Teq Systems Limited v Sister N Sister Enterprises (Commercial Appeal E210 of 2022) [2025] KEHC 5250 (KLR) (Commercial and Tax) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5250 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E210 OF 2022

RC RUTTO, J

APRIL 25, 2025

BETWEEN

TEQ SYSTEMS LIMITED ..... APPELLANT

AND

SISTER N SISTER ENTERPRISES ..... RESPONDENT

(An appeal from the Judgment of the Principal Magistrate's Court at Nairobi (Kagoni. E.M. PM) delivered on 25th November 2022 in CMCC E5117 OF 2020)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Chief Magistrates Milimani Commercial Court Case No. E5117 of 2020 in favour of the Respondent against the Appellant in the sum of Ksh.985,000/=. The genesis of the claim is as contained in the plaint dated 17th September 2020. In the plaint, the Appellant sued the Respondent for the principal sum of Ksh.985,000/= being the price of unpaid transportation costs and fines incurred as a result of the Respondent's illegalities. In its defence dated 28th December 2020, the Respondent denied all the allegations in the plaint.

2. The primary facts in this appeal are rather straightforward and are as follows. Via an oral agreement, the Appellant was contracted by the Respondent to transport 26 tonnes of timber from Uganda. While in transit, the truck developed mechanical problems and was subsequently found to be overloaded and a fine of Ksh,300,000 imposed and paid by the Appellant. The Appellant obtained another vehicle, KAS 524W where the excess load was offloaded into. However, this vehicle was also found to be overloaded.

3. The dispute arose when the Appellant claimed from the Respondent Ksh.985,000/= being the price of unpaid transportation costs and fines incurred during the transportation which was denied by the Respondent.

4. In the trial Court, the Appellant claimed that it was contracted by the Respondent to transport 26 tonnes of timber from Uganda to Nairobi on the Plaintiff's truck registration number KBL 395K in container number EMCU 8250 981 45G1. It claimed further that during transit, the truck developed mechanical problems including a tyre bursts. Suspecting overloading, the Appellant paid for the truck to be weighed at a private weighbridge at Mai Mahiu. It ascertained that the truck and cargo weighed 65 tonnes. The Appellant claimed that at this point the truck has been flagged by Kenya Highway Authority (KenHa) for overloading.

5. The Appellant claimed that it informed the Respondent who requested that the cargo be transported to its final destination, Nairobi. The Appellant then brought another truck, KAS 524W to complete the task.

6. The Appellant stated that on 7th September 2020 it informed the Respondent that the KenHa fines amounted to Ksh.800,000/= and that the Respondent agreed to cater for the fines. It was the Appellant's case that one of the Respondent's officer, Alison Ntinyari informed the Appellant that she had paid the fines to KenHa but she could not provide any evidence of payment.

7. The appellant also claimed that it was an express term of the contract that payment of the various services would be effected after delivery and that in default of payment of the respective amounts as and when the payments fell due, the respondents would pay interest theron at commercial rates per month on the amounts due. Thus, the Appellant claimed Kshs.985,000/= together with interest and costs of the suit.

8. The Appellant's claim was disputed by the Respondent who denied owing the Appellant the stated sum. The Respondent averred that indeed payment for the services was to be effected after delivery but there was no agreement whether express or implied that there would be interest for default of payment. The Respondent denied committing any illegalities.

9. It averred that it had indicated to the Appellant's agent the precise tonnage of timber for delivery and the Appellant had indicated that it had capacity to deliver the same to Nairobi. It was the Respondent's case that the Appellant loaded the truck itself and accepted payment for the services. The Respondent further averred that the Appellant was in control of the truck and would not have incurred any fines if they stopped their journey when they realized that the truck was overloaded. The Respondent therefore asked the suit to be dismissed with costs.

10. The trial court isolated four issues for determination. These were; whether the appellant loaded the truck with timber before leaving Kampala, Uganda; whether the Appellant had a duty of weighing the timber which was loaded in Kampala, Uganda; whether the respondent was liable to pay the fines incurred by the Appellant on account of overloading and lastly, who should bear the costs of the suit.

11. On the issue of whether the appellant loaded the truck with timber before leaving Kampala, Uganda, the court interrogated sections 55 (2) and section 58 (1) and (2) of the *Traffic Act* and concluded that no motor vehicle is allowed to exceed the maximum weight or dimensions provided for such vehicles by rules made under the *Traffic Act* Cap 403. Further, that the effect of section 58(2) is that the persons who are shown to have loaded the vehicle and persons responsible for maintaining the vehicle are liable where it is shown that the vehicle has ran afoul sections 55(2), 56, and 58(1) of the *Traffic Act*. The trial court determined that at the time the truck was being loaded, the Appellant had a servant, agent, staff, employee or a person who was under its instruction. The Court also concluded that the best person to have been called as a witness was the Appellant's driver who could have shed more light on the material events of the case.

12. The trial court determined that the Forest produce movement permit was prima facie proof that the person transporting forest produce was allowed to transport it for the duration stated in the permit. However, it was not evidence of the tonnage loaded onto a vehicle. On this issue, the trial court concluded that the Appellant's claim that the vehicle was overloaded from Kampala was not proved.

13. On whether the Appellant had a duty of weighing the timber which was loaded in Kampala, the trial court found that there exists a duty upon the owner of a vehicle or a transporter to ensure that their vehicle that is being used to transport cargo is not overloaded. Further, that this duty requires positive effort on the part of the transporter. Otherwise, the transporter runs the risk of facing the consequences of the law.

14. On whether the claim for fuel costs was merited, the trial court concluded that parties are bound by their pleading and having failed to plead fuel costs, it could not pray for such costs in its submissions.

15. On whether the Appellant was entitled to the payment of Ksh.35,000/= the trial court considered the evidence of the Respondent and observed that the Appellant did not make an attempt to controvert the Respondent's evidence that subsequent payment was made to other numbers. In conclusion, the trial court dismissed the suit with costs in a judgment dated 25th November 2022.

16. Aggrieved by the decision of the trial court, the appellant lodged this appeal vide a memorandum of appeal dated 23rd December 2022 2024, raising eleven (11) grounds of appeal set out herein verbatim as follows;

    a. The learned magistrate erred in fact and law in the appreciation of the contested factual premises by the respective parties (the Appellant and the Respondent) and the application and interpretation of the material law and thus wrongly decided the dispute and in favour of the Respondent.

    b. The learned magistrate erred in fact and law in constructing, interpreting the dispute on conjecture, abstractness, rather than the factual reality, evidentiary material placed by the Appellant's before the court that would only have yielded the correct outcome that the plaintiff's claim was sustainable and should have succeeded.

    c. The learned magistrate erred in fact and law in rewriting the terms of the agreement between the parties and using the outcome of the rewriting of the said terms to justly denude the Respondent's obligation.

    d. The learned magistrate erred in fact and law in dismissing the Plaint dated 17th September 2020.

    e. The learned magistrate erred in fact and law for failing to consider the Appellant's submissions and blatantly disregarding the High Court's binding authorities governing the claim.

    f. The learned magistrate erred in fact and law in finding that the Appellant had not proved its claim that the vehicle was overloaded from Kampala.

    g. The learned magistrate erred in fact and law in finding that failure to provide a witness led to the collapse of the Appellant's case when the same could be proved by the evidence on record.

    h. The learned magistrate erred in fact and law in imposing a non-existent obligation upon the Appellant of reweighing the cargo and failing to appreciate that it only depended on the documentation provided.

i. The learned magistrate erred in fact and law in failing to recognize and appreciate that it was the Respondent's role, obligation to ensure that the vehicle is not overloaded as provided by the *Traffic Act*.

j. The learned magistrate erred in fact and law in failing to appreciate the plaintiff's claim for fines and penalties incurred together with fuel costs incurred due to the Respondent's breach of obligation.

k. The learned magistrate erred in fact and law in finding that the Appellant was not entitled to the balance and payment of Kshs. 35,000/=.

17. The Appellant prays: for the appeal to be allowed, the judgment and finding of Honorable Kagoni E.M, PM dismissing the Plaint be set aside and/varied; costs in the subordinate and this court, and any such and further orders as the justice of the case may demand or this honorable court may deem fit.

18. The Appellant's filed their submissions dated 16th September 2024. The Respondent's did not file any submissions.

Appellant's Submissions

19. The Appellant submits that the trial court reached its decision without interrogating the evidence furnished to Court. In addition, it did not consider the testimony rendered on the different obligations attributable to the parties under the Contract. It proceeded to re-write the contract for the parties and assigned duties and obligations to the Appellant that belonged to the Respondent and not agreed upon by the parties.

20. The Appellant submits that the trial Court in its analysis failed to interrogate as to who, in fact, was responsible for what as this would have put the subject matter of the suit to rest, being the fines paid to KenHa as a result of the overloading.

21. The Appellant in its submissions consolidated the 11 grounds of appeal into four issues:

a) Who loaded the timber on the truck at Kampala?;

b) Whether the Appellant is entitled to the refund of the fines paid;

c) Whether the Appellant is entitled to the balance owed being Kshs.35,000; and

d) Who bears the costs?

22. On who loaded the timber on the truck at Kampala, the Appellant submitted that it was that the Appellant's witnesses PW1 & PW2 relied on the information given by the Respondent. It submitted that the information evinced that the tonnage of the timber loaded on the truck to be 26 tonnes. It submitted that this pointed to the fact that it is actually the Respondent who loaded the timber on the truck and was then able to determine the tonnage, which information they shared with the Appellant.

23. The Appellant stated that the evidence on record and the testimonies of the witnesses point to the fact that it was the Respondent's role to load the timber on the truck. It was submitted that the Appellant's role solely involved the transportation of the timber. It was contended that the trial Court, in this regard erred in failing to fully consider and interrogate the designated roles of the parties herein under contract therefore leading to an erroneous finding, allocating new roles to the parties. It was submitted that this was a violation of the freedom of contract of the parties and that it is not the business of the courts to rewrite contracts. The decisions in National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K)

Ltd (2002) 2 E.A. 503, (2011) eKLR and Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR were cited to buttress this assertion.

24. It was submitted that the only involvement by the Appellant as regarding the issue of loading the truck was to connect the Respondent's representatives with the Appellant's driver for him to make available the truck, for loading purposes and not to load the truck, which was solely the Respondent's mandate. Therefore, any liability that accrued in case of overloading would be the Respondent's.

25. On whether the Appellant is entitled to the refund of the fines paid, it was submitted that the trial Court erred in failing to scrutinize and interrogate the import of the forest produce movement permit & the KEPHIS Inspection Certificate which was produced in Court. It was submitted that this permit was clearly addressed to the Respondent. This document was forwarded to the Appellant by the Respondent and which document it relied upon in determining the tonnage of the timber to be 26 tonnes. This was despite evidence to the contrary that when the same was weighed at the Mai Mahiu weighbridge and was found to be in excess of 18 tonnes.

26. The Appellant submitted that the trial court failed to consider the Respondent's testimony, the documentary evidence supplied to Court including the text messages sent by DW1 to the Appellant, admitting that they will cater for the extra costs accruing due to the overloading and the Appellant should proceed with the journey from Mai Mahiu to Nairobi.

27. It was submitted that the Respondent misrepresented the actual tonnage of the timber to the Appellant, and the Appellant relied on the same thus occasioning loss to her in terms of the fines paid herein. It was submitted that the Respondent should therefore be obliged to refund the Appellant the fines paid.

28. On whether the Appellant is entitled to the balance owed being Kshs.35,000, it was submitted that no documentary evidence was produced in terms of Mpesa statements as alleged by the Respondent to show that she indeed remitted the balance of the transport costs via Mpesa to the Appellant. In this regard, it was submitted that the trial Court should have found in favour of the Appellant as no evidence of payment was adduced.

29. On who bears the costs, the Appellant relied on section 27(1) of the *Civil Procedure Act*, 2010 and on the Supreme Court decision of Jasbir Singh Rai& 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR and urged the Court to allow the appeal with costs to them.

Analysis and Determination

30. This being a first appeal this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424).

31. Guide by the the above dictum and carefully analysing the record of appeal and the parties' submissions, the following issues arise for determination:

    a. Whether the Appellant loaded the truck with timber in Kampala.

    b. Whether the Appellant is entitled to the balance of the transportation cost Ksh. 35,000/=.

    c. Whether the Appellant is entitled to costs.

Whether the Appellant loaded the truck with timber in Kampala

32. It is not in dispute that the Appellant was contracted, orally, by the Respondent to transport 26 tonnes of timber from Kampala to Nairobi. The Appellant's witness, Daniel Mwai, in his witness statement dated 21st June 2021, stated that he was an independent transport agent. He stated that he received a call by a transport broker who was calling on behalf of the Respondent to enquire on timber transport from Uganda to Nairobi. Daniel then enquired as to the weight of the timber and whether the Respondent had an importation permit. He stated that he was informed that the timber was 26 tonnes and that the permits and documents indicating this would be handed to the Appellant's driver. He stated that he gave the Respondent's broker the Appellant's truck driver's mobile number where they liaised on loading. Daniel stated that the Appellant's truck driver was provided with the Forest Permit from Respondent so as to indicate to the Appellant's truck driver that the Respondent had authority to import the timber and that it weighed 26 tonnes. He stated that they finished loading the truck on 2nd September 2021. The Respondent's witness, Alison Ntinyari Muriithi, who is a director of the Respondent, stated in her witness statement dated 28th December 2020 stated that neither she or her partner were present when the timber was loaded in the truck in Uganda and thus had no way of ascertaining whether it was overloaded.

33. The Appellant faults the trial Court for rewriting the contract for the parties and assigning duties and obligations to the Appellant that belonged to the Respondent and not agreed upon by the parties. The Appellant claims that it was the Respondent's role to load the timber and that it was actually the Respondent who loaded the timber. The Appellant contended that its role solely involved the transportation of the timber.

34. The Respondent's witness, Alison Ntinyari Muriithi, stated in its witness statement dated 28th December 2020 that it contacted the Appellant through a third-party Mr. Dominic Odhiambo Muruka for provision of transport services of timber from Uganda to Nairobi. It was the Respondent's statement that the Appellant indicated that they were in a position to transport the timber. The Respondent in an affidavit sworn by Alison Ntinyari Muriithi on 27th October 2020, deponed that the Respondent was in control of the trucks and the load therein. It was the Respondent's case that the Appellant loaded the truck themselves and accepted payment for the service.

35. It is my considered view that the Appellant loaded the truck in Kampala. Through its own statement, it's witness Daniel, it stated that they finished loading the truck on 2nd September 2021. This means that the Appellant participated in loading the timber in the Appellant's truck. Furthermore, the Appellant's truck driver's mobile number was shared with the Respondent so as to liaise on the loading of the timber.

36. I do not consider that the Trial Court re-wrote contract between the Appellant and the Respondent. It should be remembered that what existed between the Appellant and Respondent was an oral agreement. The terms of this agreement, other than it was a contract to transport 26 tonnes of timber, are hotly contested. Further, I do not find that the trial Court erred in failing to recognize that it was the Respondent's role and obligation to ensure that the truck was not overloaded as required by the *Traffic Act* and imposed a non-existent obligation on the Appellant of re-weighing the cargo.

37. In my considered view, the trial court correctly assessed and applied the import of sections 55(2) and 58(1&2) of the *Traffic Act*, Cap 403 to this matter. Section 55(2) of the *Traffic Act* prohibits overloading and section 58 of the *Traffic Act* provides for the penalty of improper condition or overloading.

38. A driver should not overload a vehicle as this contravenes section 55 of the *Traffic Act*. Thus, it was not outlandish for the trial Court to find that it is a transporter's duty to ensure that the vehicle is not overloaded. This is determined by ensuring that the cargo being loaded does not exceed the requite weight of the vehicle and or by re-weighing the vehicle when the cargo is loaded onto a vehicle. In this regard, I note that the Appellant did not dispute that its role was to transport the 26 Tonnes of timber from Uganda to Nairobi. It also indicated that it had capacity to do so. To my mind, this means that the Appellant had a truck that could carry the 26 tonnes within the load limit provided by the *Traffic Act*. I should mention at this juncture, that I concur with trial court that the Forest Movement Permit was to confirm to the Appellant, that the Respondent had permission to transport 26 tonnes of Timber from Kampala to Nairobi. Indeed, the Appellant's witness Daniel stated that the Appellant's truck driver was provided with the Forest Permit from Respondent so as to indicate to the Appellant's truck driver that the Respondent had authority to import the timber and that it weighed 26 tonnes.

39. It was the responsibility of the Appellant to ensure that its truck was not overloaded. It did not do so and thus cannot escape liability of driving an overloaded truck and pass it to the Respondent. For this reason, I do not find that the Respondent was responsible for the fines attributed to overloading.

Whether the Appellant is entitled to the balance of the transportation cost of Ksh. 35,000/=.

40. In the Appellants own testimony dated 17th September 2020, its Director Rose Wangui Macharia stated that the cost of transportation was agreed to be Ksh 70,000/= of which Ksh 35,000/= was to be paid upon the goods being loaded and the balance of Ksh 35,000/= was to paid upon the goods arriving at Nairobi.

41. According to the Appellant's witness Daniel, in his statement dated 21st June 2021, he stated that, when the Respondent's broker contacted him, they agreed that the transportation cost would be Ksh 75,000/= where Ksh.40,000/= would be paid as deposit on loading the timber and the balance 35,000/= on delivery of the timber to Nairobi. Daniel stated that he received Ksh.40,000/- via Mpesa as deposit for the transport charges, he forwarded Ksh.35,000/= to the Appellant and kept Ksh5,000/= as his agency commission.

42. The Respondent, in its affidavit sworn by Alison Ntinyari Muriithi dated 27th October 2020, however stated that it was given a quotation of Ksh.105,000/=as transport costs which it accepted and paid. Similarly, in the Respondent's witness statement by Alison Ntinyari Muriithi dated 27th December 2020, she stated that the Appellant through their manager Daniel Mwai, indicated they were in a position to transport the goods to Nairobi and gave a quotation of Ksh.105,000/= which the Respondent accepted and paid. In its submissions dated 26th September 2022, it contended that it paid the agreed price for the timber to phone number 0799623426 and 0722977806. The trial Court determined that the Appellant did not controvert the testimony that subsequent payments was made to other numbers. From the record, there is an Mpesa statement of Ksh.35,000/= in page 90 of the record. It is not evident what the payment is for.

43. In my considered view, there are varying accounts of what the transportation cost was and how much was paid. The appellant claims a balance of Ksh.35,000/= of a total cost of Ksh.70,000 while the respondent claims the transport cost was Ksh.105,000/- which it paid in full. In light of this, and guided by the record, I am inclined to agree with the trial court that there was uncontroverted evidence by the Respondent of the payment of the whole transportation cost to the Appellant.

44. The upshot of the issues above, is that I am satisfied that the learned trial magistrate correctly determined the matter, and I find no reason to interfere with the trial court's findings. Therefore, the appeal is dismissed with no orders as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 25TH DAY OF APRIL, 2025.

RHODA RUTTO

JUDGE

.....For Appellant

.....For Respondent

Sam Court Assistant