Mogas Kenya Limited v Gleys Enterprises (Civil Appeal E118 of 2022)
[2025] KEHC 2477 (KLR) (4 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E118 OF 2022

AB MWAMUYE, J

FEBRUARY 4, 2025

BETWEEN

MOGAS KENYA LIMITED ..... APPELLANT

AND

GLEYS ENTERPRISES ..... RESPONDENT

(Being an Appeal against the judgment and decree of the Hon. C.N.C Oruo (SRM) delivered on 28th October, 2022 in WINAM SPMCC Commercial No. E001 of 2021)

JUDGMENT

1. The Appellant herein has approached this Court aggrieved by the Judgment of the Trial Court delivered on 28th October, 2022 in Winam SPMCC Commercial No. E001 of 2021. The Memorandum of Appeal dated 24th November, 2022 has five Grounds of Appeal which revolve around four issues; whether the appellant is indebted to the respondent, whether the contract was breached, whether the counter-claim was wrongly dismissed, and whether the respondent is entitled to the remedies sought. The trial court found that there existed a contractual relationship between the Appellant and Respondent for fuel transportation, and there was a breach of contract since there was no notice served upon the Respondent by the Appellant pursuant to the contract as much as the Appellant pleaded frustration of the contract after Transmara sugar company terminated its contract. The Appellant's main grievance is that it is being condemned by the Trial court to settle the decretal sum, costs of the suit despite settling some amount owed to the respondent, and the trial court did not address the set off or consider there being a lease agreement between itself and the Respondent.

2. The Appellant filed its written submissions dated 25th March, 2024 while the Respondent filed its written submission dated 14th March, 2024.

3. The Appellant in its written submissions, argues that it entered into a contract with the Respondent on 6th August, 2021 and the same was to take effect from 17th August, 2021 and immediately the contract

was signed, the Appellant's main customer (Transmara sugar) terminated its supply contract resulting to non-performance of its contract with the Respondent. The Appellant also argues that it leased one of its petrol stations to the respondent and the parties agreed that the Appellant would set off the rent from the transport charges due to the respondent every month and thereafter pay the balance. The dispute arose following the termination of the appellant's contract with its main customer, leading to the alleged non-payment of the respondent for transport services rendered. It further submitted that the Respondent did not deny there being a lease agreement between the parties or deny there was a settlement of Kshs.470,000 already made. The appellant also argued that the Respondent owed it Kshs.120,000/- being rent due at the time the suit was being heard. It further submitted that the award for general damages was unwarranted and it should be set aside. It relied on various cases inter alia; Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No.54 of 2004 [2009] eKLR, Consolata Anyango Ouma vs.- South Nyanza Sugar Co. Ltd [2015], Hadley v Baxendale (1854)9. Exch.341, Kenya Tourism Development Corporation vs Sundowner Lodge Ltd 2018 eKLR.

4. The respondent in its written submissions submitted that the issue of contractual relationship between the parties is not contested. It further submitted that the appellant owes it Kshs.1,782,893/= being sum of unpaid supply of fuel as proved with its delivery notes. The respondent argues that there was no tenancy agreement between itself and the appellant. It further argued that the Appellant breached the contract as it had not been issued with a termination notice by the appellant, thus making it incur losses. The Respondent submitted it is entitled to Kshs.5,356,800/= being an award for general damages and Kshs.5,356,800/= being an award for loss of user. The respondent cited several authorities and urged this honourable court to dismiss the appellant's appeal, uphold the trial court's judgment and vary it by awarding general damages of Kshs.5,356,800/=, set aside the order dismissing its claim for loss of user and award kshs.5,356,800/= for the same.

5. This being a first appellate court, I am guided by the dictum in the case of Selle vs Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

6. I have examined the judgment of the Trial Court in light of the testimony given and the evidence tendered by the parties during the trial, and have considered the pleadings and submissions filed at this appellate stage. The issues to be determined by this Court are whether the appellant is indebted to the respondent, whether the contract was breached, whether the counter-claim was wrongly dismissed, and whether the respondent is entitled to the remedies sought.

7. Starting with the first issue, whether the appellant is indebted to the respondent, the respondent submitted that it provided transportation services worth Kshs.1,782,893/=, evidenced by delivery notes and invoices. The appellant contended that it had settled all invoices and that, at the time of termination, only Kshs.480,733.26/= was outstanding, subject to rent set-off.

8. Proof in claims of a civil nature is by way of evidence. Section 3 of the *Evidence Act* (Cap 80) defines evidence as denoting:

> "--- the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved, and without prejudice to the foregoing generally, includes statements by accused persons, admissions and observations by the court in its judicial capacity."

9. In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the *Evidence Act*, as follows;

> " 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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.
>
> 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 be on any particular person."

10. In these proceedings and particularly the claim that the respondent had offered transportation services to the appellant, the respondent had the burden to prove existence of those facts. The respondent through its PW1, averred that it honoured its part of the agreement by transporting the appellant's oil/petroleum products and proved this by producing its delivery notes and statement of account indicating the amount it was owed and which was due for payment. On the other hand, the appellant contended that it had settled all invoices and that only Kshs.480,733.26/= was outstanding as at April, 2022, subject to rent set-off.

11. It is trite law that he who asserts must prove (Section 107 of the *Evidence Act*, Cap 80, Laws of Kenya). The respondent bore the burden of proving that the invoices were unpaid. The respondent proved its claim through the evidence produced in court showing the money it is owed by the appellant by way of unpaid invoices, and the delivery notes of the fuel it delivered. The appellant's claim that it settled part of the deliveries required documentary evidence. The appellant ought to have produced bank statements or cheques to show it had made some payments to the respondent. The appellant, however, did not provide sufficient proof of full settlement of invoices, thus making the trial court's decision that the appellant owes the respondent Kshs.1,782,893/= reasonable.

12. On the second issue, it is undisputed that the parties entered into a contractual agreement. The appellant argued that its contract with the respondent became frustrated after the termination of its supply contract by its main customer. The respondent, however, argued that no formal termination notice was issued and that the contract continued until August 2023.

13. The case of Davis Contractors Ltd vs Farehum U.D.C. (1956) AC 696 sought to provide guidance on when a contract can be held to have been frustrated. In that case Lord Radcliff stated thus: -

> " ...frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. "Non haec in foederi veni" It was not what I promised to do...There... must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for."

14. In the circumstances, the alleged failure to engage the services of the respondent was based on the frustration of the contract. The appellant further alleged that it scheduled a meeting with the

respondent and informed them of the termination of the contract. No minutes of the meetings were adduced to proof the same. Pursuant to the contract between the parties, Article 15 on termination and alteration of the contract provided that, "if one of the parties fails to fulfill all or any of its obligations, the other party may serve a formal notice on it to remedy the same with a maximum time limit of 30 days from the date of the formal notice". There was no notice served upon the respondent as required by the contract and I find the trial court did not fault in finding the appellant to have breached the contract. Consequently, frustration does not automatically discharge payment obligations arising before the alleged frustrating event. The appellant, having benefited from transport services, could not avoid payment based on frustration. Therefore, the claim for outstanding payments was properly ruled by the trial court.

15. On the issue of whether the counterclaim was wrongly dismissed, the appellant claimed that the respondent owed Kshs.80,000 in rent arrears and sought to offset it against transport charges. The respondent disputed the existence of a lease agreement and argued that the appellant failed to prove the counterclaim.

16. A counterclaim must be proved on a balance of probabilities. The appellant's failure to provide documentary proof of the lease agreement or the rental arrears justified the trial court's dismissal of the counterclaim. The trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. Therefore, on this ground of proof regarding the existence of a lease agreement and outstanding rent arrears, the appellant failed to discharge its burden and the trial court was not at fault to dismiss the counter claim and set off.

17. On the last issue whether the respondent is entitled to the remedies sought; general damages and loss of use. On whether general damages were awardable for breach of contract, it is a settled principle that general damages are not awardable for breach of contract unless there is proof of special circumstances. As a general rule, there can be no damages for breach of contract. (See Provincial Insurance Co East Africa Ltd v Nandwa LLR No. 867 (CAK). In Habib Zurich Finance (K) limited vs. Muthoga & Another. [2002] 1 EA 81 at page 88 cited with approval the decision of the Court of Appeal for Eastern Africa in the Case of Dharamshi vs. Karan (supra) where that court held as follows:

> " This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified, they cease to be general..."

18. The trial court awarded Kshs.100,000/= in general damages to the respondent without specific proof of loss. This was erroneous and should be set aside.

19. On the issue of damages for loss of user, the respondent sought Kshs.5,356,800/= in damages for loss of user, arguing that it expected to continue transporting petroleum until August 2023. Loss of user must be specifically pleaded and strictly proved.

20. In David Bagine vs. Martin Bundi [1997] eKLR, the Court of Appeal stated: -

> " We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved."

21. Special damages in addition to being pleaded, they must be strictly proved since it is not sufficient to write down particulars and urge the court to grant the same. The respondent did not provide sufficient evidence of financial loss as it failed to show how the loss would be sustained. Accordingly, this claim must fail.

22. From the foregoing, the appeal partially succeeds and I enter judgement in the following terms;

    a. The appeal partially succeeds.

    b. The trial court's award of Kshs.1,782,893/= for transport services is upheld.

    c. The award of Kshs.100,000/= in general damages is set aside.

    d. The dismissal of the appellant's counterclaim is upheld.

    e. The respondent's prayer for loss of user damages is dismissed.

    f. Each party shall bear its own costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 4TH DAY OF FEBRUARY, 2025

_____

BAHATI MWAMUYE

JUDGE

In the presence of:

Counsel for the Appellant – Ms. Waitere

Counsel for the Respondent – Mr. Owour

Court Assistant – Mr. Guyo