



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 98 OF 2017

TRUCKS DIRECT LTD.....APPELLANT

VERSUS

AGRICOM HOLDINGS LTD.....RESPONDENT

(Being an Appeal from the Judgment by Hon. T. Murigi M/s Chief Magistrate in Civil Case No. 513 of 2015 at Thika)

J U D G M E N T

1. The undisputed background to this appeal is as follows. **Agricom Holdings Ltd**, the Respondent herein, was the Plaintiff in the court below. In the material period, the Respondent was engaged on contract, to transport goods on behalf of East African Breweries Ltd (EABL), between Thika and Nairobi. The goods comprised alcoholic beverages and empty bottles or cans. In the same period, the Respondent sub-contracted the work to **Trucks Direct Ltd**, the Defendant in the court below, now Appellant, for the purpose of carriage of EABL'S designated goods. The Appellant supplied a vehicle and a driver.

2. On 22.12.12 the Appellant's vehicle registration No. KBQ, 488R and trailer registration No. ZC 6354 was being driven by the Appellant's driver, **Simon Mugo Murage**. The said driver, received on board his vehicle 1120 cases of empty beer bottles destined for EABL's premises described as **NCD Ruaraka**. The said cargo was not delivered. The Respondent, upon being notified contacted the Appellant and as the driver had disappeared, the matter was eventually reported to the police. Meanwhile EABL demanded of the Respondent that he makes good its loss.

3. In turn the Respondent pressed the Appellant to compensate him for the value of the lost goods which was stated to be KSh.851,200/=. Numerous correspondences were exchanged between the parties before the Respondent filed its suit in the court below, for the sum of KShs.875,400, out of which KShs.24,200/= was stated to be an advance made to the Appellant. The Appellant denied the claim restating as it had in previous correspondence that it was not vicariously liable for the criminal acts of the driver, and that it was the duty of the Respondent to insure the cargo. Judgment was delivered in favour of the Respondent on 27th July 2017. The judgment is the subject of this appeal by the Appellant/Defendant.

4. The grounds of appeal attack five findings of fact by the trial magistrate as follows:

- a) That the Respondent held an insurance cover for the cargo while in transit.
- b) That the Respondent had been surcharged by the insurance company (this likely refers to the cargo owners rather than the insurance company).
- c) That the Respondent had paid the surcharged sum.
- d) That the insurance cover did not cover loss of goods in transit through criminal activity.
- e) That the goods were stolen.

5. The Appellant final ground is that the trial magistrate erred in both law and fact by finding the Appellant vicariously liable for the criminal acts of the driver.

6. The parties agreed to dispose of the appeal by way of written submissions. The Appellant, rather than submit seriatim or in merged form the grounds of appeal, framed four issues in its submission. One of the issues (b) was stated to be, whether the goods were indeed lost. From the pleadings, evidence and the Appellants grounds of appeal, there was no dispute as to whether or not the goods in question were lost. The Appellant cannot be allowed to introduce a fresh issue extraneous to his evidence and pleading on an appeal. Similarly, the framing of the first issue relating to whether the Respondent held an insurance cover leaves much to be desired. Be that as it may, the Appellant's

submission on that score is that no copy of the insurance policy was exhibited at the trial to enable the court confirm whether or not the Respondent's insurance policy covered the lost goods.

7. The Appellant therefore faults the trial court for accepting the disclaimer by the Respondent as to the scope of the insurance cover taken out by them. In the Appellant's view the court's finding paved the way for the Respondent to benefit twice – from the Appellant directly, rather than via a claim brought under the doctrine of subrogation, and by indemnity paid by the insurance company. Moreover, that if the Respondent failed to insure cargo in transit, he could not pass this subsequent losses to the Appellant.

8. On the question whether the Respondent was surcharged for the loss by EABL, the Appellant submits there was no proof tendered by the Respondent and that the statement contained in the Respondent's record did not suffice. Regarding vicarious liability the Appellant asserts that the goods were lost through a criminal activity and that liability lay squarely with the driver. The Appellant relied on the case of **Patriotic Grounds Ltd v Great Rift Transporters Ltd [2010] eKLR** to make the case that in this case there was no evidence that the driver stole the goods in question.

9. For its part, the Respondent tackled the grounds of appeal seriatim. On the first ground the Respondent submitted that the existence of an insurance cover held by the Respondent was proven and that this fact could not be used by the Appellant to escape its own liability. On the said ground the Respondent referred to evidence tendered by them in proof of the surcharge to the tune of KShs.851,200/=. The Respondent asserts that no such finding as stated in ground 3 is contained in the judgment impugned.

10. Ground 4 which relates to the terms of the insurance cover is opposed, the Respondent asserting that such cover could not include 3rd parties not in the direct control of the Respondent. For this proposition the Respondent relied on authorities cited in submissions in the lower court, including **Morris v C.W. Martin & Sons Ltd [1966] IQB 716** and **LLoyd v Grace Smith & Co. [1912] UK HC 1**. The Respondent further point out regarding the 5th ground that the trial court did not make a finding that the goods had been stolen.

11. The Respondent defends the finding of vicarious liability against the Appellant which is the subject of the sixth ground of appeal. Once more the Respondents reiterate the above authorities and others which were cited in submissions before the lower court.

12. This court has considered the evidence in the court below and submissions on this appeal. As stated in **Selle v Associated Motor Boat Co. [1968]EA 123**:

*“An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court in not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hamid Saif v. Ali Mohamed Sholan[1955] 22 EACA 270**).”*

13. The first appellate court will only interfere with findings of a fact by a trial court which had the benefit of seeing and hearing witnesses if those findings are not supported by evidence, or it is demonstrated that the trial court acted on wrong principles in reaching such findings. See **Ephantus Mwangi v Duncan Mwangi Wambugu [1982 – 88] IKAR 278**.

14. In my view, one broad question requires determination on this appeal and is sufficient to dispose of this appeal. The question is whether the Respondent suffered loss by way of a surcharge or debit on its account by the owner of the goods. The trial court found, based on the statement of account in the Respondent's bundle of documents, that the Respondent was surcharged by EABL. This is what the Respondent had asserted all along through the various correspondences in the document bundle filed in court. And for their part, the Appellant demanded the proof of the surcharge.

15. What is interesting in my view is that the Respondent did not produce any of the documents filed in its bundle during the trial. At the *denovo* hearing of the matter, **James Ngari Mathu (PW1)** who described himself as the Logistics Director of the Respondent made no reference to the bundle of documents in his evidence in chief. Following his cross-examination, his counsel referred him to an alleged debit at pg. 34 and the security report at pg.35 of the Plaintiff bundle of documents. (The correct pages are 34 and 36 and 45) The Respondent's advocate submitting at the close of the trial that the Plaintiff's documents were undisputed. The documents were not produced, and it seems that the Appellant's counsel did not notice the anomaly.

16. That notwithstanding, a good number of the emails exchanged by the parties were produced as exhibits by the Appellant's witness **Michael Muringe Kihianyu (DW1)**. The witness testified that the Respondent did not supply the Appellant with any evidence of the alleged surcharge by EABL and that they gave a verbal notification of the same. For what it may be worth, this court has looked at the documents relied on by the Respondent as evidence of the surcharge. The documents at page 34 and 36 must be read in the context of the other correspondence between the parties themselves and with third parties (presumably EABL staff) at pages 30 – 34.

17. At page 30 is an email from Kariuki George of EABL to PW1 dated 5th January 2013 demanding to know the fate of the truck (lost goods). The writer states that once the load (cases) is confirmed lost, the Respondent should write to EABL “approving debit to your account”. On 7th January a response is made by the Respondents confirming the loss and that the Respondents would assume responsibility for the loss, that the matter was under police investigations and would be closed within the month. On the same date Kariuki George issues instructions via e-mail to debit the Respondents account for 1120 cases lost while in transit. Subsequently there is an email by Omondi Irene of EABL to Kariuki George on the same date confirming, the raising of an **invoice No. 9500432778** in that regard.

18. At page 34 is an e-mail from Ngugi James of EABL sent out on 29/1/13 to the Respondents attaching a statement listing a series of what appear to be invoices against the Respondent, in regard to breakages, presumably of beer bottles while in transit. Included in the list of

invoices is the **Invoice 9500437778** in the sum of KShs.851,200/=. The total sum due in the statement is KShs.870,200/=. The e-mail (by James Ngugi) forwarding this statement contains a sentence at the bottom to the following effect,

“Hi,

Find the account status. We will recover the amounts tomorrow.”

19. On the next day, PW1 responds to the e-mail as follow;

“Hi James,

Kindly hold on charging this to our account to allow us time to verify the same.”

20. To which James replies as follows;

“Njeru,

Thanks for the reply however, we are not supposed to close the month with the debt. My ask is that you give it a priority and close it by today.”

21. There is no evidence that the invoice was settled by the Respondent through surcharge as no further statements of accounts between the Respondent and EABL are furnished. Nor was any receipt tendered by the Respondent to confirm settlement of the invoice via surcharge. By March 2013 the Respondent was demanding that the Appellants make good the surcharge. On the face of it there followed a flurry of e-mails between the Appellant and Respondent on this question [pgs 38 – 44.]

22. In response to an e-mail sent on 6th March 2014 by the Respondent to the Appellant which proposed settlement of the surcharge sum by way of instalments, the Appellant, through **DW1** wrote stating;

“Your e-mail of 6th March refers. I will need time to organize meantime, please forward papers showing the money recovered by Kbl (EABL) and statement from insurance saying truck was not insured. As requested we look forward to another meeting on the matter”. (emphasis added)

23. On the same date **PW1** responded by e-mail stating *inter alia* that the Respondent had

“Forwarded communication from EABL for the deductions for the transit loss occasioned by your KBQ 488 R. We could not make a claim from the insurance company since as advised, your truck was not covered to GIT (goods in transit) by us. Besides, GIT does not cover for theft by staff, which would traditionally be covered under a fidelity guarantee rider. Please advise soonest when to expect payment for this loss...”

24. On 9th June 2014 the Appellants responded in an email

“Have received communication between yourself and each eabl but the document we are requesting is the official letter from eabl stating the loss and amount incurred and amount deducted.” (emphasis added)

25. This request is repeated in an e-mail by the Appellants sent earlier on 29th May 2014. One would have hoped that the Respondent would tender evidence of receipts or other documents from EABL and/or called EABL officials to confirm the surcharge. This however did not happen. Even though the Appellant had denied the claim in their defence. The question whether the Respondent was actually surcharged is an important one, because the lost cargo was not its property. Thus it was not enough to establish the loss of the cargo, the Respondent had to prove the Respondent's personal loss through surcharge as a consequence of the cargo loss.

26. Reviewing the evidence on record, I have to agree with the Appellant that the Respondent's evidence does not establish a loss by itself of the sum of KShs.851,200/= through surcharge.

27. The parties expended a lot energy in submitting on the question of vicarious liability by the Respondent. There is no doubt that the EABL cargo was lost through the mischief of the Appellant's admitted servant, Simon Mugo. As the principal (bailee), the Appellant are no doubt vicariously liable for any losses incurred by the Respondent through fraud or other malfeasance on the part of his agent, the driver in charge of ferrying the EABL cargo. This is true whether the principal has profited from the fraud or not. See **Barwick v English Joint Stock Bank (1867) L R 2 Ex 259** as discussed in **Lloyd V Grace, Smith & Co. [1912] AC 716; [1912] UKHL1** and **Patrick Guards Ltd v Great Rift Valley Transporters Ltd [2010] eKLR**.

28. This is true whether or not the Respondent had taken out a cover to insure the goods ferried by the Appellant. Indeed, even a claim against the Appellant under the doctrine of subrogation would be determined upon the same principles. Suffice to say, that there was a dearth of evidence as to the existence nature, scope and terms of the alleged insurance cover, and therefore no finding in respect of loss or liability thereof could have been properly based thereon in this case. In my view, the failure by Respondent to prove its alleged damage or loss resolved the entire matter in the Appellant's favour. In the result, this appeal is allowed. The judgment of the court below and the resulting

decree are hereby set aside. This court substitutes therefor an order dismissing the suit with costs. The costs of the appeal are awarded to the Appellants.

DELIVERED, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF SEPTEMBER, 2018

In the presence of :

Mr. Wambugu for the Respondent

Appellant – No appearance

Court clerk Kevin

C. MEOLI

JUDGE