The defendant was served with the invoice and was compensated for the goods by the insurer. He never paid for the goods but kept them as well as the money. The plaintiff proved that he had paid for the goods.”*
5. Aggrieved by the trial court’s decision, the appellant filed this appeal. In the memorandum of appeal dated 19<sup>th</sup> March 2014, it faults the trial magistrate on several grounds. In summary, it contends that the trial magistrate erred in ordering compensation when the generators were available for collection. That the trial magistrate erred in expressing the judgment in Kenya Shilling instead of US Dollars and Sterling Pounds, which are the currencies in which the cargo was purchased, when evidence was led on the exchange rate. The appellant also condemns the judgment on as being against the weight of evidence and that the trial magistrate was openly biased and in her judgment which was contrary to the law. Mr Yogo, counsel for Prafulla, supplemented the grounds of appeal by brief oral submissions.
6. In response, Mr Awino, counsel for Dunga, opposed the appeal and supported the judgment. In his view, the respondent established that the appellant was to clear and deliver the cargo to Kisumu. It did not do so and when the parties agreed on a price for the cargo, the appellant avoided settling the invoice yet it had been compensated by its insurer for the same cargo.

7. This being a first appeal, this Court must bear in mind its primary role as a first appellate court namely to review the evidence before the trial court and reach an independent decision whether or not to uphold the judgment always bearing in mind that it did not hear or see the witnesses testify (see *Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212*).

8. The Managing Director of Dunga, Kaushik Panchmatia (PW 1), testified that he engaged Prafulla to clear and deliver cargo imported from the United Kingdom to his door step in Kisumu. Unfortunately, the cargo was not delivered or lost. PW 1 testified that Ramesh Karia (DW 1), the Managing Director for Prafulla, approached him after the loss and requested to be allowed to purchase the goods or pay for their value. They agreed on a price whereafter PW 1 prepared an invoice no. 25452 dated 21<sup>st</sup> July 2000 for Kshs. 2,081,215.00/- representing the value of the cargo which Prafulla accepted. PW 1 also testified that his advocate, *Rajni K. Somaia*, sent a demand letter dated 22<sup>nd</sup> June 2001 to Prafulla. PW 1 testified that later DW 1 approached him with the duly repaired second hand power saw which he accepted.

9. DW 1 testified that Prafulla had insurance cover which extended to its vehicles and goods but did not extend to goods belonging to third parties and a third party hiring its transport services would have to insure its own goods. He told the court that after the accident, the power saw and the generator were damaged while the 100 alternators were stolen. He informed PW 1 immediately and advised him to contact their insurer. He also contacted his insurer who agreed to repair the damaged goods but refused to pay for the stolen goods.

10. DW 1 testified that after his insurer repaired the generator and the power saw, he delivered them to the respondent who accepted the power saw and but refused to accept the generator. DW 1 stated that the generator was still lying at Prafulla's Go-down and Dunga was free to collect it at any time. DW 1 denied that Prafulla agreed to buy the damaged cargo as it was not in that line of business. DW 1 admitted in re-examination that he was paid by the insurer Kshs. 809,249/- both for the value and repair of the damaged goods. He stated further that he attempted to forward a cheque to Dunga but it refused to accept the cheque stating that not the amount it expected to be paid.

11. Having looked at the pleadings and evidence, the issue for determination before the trial court was whether, the appellant agreed pay for the respondent's cargo that had been stolen and or lost before delivery. Distilled to its essence, the dispute between the parties was whether and under what terms Prafulla agreed to pay for the lost and destroyed cargo. Although Prafulla initially denied the claim, it was common ground that Prafulla was a clearing agent and was contracted by Dunga to deliver cargo to Kisumu but it failed to do so as the goods were either lost or damaged in transit. It is also not in dispute that Prafulla delivered to Dunga the second hand power saw.

12. Dunga's case is supported by the fact that it issued an invoice No. 25452 dated 21<sup>st</sup> July 2000 for Kshs. 2,081,215.00 being the value of the goods as agreed between PW 1 and DW 1. Although DW 1 denied that the invoice was received, this fact was confirmed by production of the duly acknowledged invoice in evidence. Why would the respondent issue an invoice unless there was an agreement? Prafulla's position is also undermined by the fact that Dunga delivered to it the original documents of title to the goods to enable it claim compensation from its insurer. In that letter dated 4<sup>th</sup> August 2000 addressed to Dunga by Prafulla stated that, "*Sir, Please note that the original documents are being held by ourselves for purposes of claiming from the insurance Company and shall forward to you as soon as possible.*"

13. Although Prafulla's position was that the insurer could only repair its own goods damaged in the vehicle, DW 1 stated that in his testimony that the insurer repaired the generator and the power saw and it was in fact compensated to the tune of Kshs. 809,249/- for the damaged and lost cargo. In cross examination, DW 1 also accepted that he received compensation for lost alternators.

14. Prafulla's cases raises two possibilities; either it was untruthful about its insurer not covering third party cargo or it represented itself as the owner of the cargo to its insurer. The latter position is consistent with the evidence Prafulla requested Dunga to purchase the cargo and it even retained the original importation and clearance documents to lodge the claim by presenting the goods as its own. This also supports Dunga's claim that Prafulla requested to purchase the cargo even in their damaged state knowing that it would receive compensation.

15. Prafulla pleaded at paragraph 7(d) of the defence that, "*the goods were repaired to the satisfaction of the plaintiff, the generator and power milling machine which were delivered to the plaintiff by the defendant and plaintiff unconditionally accepted them without claiming any payment for the same.*" Obviously, its case was inconsistent with the pleading as it did not produce any evidence to show that he delivered the generator to Dunga as pleaded. Prafulla did not deal with the issue of the 100 lost alternators which it was not in a position to deliver. I would also add that when Prafulla's advocate, *Behan & Okero Advocates*, finally responded to Dunga's advocate's demand letters by the letter dated 18<sup>th</sup> February 2002, it was a bare denial of the claim.

16. In his oral submissions, Mr Yogo, counsel for Prafulla, submitted that there was no basis on which the trial court could enter judgment against Dunga as the price of the goods was in foreign currency and that evidence was given of the exchange rate. Mr Awino, counsel for Dunga, in his terse submission, stated that the exchange rate was irrelevant. I agree with him as the claim was not based on the value of the goods but on the agreement that Prafulla would purchase the goods whose value was agreed in Kenya Shillings.

17. After reviewing the evidence on my own, I am satisfied that Dunga proved its case on the balance of probabilities. I therefore reject Prafulla's contention that the judgment was against the weight of evidence. It never delivered the cargo in good order. It only returned the power saw which Dunga accepted and gave it credit. It did not plead a set-off for the generator nor make an offer to pay for the 100 alternators that were lost in its possession yet it had received compensation from its insurers.

18. It must now be clear that this appeal is for dismissal. It is hereby dismissed with costs to the respondent.

19. This matter was straightforward and given the age of the matter, I assess costs of this appeal at **Kshs. 200,000/-** all inclusive taking into account **Schedule VI Part 1 para B** of the applicable **Advocates Remuneration Order**.

**DATED and DELIVERED at KISUMU this day of 22<sup>nd</sup> March 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Yogo instructed by Otieno, Yogo and Ojuro Advocates for the appellant.

Mr Awino instructed by Wasuna and Company Advocates for the respondent.