Universe Freight Services Ltd v Aexcel Auto Spares Ltd (Civil Appeal E048 of 2023) [2025] KEHC 251 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 251 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E048 OF 2023

H NAMISI, J

JANUARY 23, 2025

BETWEEN

UNIVERSE FREIGHT SERVICES LTD ..... APPELLANT

AND

AEXCEL AUTO SPARES LTD ..... RESPONDENT

(Being an Appeal from the Judgement of Hon. Kagoni EM, Principal Magistrate delivered on 13 February 2023 in Milimani Civil Suit No. E1024 of 2020)

JUDGMENT

1. The appeal arises from a dispute regarding delivery of goods. In the Plaint dated 27 October 2020, the Respondent the sum of Kshs 507,500/=, being monies due and owing to it for delivery of goods to the Appellant sometime in the year 2020. According to the Respondent, the value of the goods delivered was Kshs 656,700/=. On 23 October 2020, the Appellant made a payment of Kshs 149,500/= vide cheque number 00067, bringing the balance to Kshs 507,500/=.

2. In support of the claim, the Respondent produced a statement no. CU006 dated 30 September 2020 for Kshs 656,700/=. The same bore the stamp of the Respondent.

3. In its Defence, the Appellant pleaded that the parties had an agreement that the Respondent would supply spares to the Appellant when requested by the Appellant's Yard Manager through a local purchase order (LPO). The Appellant denied issuing any purchase order to the Respondent or receiving any of the alleged goods. The Appellant also denied owing the Respondent the sums claimed.

4. In support of their defence, the Appellant produced copies of work order request forms dated 3rd March 2020, copy of cheque number 000671 for Kshs 149,200/=, copies of duly paid invoices and a copy of cheque number 00404 dated 5 May 2020.

5. At the hearing, each party called one witness. The Respondent called PW1 – Aamor Butt, the Managing Director of the Respondent. He adopted his witness statement dated 27 October 2020 and produced the list of documents. On cross examination, he confirmed that the goods were collected by one Benson. The invoices and delivery notes were returned stamped. No LPOs were raised.

6. DW1 was the Yard Manager. He adopted his witness statement dated 4 May 2021 and produced his bundle of documents. On cross examination, he confirmed that he is not part of management and does not execute contracts.

7. Parties filed their respective submissions.

8. In its judgement, the trial court wondered how much of the testimony of DW1 was true, considering the gist of his testimony was marred by him blowing hot and cold. The court further noted that no explanation was given at trial by DW1 as to why the witness statement he adopted in court was opposite to what he stated on cross examination. In the end, the court found that DW1 was not a credible witness.

9. Further, the trial court noted that in the year 2020, the Appellant received some invoice/delivery notes for diverse dates. These were produced by the Appellant. The trial court held that the testimony of DW1 was in large parts, if not wholly, inaccurate and false. The court relied on the case of Behan & Okero Advocates -vs- National Bank of Kenya [2007] eKLR in concluding that a party cannot be allowed to blow hot and cold at the same time. In its observation, PW1 was the only credible witness.

10. Judgement was entered in favor of the Respondent against the Appellant as prayed in the Plaint.

11. Aggrieved by the judgement, the Appellant lodged this appeal on the following grounds, most of which are mere repetitions of the defence;

    i. The learned Magistrate erred in law and in fact in making a finding that the Appellant is indebted to the Respondent for a sum of Kshs 507,500 despite there being no evidence showing the same;

    ii. The learned Magistrate erred in law and in fact in making a finding that the Appellant owed the Respondent a sum of Kshs 507,500/= despite there being no evidence by the Respondent to prove the claim;

    iii. The learned Magistrate erred in law and in fact in making a finding that there was an existing oral contract between the Appellant and Respondent and misdirected himself by interpreting an understanding between the parties as an existing oral contract between the Appellant and Respondent;

    iv. The learned Magistrate erred in law and in fact by finding the claim in favor of the Respondent despite there being no evidence adduced by the Respondent to prove that the Appellant raised an LPO as was the agreement for supply of spare parts worth Kshs 656,700/= or that it supplied the said spare parts to the Appellant;

    v. The learned Magistrate erred in law and in fact in making a finding that the Appellant made a part payment of Kshs 149,500/- leaving an outstanding balance of Kshs 507,500/- despite there being no evidence adduced by the Respondent to prove any payments were down whatsoever towards settled of the alleged supply of spare parts worth Kshs 656,700/=;

vi. The learned Magistrate erred in law and in fact by failing to consider the evidence on record by the Appellant that all the goods that were requested for by the Plaintiff were paid for in full leaving no outstanding balance;

vii. The learned Magistrate erred in law and in fact by applying improper standard of proof whereas the Appellant had presented the trial court with sufficient proof to meet the legally required threshold on balance of probability;

viii. The learned Magistrate erred in law and in fact by failing to consider the testimony of the Appellant's witness which proved the Appellant's Manager and/or Yard Manger did not request for the goods worth Kshs 656,700/= and the goods requested by the said persons and delivered were paid for in full;

ix. The learned Magistrate erred in law and in fact by fauling to appreciate the principles of stare decisis to the holdings in the Court of Appeal authorities on the issues before the court holding contrary to the holding of the learned Magistrate;

x. The learned Magistrate erred in law and in fact by disregarding the documentary evidence adduced by the Appellant, which evidence was not countered or otherwise disproved by more compelling evidence by the Respondent;

xi. The learned Magistrate totally misdirected himself in delivering the judgement in favor of the Respondent as against the Appellant by failing to consider and appreciate the evidence on record tendered by the said Respondent on behalf of the Appellant;

12. Parties canvassed the Appeal by way of written submissions. In their submissions, the Appellant identified the following issues for determination:

i. What were the terms of the agreement between the Appellant and the Respondent?

ii. Whether the Respondent proved its case against the Appellant

iii. Costs.

13. On the first issue, the Appellant submitted it was not in dispute that parties entered into an oral agreement for supply of goods. The requests would be made by the Yard Manager or someone designated by the Manager. The goods would be supplied and receipt acknowledged by stamping and signing. The Appellant relied on the cases of Pius Kimaiyo Langat -vs- Co-operative Bank of Kenya Ltd [2017] eKLR and Jane Elizabeth Gitiri Waroga -vs- John Dryden Kimotho [2019] eKLR.

14. On the second issue, the Appellant submitted that if goods were supplied at all, then the same were not supplied to an authorised party as per the agreement and the said goods were not received on behalf of the Appellant. The Appellant argued that the Respondent did not adduce any evidence to prove that the alleged goods were delivered to the Appellant. Further, any requests that were made by the Appellant were delivered and subsequently paid for in full, and there was no outstanding balance.

15. It was the Appellant's submission that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings as guided in the case of Trust Bank Ltd -vs- Paramount Universal Bank Ltd & 2 Others [2009] eKLR.

16. It was the Respondent's submission that following the delivery of the goods, the Respondent duly raised an invoice. By September 2020, the Appellant had not settled the outstanding amount, necessitating the use of a debt collector. It is only when the demand letter was issued, that the Appellant

issued a cheque for part settlement of the outstanding amount. It was the Respondent's argument that despite producing the invoices raised by it, the Appellant did not produce any evidence to show that it made the payments in full for all the invoices. The Respondent submitted that when the Appellant was served with the demand notice, they did not dispute the amount claimed but instead made part payment of the debt, which is an acknowledgement of the debt.

17. Further, the Respondent submitted that based on the documentary evidence and the oral testimonies, the balance of probability tilts in favor of the Respondent for various reasons.

Analysis & Determination

18. I have read the Record of Appeal, Memorandum of Appeal and respective submissions. It is the duty of a first appellate court to re- appraise and re-analyse the evidence on record and arrive at its own conclusion and give reasons either way – see Sumaria & Another vs Allied Industries Limited [2007] 2 KLR. The Court has also to appreciate that in the discharge of its aforesaid mandate the Court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, it was based on a misapprehension of the evidence or the Magistrate had been shown demonstrably to have acted on wrong principle in reaching the finding he did –see Musera vs Mwechelesi & another [2007] 2 KLR 159.

19. In my considered view, the main issue in this appeal is whether the Respondent discharged its burden of proving the debt owed to it by the Appellant. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 107 (1) of the *Evidence Act*, Cap 80 provides thus:

> 107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

20. There is, however, the evidential burden that is cast upon any party who desires the court to believe in the existence of a particular fact. Sections 109 and 112 of the *Evidence Act* provide as follows:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

21. Simply put, he who asserts must prove. This was augmented by the Court of Appeal in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR as follows

> We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.

22. I have examined the evidence presented before the trial court. The Respondent's witness stated that goods were supplied to the Appellant. Immediately after delivering the goods, the Respondent invoiced the Appellant and demanded payment. There was no invoice produced. Instead, the Respondent produced a Statement ending 30 September 2020, indicating balances for the months of June, July, August, September and "before June" 2020.

23. On the other hand, the Appellant filed a Defence with contradicting averments. First, the Appellant denied issuing any purchase order to the Respondent, but produced several invoices/delivery notes for goods supplied in the year 2020. Perhaps the contradictions can be attributed to lack of a keen eye when drafting, thus leading to the trial court's observation that the Appellant was blowing hot and cold at the same time.

24. Despite the patchy defence by the Appellant, the question still remains whether the Respondent proved its case to the required standard. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

25. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the Court of Appeal held that:

> Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

26. Looking at the evidence before the trial court, one question lingers in my mind. If, indeed the Respondent issued an invoice for the delivery of the goods, why was the same not produced before the court? The Appellant produced several copies of invoices/ delivery notes for the years 2019 and 2020. These bear the logo and name of the Respondent, signatures of the person who prepared and the one who received the goods. They also bear the Appellant's stamp. Presumably, once received and signed by the Appellant, the Respondent would retain a copy for their records. Nothing would have been easier than for the Respondent to produce the invoice(s)/ delivery note(s) for the goods worth Kshs 656,700/=. It was not enough for the Respondent to produce a statement and claim that the Appellant owed it money.

27. Interestingly, I note the submission by the Respondent that one of the reasons the balance of probabilities tilts in favour of the Respondent is that the invoices from the Respondent to the Appellant were duly received by stamping in acknowledgement of the contents. Respectfully, I disagree. This fact tilts the scales in favour of the Appellant, considering that the Respondent did not produce any invoice in support of its claim.

28. The question now is whether this court sitting on appeal has any reason to disturb the findings of the trial court. In United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A, the court had this to say on this issue:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

29. Based on the evidence presented before the trial court, it is my considered view that the Respondent's suit was not proved. Accordingly, the appeal is allowed and the judgement of the trial court rendered on 13 February 2023 is hereby set aside. I hereby substitute that finding with an order dismissing the suit with costs to the Appellant. The Appellant shall also have costs of the appeal, assessed at Kshs 50,000/=.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

..... for the Appellant

..... for the Respondent

Ms. Libertine ..... Court Assistant