



**Maersk Kenya Limited v Danka Investments Limited (Civil Appeal E112 of 2022)
[2025] KEHC 2480 (KLR) (Commercial and Tax) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E112 OF 2022
PM MULWA, J
FEBRUARY 13, 2025**

BETWEEN

MAERSK KENYA LIMITED APPELLANT

AND

DANKA INVESTMENTS LIMITED RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate's court at Nairobi Hon. Selina Muchungi delivered on 22nd July 2022 in CMCC E5330 of 2020)

JUDGMENT

1. In this appeal, Maersk Kenya Limited (the Appellant) has challenged the trial court's judgment and decree entered against it on 22nd July 2022.
2. The appellant was the defendant in the lower court whereas the respondent was the plaintiff. By the plaint dated 17th August 2020, the respondent sued the appellant seeking compensation for breach of contract, claiming that the appellant failed to transport avocados in an atmosphere-controlled container as a consequence they went bad.
3. The respondent also sought a declaration that clause 12.2(b) of the Bill of Lading (No. 910434773) in relation to container MMAU1056333 did not apply to atmosphere-controlled containers. The respondent argues that the entire consignment was rejected at the port of entry and subsequently destroyed at their own expense. The respondent asserts that the atmosphere-controlled container was intended to maintain the goods within specified atmospheric parameters, which the appellant allegedly failed to uphold.
4. In response, the appellant filed a statement of defence on 21st January 2021, denying the respondent's claims. The appellant acknowledges shipping 5,760 cartons of fresh avocados in a refrigerated



- container, with a specified temperature of 5.0 degrees Celsius but disputes responsibility for maintaining the container's atmosphere. The appellant acknowledges the goods' destruction due to changes in humidity and temperature but denies liability for the loss or damage.
5. The trial magistrate delivered judgment on 22nd July 2022 in favour of the respondent, and awarded damages.
 6. Aggrieved by the said decision, the appellant commenced this appeal by a Memorandum of Appeal dated 20th June 2022 citing 9 grounds as summarized therein.
 7. The appellant prayed that the appeal be allowed and the judgment of the lower court dated 22nd July 2022 be set aside and be substituted with an order dismissing the suit with costs. The appellant also prayed that the costs of the appeal be met by the Respondent.
 8. The appeal was canvassed by way of written submission.
 9. In its submissions dated 27th June 2024, the appellant stated that the trial court erred in finding that the appellant breached its contract by failing to maintain humidity during the transportation of avocados. It argues that the contract, as outlined in the Bill of Lading and the appellant's promotional material, only obligated the appellant to control temperature, oxygen and carbon dioxide, but not humidity. They emphasize that the respondent was not charged for humidity control, and humidity was explicitly excluded from the controlled atmosphere service provided by the appellant.
 10. The appellant asserts that the respondent did not prove its case and that the special damages claimed were neither specifically pleaded nor properly substantiated with the necessary documentation, such as the customs declaration or transport receipts. Therefore, the appellant urged the court to interfere with the trial court's finding and allow the appeal.
 11. The respondent in its submissions dated 12th July 2024 submits that the lower court's judgment was well-reasoned and legally sound. That the court accurately interpreted the parties' intentions by considering all relevant documents, including promotional materials, invoices and the bill of lading. The respondent believes that the court correctly upheld the appellant's responsibility for providing a "controlled atmosphere container" service, which included humidity control, as no exclusion was indicated in the documents.
 12. The respondent further submits that the appellant failed to address important legal issues raised during the trial and misinterpreted the intent of the contract. Additionally, the respondent contends the appellant neglected its statutory obligations under the *Carriage of Goods by Sea Act*, which mandates the maintenance of refrigerating and cooling facilities. The respondent also points out that the appellant did not challenge the valuation of the goods as stated in the commercial invoice. The respondent argues that the appellant should be estopped from denying liability due to their actions. It urged the court to dismiss the appeal with costs.

Analysis and determination

13. As is required by Section 78 of the *Civil Procedure Act*, this being the first appellate court, the court has a duty to re-evaluate and analyze all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded – (See *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123 and *Abok James Odors t/a A.J. Odera & Associates v John Patrick Macharia t/a Macharia & Co. Advocates* (2013) eKLR).



14. It is trite law that this court as an appellate court will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have demonstrably to have acted on wrong principles in reaching his conclusions (*Mbogoh vs Shah & Anor* (1968) EA 93).
15. I have considered the record of appeal and the supplementary record, the memorandum of appeal, the parties' submissions and the trial court's record. I frame the following issues for determination:
 - a. whether there was a transportation agreement between the appellant and the respondent and if so what were the terms of the agreement.
 - b. whether the terms of the said agreement were breached and by whom.
 - c. whether the respondent was entitled to the reliefs granted.
16. From the record, it is undisputed that there was a transportation agreement between the appellant and the respondent regarding the Bill of Lading number B/L No. 91043434773. On this aspect therefore, the answer is in the affirmative.
17. I now move to consider the aspect on what the terms of the contract were. Here the parties agree that the terms of the contract are outlined in the Bill of Lading.
18. The respondent contends the Bill of Lading must be read together with the provisions for the freight invoice and the promotional material provided by the appellant, which reflect the intention of the parties. On the Other hand, the appellant maintains that the terms of the agreement were solely contained in the Bill of Lading. According to the appellant a controlled atmosphere service referred to in its promotional material did not include humidity.
19. The respondent asserts that it paid the appellant to transport the Avocados in an atmosphere-controlled container, as the product was perishable, as indicated in the promotional material from the appellant. The respondent faults the appellant for failing to maintain the required humidity levels during transit, which led to the decrease in humidity and caused the Avocados to spoil. The respondent claims that the appellant is liable for the resulting loss.
20. In contrast, the Appellant denies responsibility for maintaining the humidity of the goods during transit. It argues that its primary obligation was to maintain the temperature, oxygen, and carbon dioxide and denies any liability for the loss. It also contends that the avocados were to be transported in a refrigerated container and not a controlled atmosphere container.
21. Upon careful consideration of the Bill of Lading, particularly Clause 12.2(b), it is clear that the refrigerated container provided by the Appellant was not designed to monitor and control the humidity levels. The clause specifically notes that while the container has a setting facility, humidity is influenced by various external factors beyond the control of the carrier, and as such, the carrier does not guarantee the maintenance of any intended humidity level within the container. This provision is critical because it outlines the scope of the Appellant's responsibility with respect to humidity control during transportation. In this regard, Clause 12.2(b) expressly excludes any responsibility for the carrier to control humidity, a fact that would have been understood by the parties at the time of entering the contract.
22. The terms of Clause 12.2(b) are clear, and they expressly limit the carrier's responsibility for humidity control. Thus, in the absence of any contrary provision or understanding, the Appellant cannot be held liable for failing to control the humidity of the product during transport.



23. I have reviewed the appellant's definition of "StarCare" in their promotion material, as a Controlled Atmosphere container designed to slow down the respiration process of fresh commodities. It does not provide for humidity.
24. It follows that the Respondent, in choosing to transport with the Appellant, was aware of the exact type of container to be used for the shipment of the avocados. The Appellant issued a receipt indicating the provision of controlled atmosphere services, for which the Respondent paid USD 1,500. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence is pleaded and proven, (see *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR).
25. The court should consider the intention of the parties when entering into an agreement, and should not re-write the contract. In the present case, it is evident that the Respondent intended for the avocados to be shipped as a perishable commodity. The appellant, therefore, had a duty to exercise a higher degree of care in the transport process.
26. The import invoice clearly shows that the Respondent paid for controlled atmosphere services, which suggests that there was an expectation that the goods would be transported in a manner that slowed down the respiration process and preserved their quality. However, it is important to note that the controlled atmosphere service, as defined by the Appellant, may not have included humidity control. As noted earlier, the Appellant's promotional material and the Bill of Lading make a distinction between refrigeration and controlled atmosphere.
27. In cases where there is a conflict between the factual expectations of the parties and the explicit terms of the contract, the established principle of law is that the terms of the contract must prevail, unless there is credible evidence of misrepresentation, fraud, or undue influence.
28. The Respondent, having paid for a controlled atmosphere service, would reasonably expect that the transport conditions were conducive to preserving the product. However, the explicit terms of the Bill of Lading clearly distinguish between refrigeration and humidity control, and the Respondent cannot rely on a broader expectation than what the contract provides.
29. The Appellant correctly argues that the service provided was limited to maintaining the appropriate temperature, oxygen and carbon dioxide levels to slow down the respiration process of the avocados. No provision in the Bill of Lading explicitly guarantees humidity control. The court's role is to give effect to the parties' clear intentions as expressed in the contract and not to rewrite the terms based on a party's post-contractual expectations.
30. In light of the above, it is my finding that the terms of the Bill of Lading must be upheld, the Respondent's expectation regarding humidity control cannot supersede the explicit contractual terms
31. Therefore, I find that the trial magistrate erred in finding that the Appellant was required to control the humidity during transportation. The trial court misinterpreted the scope of the Appellant's obligations as outlined in the Bill of Lading, and in doing so, it extended the Appellant's liability beyond what was agreed upon by the parties.
32. In conclusion, given the clear and unambiguous terms of the contract, the Respondent's claim for damages arising from the failure to control humidity must fail. The Appellant's liability is strictly confined to the terms of the contract, and since the contract does not include a guarantee for humidity control, the claim for damages will not succeed.
33. The upshot of the foregoing is that the appeal is merited and is hereby allowed. I set aside the trial court's judgment delivered on July 22, 2022 and substitute it with an order dismissing the suit. Each party will bear its own costs both in the lower court and on appeal.



JUDGMENT DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Mutua for Appellant

N/A for Respondent

Court Assistant: Carlos

