



Kenyatta International Convention Centre v Bayport Freighters Limited (Commercial Appeal E018 of 2023) [2025] KEHC 898 (KLR) (Commercial and Tax) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 898 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E018 OF 2023
MN MWANGI, J
JANUARY 17, 2025

BETWEEN

KENYATTA INTERNATIONAL CONVENTION CENTRE APPELLANT

AND

BAYPORT FREIGHTERS LIMITED RESPONDENT

(Being an Appeal from the ruling of the Hon. G.M. Gitonga (PM) delivered on 27th January 2023 in Milimani Commercial Civil Suit No. E1620 of 2021 at Nairobi)

JUDGMENT

1. The plaintiff (respondent) filed a suit against the defendant (appellant) in the lower Court vide a plaint dated 10th December 2021 seeking special damages in the sum of Kshs.9,647,108.00, interest on the said sum at prevailing commercial rates with effect from 25th November 2015 until payment in full, costs of the suit and interest thereon at Court rates. The respondent's case was that the appellant entered into a contract with Congress Rental (SA) Pty Ltd (CRSA) on 11th December 2015 for the supply and installation of Bosch conference management equipment at the Kenyatta International Convention Centre (KICC), ahead of two Ministerial Conferences scheduled between 17th & 19th December 2015. Due to the late agreement, the appellant authorized the CRSA on 25th November 2015 to appoint a reliable clearing and forwarding agent for the swift clearance and delivery of the equipment.
2. CRSA subsequently appointed the respondent on the same date to handle the clearance and forwarding of the goods. The respondent stated that it provided services on a 24-hour shift basis and successfully cleared the goods under prior release terms with the KRA, to ensure timely delivery of the equipment for installation before the WTO Ministerial Conferences scheduled for 17th to 19th December 2015. On 9th January 2016, the plaintiff issued an invoice for Kshs.9,647,108.00 to the



appellant, but the appellant refused to make the payment. The respondent subsequently filed a claim for the said amount in the lower Court.

3. In opposition to the respondent's suit, the appellant filed a statement of defence dated 10th February 2022 where it denied all the averments contained in the respondent's plaint save for the fact that it entered into a contract with the CRSA on 11th December 2015 for the supply and installation of Bosch conference management equipment at KICC. The appellant claimed that it was neither aware of, nor involved in the agreement between the respondent and the CRSA, and it therefore had no legal responsibility or obligation to make the payment.
4. Further, that the clearing and forwarding costs related to the said supply and installation were subject to arbitral proceedings between the respondent and the CRSA, which resulted in an Arbitral Award in favour of the CRSA published on 18th September 2017. That the said proceedings were concluded in the HCCOMM Misc. Civil App. No. 433 of 2017, where the Arbitral Award, along with the associated costs and interest thereon, were fully paid to the CRSA. The appellant contended that before the arbitral proceedings begun, it had fully paid the CRSA the agreed contract price, which included import duties and other charges on the conference management equipment.
5. The appellant denied having received a demand letter or notice of intention to sue as required by Section 13A of the *Government Proceedings Act*. As a result of the foregoing, the appellant asserted that the respondent's suit against it was res judicata. Additionally, the appellant disputed the lower Court's jurisdiction, asserting that the suit was barred by limitation under Section 3(2) of the *Public Authorities Limitation Act*.
6. The respondent then filed a Notice of Motion application dated 6th April 2022 seeking an order for summary judgment to be entered for the respondent against the appellant for Kshs.9,647,108.00 with costs and interest as prayed in the plaint. The application was supported by an affidavit sworn on 6th April 2022 by Urbanus Kioko Kibila, the respondent's Managing Director, who averred that the appellant's defence consists of mere denials and that it does not raise any triable issues. The application was also supported by an affidavit sworn on 6th April 2022 by Geoff Muisyo Kithome, the holder of a Power of Attorney issued by the CRSA. He averred that the CRSA was expressly authorized by the appellant to engage a local clearing and forwarding agent to clear the conference management equipment, as result of which the CRSA appointed the respondent on 25th November 2016 to manage the clearing and forwarding of the equipment upon arrival at the Jomo Kenyatta International Airport.
7. In opposition to the said application, the appellant filed Grounds of Opposition dated 28th April 2022 and a replying affidavit sworn on 24th June 2022 by Jane Frances M. Mutisya, the appellant's Corporation Secretary/Director Legal and Regulatory Services. The appellant averred that its defence raises triable issues of law and fact, and that the respondent's claim is not a liquidated demand in nature as it requires judicial interrogation beyond mere calculation, thus not capable of being awarded summarily. Ms. Mutisya referred to the contract between the respondent and the CRSA and stated that neither Clause 7.4 nor Clause 9 thereof authorized the CRSA to engage a third party to clear the conference management equipment on behalf of the appellant.
8. She submitted that Clause 10 of the said contract expressly provided that the CRSA could not assign the contract or any part of it to a third party without the appellant's written consent, which consent was never granted to the CRSA by the appellant. Further, that no such consent was produced by the respondent in support of the averment that the appellant authorized the CRSA to engage a clearing and forwarding agent to clear the conference management equipment on its behalf. She contended that no financial obligation could plausibly accrue from the appellant by virtue of the doctrine of privity of contracts.



9. The Trial Court in a ruling delivered on 27th January 2023 allowed the respondent's application and entered summary judgment in favour of the respondent against the appellant for Kshs.9,647,108.00 together with costs and interest at Court rates from the date of filing suit, until payment in full. Being dissatisfied with the said decision, the appellant filed a Memorandum of Appeal dated 7th February 2023 raising the following grounds of appeal -
- i. The learned Magistrate erred in law and fact in determining the respondent's suit summarily and denying the appellant the opportunity of defending the suit on merits hence fundamentally disregarding the overriding objective of the law;
 - ii. The learned Magistrate erred in law and fact in failing to fully appreciate the legal framework governing the entry of summary judgment thereby arriving at an erroneous determination;
 - iii. The learned Magistrate erred in law and fact in disregarding and failing to appreciate the triable issues raised in the appellant's defence which could only be determined at full trial;
 - iv. The learned Magistrate erred in law and fact in finding that the respondent's invoice remained unpaid by the appellant despite having found that the services purported to have been rendered by the respondent had been procured by a third party to the suit;
 - v. The learned Magistrate erred in law and fact in holding that the respondent's claim was plain and clear despite the inconsistent depositions laid out by the parties in their rival affidavits and the pleadings filed before the subordinate Court;
 - vi. The learned Magistrate erred in law and fact in finding the respondent's claim was for a liquidated sum while in fact the same had not been sufficiently proven; and
 - vii. The learned Magistrate erred in law and fact in disregarding and not taking into account the authorities submitted/cited by the appellant herein thereby arriving at an erroneous and unjust decision.
10. The appellant's prayer is for the appeal to be allowed with costs, the ruling of the subordinate Court be set aside in its entirety, and for the suit therein to be allowed to proceed de novo on merits before another Magistrate of competent jurisdiction other than the one who made the orders giving rise to the instant appeal.
11. The appeal herein was canvassed by way of written submissions. The appellant's submissions were filed on 22nd April 2024 by the Hon. Attorney General, whereas the respondent's submissions were filed by the law firm of Kyalo & Associates Advocates on 23rd April 2024.
12. Ms. Chibole, learned Counsel for the appellant cited the provisions of Order 36 Rule 1 of the Civil Procedure Rules, 2010 and the case of Magram Butchery Limited v African Safari Club Ltd [2012] eKLR, and submitted that summary judgment can only be sought in instances where a defence has not been filed, which is not the case herein. She contended that by the time the respondent filed its application seeking summary judgment to be entered against the appellant, the appellant had already filed its defence to the respondent's suit.
13. Counsel relied on the case of Mugambi v Gatururu [1967] E.A. 196 E.A 196, and submitted that numerous points of divergence emerged from the rival pleadings filed by the parties in the subordinate Court that required resolution through a full trial, making it improper for the learned Magistrate to enter summary judgment against the appellant. Ms. Chibole referred to the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75, and asserted that the appellant's defence raises triable issues that ought to have been determined on merits after a full hearing of the respondent's suit such as the fact



that the appellant had not contracted the services of the respondent thus no payment obligation could attach to it, and that all expenses relating to clearing and forwarding were paid in full by the appellant to the CRSA.

14. Mr. Kyalo, learned Counsel for the respondent referred to the case of Challenger Trade Finance Segregated Portfolio of the South Africa SPC v Danish Brewing Company E.A. Limited & others [2021] eKLR, and submitted that the respondent's application for summary judgment falls within the ambit of Order 36 Rule 1 of the Civil Procedure Rules, 2010 notwithstanding the fact that it was filed after the appellant filed its defence to the respondent's suit. He cited the case of Job Kilach v Nation Media Group Ltd [2015] eKLR, and further submitted that the appellant's defence did not raise any triable issues as it consisted of mere denials.
15. He submitted that the learned Magistrate exercised her discretion properly in entering summary judgment in favour of the respondent against the appellant. He argued that the appellant indeed authorized the CRSA to appoint the respondent to facilitate the clearing and forwarding of the equipment pursuant to the provisions of Clause 10 of the Agreement between the appellant and the CRSA. He asserted that the appellant cannot run away from its responsibility by claiming that it did not engage the respondent as its clearing and forwarding agent.

Analysis And Determination.

16. This being the 1st appellate Court, I have a duty to analyze and re-evaluate the evidence adduced before the lower Court and reach my own independent conclusion. See *Williamsons Diamonds Ltd v Brown* [1970] EA 1 and [*Ramji Ratna and Company Limited v Wood Products \(Kenya\) Limited, Civil Appeal No. 117 of 2001.*](#)
17. I have re-examined the entire record and given due consideration to the written submissions by the parties' respective Counsel. The issue that arises for determination is whether the instant appeal is merited.
18. Summary Judgment is provided for under the provisions of Order 36 Rule 1 of the Civil Procedure Rules, 2010 which states that –
 1. In all suits where a plaintiff seeks judgment for –
 - a. a liquidated demand with or without interest; or
 - b. the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.
 2. The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.
 3. Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days. (Emphasis added).
19. Rule 1 here before expressly provides that an application for summary judgment can only be filed in instances where a defendant has entered appearance but has failed to file a defence. In the lower Court case, it is not in contest that by the time the respondent filed its application for summary judgment before the Trial Court, the appellant had already filed a defence to the respondent's claim.



The respondent relied on the case of Challenger Trade Finance Segregated Portfolio of the South Africa SPC v Danish Brewing Company E.A. Limited & others (supra) and submitted that its application for summary judgment falls within the ambit of Order 36 Rule 1 of the Civil Procedure Rules, 2010 notwithstanding the fact that it was filed after the appellant filed its defence to the respondent's suit. On perusal of the said decision, I find that it was rendered by the High Court, which means that it is of persuasive value, and not binding to this Court.

20. The Court of Appeal in the case of Mega Garment Limited v Mistry Jadva Parbat & Co. (Epz) Limited [2016] KECA 172 (KLR), addressed itself on the import of the provisions of Order 36 Rule 1 of the Civil Procedure Rules, 2010 and held that –

A summary judgment, in terms of order 36 rule 1(1) (b) can only be sought after the defendant has entered appearance but before he has filed a statement of defence.

21. Bound by the aforesaid decision, this Court finds that since the respondent's application for summary judgment was filed after the appellant had filed a defence to the respondent's claim, and which defence was properly on record, the said application cannot fall squarely within the ambit of the provisions of Order 36 Rule 1 of the Civil Procedure Rules, 2010. Non-compliance with the aforesaid provisions is not a technicality that can be cured under the provisions of Article 159(2)(d) of *the Constitution* of Kenya since the law is very clear that such an application can only be filed in instances where a defendant has entered appearance but failed to file a defence. If at all the framers of the law wanted the provisions of Order 36 Rule 1 of the Civil Procedure Rules, 2010 to apply even to instances where a defendant has entered appearance and filed a defence, they would have stated as much.
22. In the circumstances, this Court finds that the respondent's application for summary judgment was fatally defective for want of compliance with the Provisions of Order 36 Rule 1 of the Civil Procedure Rules, 2010. The Subordinate Court should not have entered summary judgment against the appellant herein.
23. Accordingly, I find that the appeal herein is merited. It is hereby allowed as prayed. Costs are awarded to the appellant. The consequence thereof is that the lower Court case shall be heard de novo by another Magistrate save for Hon. G. M. Gitonga, Principal Magistrate.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the appellant

Mr. Kyalo Mbubu for the respondent

Ms B. Wokabi - Court Assistant.

