Speedex Logiistics Limited v Kifaru Enterprises Limited & another (Civil Appeal E057 of 2024) [2025] KEHC 7221 (KLR) (Civ) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7221 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E057 OF 2024

RC RUTTO, J

MAY 23, 2025

BETWEEN

SPEEDEX LOGIISTICS LIMITED ..... APPELLANT

AND

KIFARU ENTERPRISES LIMITED ..... 1ST RESPONDENT

KASSAM HAULIERS LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Judgment of the Small Claims Court of Kenya at Nairobi delivered by the Hon. Resident Magistrate Wamae E. M. Muindi, on the 22nd February 2024 in Nairobi SCC COMM No E7096 of 2023)

JUDGMENT

1. This appeal arises from a Judgment and decree entered in Nairobi SCC COMM NO E7096 of 2023. In the said suit, the 1st Respondent herein sued both the Appellant and the 2nd Respondent herein for breach of contract relating to clearing and delivering an imported consignment.

2. The genesis of this dispute, as stated in the Statement of Claim, is that on or about 19th September 2017, the 1st Respondent imported a consignment of manhole covers supplied by H/S Daya International Company Limited and shipped to Mombasa. The 1st Respondent contracted the Appellant to clear and deliver the consignment to its warehouse located off Baba Dogo Road in Nairobi. The consignment was cleared at the Mombasa Port, and the Appellant subcontracted the 2nd Respondent to transport it to the 1st Respondent's warehouse. Upon arrival, the 1st Respondent opened the consignment and discovered that 311 pieces of manhole covers were missing, while others were damaged.

3. The 1st Respondent claimed that, as a result of the above, it lodged a compensation claim with its insurer, GA Insurance Company Limited. The insurer compensated the 1st Respondent for the loss of goods amounting to Kshs.472,986/= and additionally incurred adjuster's fees of Kshs.42,340/= to investigate the circumstances of the loss. Consequently, the insurance company sought recovery under the doctrine of subrogation through a Statement of Claim dated 14th August 2023.

4. In response, only the Appellant contested the claim and judgment in default was entered against the 2nd Respondent. The Appellant denied liability, asserting that it was only contracted to clear the consignment at the Mombasa Port and not to deliver or transport it to the 1st Respondent's warehouse. It further stated that it did not subcontract the 2nd Respondent. Additionally, the Appellant argued that the consignment was neither mishandled nor tampered with during the clearing and forwarding process and, therefore, the manhole covers could not have been lost, stolen, or broken during that process.

5. The trial Magistrate delivered judgment on 22nd February 2024 and allowed the claim with costs and interest.

6. The Appellant, aggrieved with the entire judgment, lodged this appeal on 12th March 2024 on the grounds that the Learned Adjudicator erred in law in failing to determine issues of law and fact raised before her; in re-writing the contract of the parties and re-assigning duties and responsibilities to the parties in the contract; in finding that the goods were in the custody of the Appellant contrary to the evidence adduced by the Appellant and the 1st respondent to the effect that the consignment and lost/damaged goods were in the custody of the 2nd Respondent when they were lost and damaged; in failing to determine whether the 1st Respondent had pleaded damage of 1,231 pieces of manhole where only 311 pieces was pleaded; in finding that the Respondents were jointly and severally liable for the loss; in finding that the Claimant was entitled to the sum of Kshs.515, 326/=.

7. The appeal was canvassed by way of written submissions.

Appellant's submissions

8. The Appellant's submissions dated 9th October, 2024 identified four issues for determination. First, whether the Learned trial Magistrate erred in fact and in law in re-writing the contract of the parties; second, whether the Learned trial Magistrate erred in law in finding that the goods were in the custody of the Appellant contrary to the evidence adduced by the appellant and the 1st Respondent to the effect that the consignment and lost/damages goods were in the custody of the 2nd Respondent when they were lost and damaged; third, whether the trial court erred in law in failing to determine whether the Respondent had pleaded damage of 1,231 pieces of manhole where only 311 pieces were pleaded and lastly, whether the trial court erred in finding that the Respondents were jointly and severally liable for the loss.

9. On the first issue, it was submitted that the contents of the letter dated 1st September 2017 are undisputed. The letter states that the Appellant was responsible for clearing the goods before handing them over to the 2nd Respondent for delivery. In this regard, the Appellant maintained that it did not subcontract the 2nd Respondent.

10. On the second issue, the Appellant argued that the 1st Respondent failed to prove, to the required standard, when the consignment was lost. It contended that the documents provided by the 1st Respondent, including those authored by the 1st Respondent itself, indicate that the goods were lost while in the custody of the 2nd Respondent. The Appellant referred to the letter dated 25th September

2017, titled "Holding You Liable for Missing & Damaged Goods," addressed to the 2nd Respondent, along with the Final Adjustment Report dated 5th February 2018, which confirmed that the damage to the consignment occurred while it was under the 2nd Respondent's custody. The Appellant further submitted that the driver of the 2nd Respondent was a common carrier and relied on the cases of Bid Road Enterprises v. DHL Global Forwarding (K) Ltd [2017] eKLR and P.N. Mashru Transporters Limited v. Rayshian Apparels Limited [2016] eKLR to define the liability of a common carrier. It asserted that a common carrier is liable in all circumstances for any goods lost while in its custody.

11. The Appellant submitted that its role was limited to clearing and forwarding, which entailed facilitating the clearance of the consignment at the port, processing customs documentation, and ensuring payment of the requisite duties before handing over the goods to the 1st Respondent's appointed transporter. It argued that once the goods are offloaded from the ship into the Kenya Ports Authority's (KPA) warehouse, any loss or breach of duty that occurs at that stage falls under KPA's strict liability. The Appellant maintained that since it fully performed its contractual obligations, it cannot be held liable for any damage to the consignment.

12. On the third issue, the Appellant submitted that only the loss of 311 pieces of manhole covers was specifically pleaded, while the rest were vaguely described as "others were found broken." The Appellant argued that the use of the term "others" does not meet the legal requirement for specificity in pleading. In support of this argument, the Appellant relied on the case of Linus Fredrick Masaky v. Lazaro Thuram Richoro & Another [2016] eKLR, asserting that the Final Adjustment Report and other documents referenced a total loss of 1,542 pieces of manhole covers, whereas only 311 were expressly pleaded. Consequently, the Appellant contended that any evidence tendered in respect of the additional manhole covers, having not been pleaded, is immaterial. The Appellant concluded that the amount of damage proved is Kshs.117,033.84.

13. On the final issue, the Appellant submitted that it cannot be held jointly liable with the 2nd Respondent, as the 2nd Respondent is solely to blame for the loss. The Appellant concluded that the 1st Respondent failed to prove the case against it and therefore the claim should be dismissed.

1st Respondent's submissions

14. The 1st Respondent's submissions are dated 8th November 2024. The Respondent acknowledges the court's jurisdiction under Section 38 of the *Small Claims Court Act*, which is limited to matters of law only. The 1st Respondent submitted that the appeal seeks to disguise an attack on the trial court's findings of fact by framing it as a challenge on matters of law. The Respondent contended that the court is being invited to reopen the trial court's evaluation of the facts and effectively sit on appeal on factual matters.

15. The 1st Respondent also submitted that the 2nd Respondent's arguments on the facts should be disregarded as the 2nd Respondent did not participate in the trial. The 1st Respondent argued that all factual defenses should have been raised and addressed at the trial court.

16. In addressing the first ground of appeal, the 1st Respondent submitted that the trial court correctly evaluated the Appellant's defense and made a finding based on the evidence presented. The 1st Respondent contended that it is improper for the Appellant to argue that the Adjudicator failed to determine both the law and the facts before her.

17. Regarding the second and third grounds of appeal, the 1st Respondent argued that these issues relate to matters of fact, which the Appellant seeks to have reevaluated by the court in order to draw a different conclusion. The 1st Respondent further submitted that neither the Appellant nor the 2nd Respondent

has been able to explain exactly when the manhole covers were damaged or stolen. That given that both parties are shifting blame onto one another, the 1st Respondent sought to have both the Appellant and the 2nd Respondent held jointly liable for the loss and damage.

18. On the third ground of appeal, the 1st Respondent submitted that the loss or damage to part of the consignment was not in dispute. The loss adjuster's report provided a detailed account of the circumstances and extent of the loss, attaching various documents from the shipping line. It also listed the lost and damaged items and included a police abstract confirming the loss. According to the 1st Respondent, these documents sufficiently support the claim as pleaded.

19. The 1st Respondent concluded by submitting that the appeal violates Section 38 of the *Small Claims Court Act* and even if the appeal were considered on its merits, the 1st Respondent argued that it is misplaced, unfounded, and should therefore be dismissed with costs.

2nd Respondent's submissions

20. The 2nd Respondent's submissions, dated 24th October 2024, identified three key issues for determination. First, whether the 2nd Respondent was contractually obligated to inspect the consignment either at the port or upon delivery. Second, whether the trial court erred in law by failing to determine whether the 1st Respondent had pleaded the damage of 1,231 pieces of manhole covers, while only 311 pieces were specifically pleaded. Lastly, whether the quantum of damages, if any, was proven by the 1st Respondent.

21. On the first issue, the 2nd Respondent submitted that its contractual arrangement was solely to transport the consignment from the port of Mombasa to the 1st Respondent's warehouse in Baba Dogo, and that there was no express or implied term requiring the 2nd Respondent to inspect the condition of the goods. In reference to the case of David Odongo vs Kenya Ports Authority [2011] eKLR the 2nd Respondent argued that a transporter cannot be held liable for losses arising from the condition of goods unless negligence is proven. The 2nd Respondent further submitted that the trial court's finding of joint and several liability was based on an incorrect assessment of the evidence. It pointed out that the 1st Respondent failed to adduce credible evidence linking the 2nd Respondent to the loss of 311 pieces of manhole covers or the damage to the 1,213 pieces. According to the 2nd Respondent, the Adjuster's report suggested that the 1st Respondent's report was inconclusive, speculating that the damage may have been caused by rough terrain near Miritini. The 2nd Respondent relied on the case of Chanzu & Another versus KPLC [2012] eKLR, submitting that speculative evidence is insufficient to establish liability in civil cases.

22. On the second issue, the 2nd Respondent submitted that the 1st Respondent only pleaded the loss of 311 pieces of manhole covers, valued at USD.1,165.05. The 2nd Respondent argued that the misinterpretation of facts was prejudicial, as it inflated the quantum of damages without supporting evidence. The 2nd Respondent relied on the case of Independent Electoral and Boundaries Commission & Another versus Stephen Mutinda Mule & 3 Others [2014] eKLR and the case of Linus Fredrick Masaky versus Lazaro Thuram Richoro & Another [2016] eKLR in submitting that any evidence outside the scope of the pleadings must be disregarded, as special damages must be pleaded with specificity.

23. On the third issue, the 2nd Respondent submitted that the quantum of damages, if any, proved by the 1st Respondent, is Kshs 117,033.84, and that the amount awarded by the trial court was higher and unjustifiable. They urged the court to set aside the judgment of the Trial court and they be awarded costs

Analysis and Determination

24. This court has considered the grounds of appeal, the proceedings of the lower court, and the submissions filed by the Appellant. To begin with, the duty of this court as the appellate court exercising jurisdiction under the Small Claims Court squarely falls under Section 38 of the *Small Claims Court Act*. This section limits the jurisdiction of the High Court on appeals from the Small Claims Court to matters of law only.

25. What constitutes, points of law, has been settled in the case of Peter Gichuki King'ara Vs *Independent Electoral and Boundaries Commission & 2 Others, Nyeri Civil Appeal No. 31 Of 2013*, (Court of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, where the court of appeal stated as follows:

> " [I]t is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law."

26. The Court of Appeal in its subsequent decision in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR while addressing the question whether a memorandum of appeal on a second appeal raised factual issues and the distinction between a matter of fact and a matter of law, observed that; -

> " One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of Bracegirdle v Oxley(2) [1947] 1 ALL E.R. 126 at p 130;
>
> "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

27. The Court of Appeal the continued to state that: -

> " That reasoning has been adopted in this jurisdiction. In A.G. v David Murakaru[1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if

the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also Patel v Uganda [1966] EA 311 and Shah v Aguto [1970] EA 263.

There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal a question of law is or of fact is not always a very straight-forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision. That reality has with it the inherent danger that legal ingenuity may attempt to dress-up and camouflage purely factual issues with the borrowed garb of "legalness." This is what the majority of this Court had in mind in M'riungu And Others v R [1982-88] 1 KAR 360 when it stated, (per Chesoni AJA) at p366;

"We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law."

28. Having gone through the Memorandum of Appeal and the grounds set out thereunder, I note that the Appellant raises issues of both law and fact. The submissions have been crafted to support both the issues of fact and law. The Appellant is inviting this court to re-evaluate the trial evidence which is contrary to the provisions of Section 38 of the Small Claims Court and to make contrary findings. Thus, based on the above authorities cited, and on the definition of what constitutes issues of law, this court will limit itself from delving into the issues of facts and address the only issue of law arising which is; whether the 1st Respondent proved its case on a balance of probabilities as required by law.

29. It is undisputed that the 1st Respondent contracted the Appellant to clear a consignment of manhole covers at the Mombasa Port. Likewise, it is not in contention that the 2nd Respondent was contracted to transport the consignment. Furthermore, it is common ground that the 1st Respondent's consignment was damaged, and the trial court found the Appellant and the 2nd Respondent jointly liable for the damage to the consignment. The issue in dispute is whether the 1st Respondent proved that the Appellant and the 2nd Respondent were responsible for the damage and, lastly, whether the liability for damages pertains to 311 pieces of manhole covers or the entire 1,231 pieces.

30. I note that the 2nd Respondent did not rebut the evidence presented in the trial court, and its attempt to challenge it before this court constitutes an effort to pursue a defence that should have been raised at the trial court. Consequently, this court upholds the judgment entered against the 2nd Respondent as it did not pursue any appeal against the finding by the trial court. Regarding the Appellant, it did not challenge the existence of the damage to the consignment and, in its defence, merely blamed the 2nd Respondent. The appellant maintained that its obligations were limited to the clearing and forwarding of the 1st Respondent's goods at the port in Mombasa which it did. Thus, the transportation of the goods to the 1st Respondent's warehouse was a separate engagement between the appellant and the 2nd Respondent.

31. The Court of Appeal in Mbuthia Macharia v Annah Mutua & Ano [2017] eKLR discussed the issue of burden of proof and stated that;

> "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore while both the legal and evidential burden initially rests upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case the incident of both the legal and evidential burden was with the Appellant."

32. Further, Sections 107 and 109 of the *Evidence Act* place the burden of proof on the 1st Respondent to substantiate its claim. In this case, the 1st Respondent asserted that the damage was caused by both the Appellant and the 2nd Respondent. It provided documentary evidence to support this claim, which was not rebutted, except for the allegation raised in the appeal by the Appellant that only 311 manhole covers were missing. This issue, however, was not duly considered by the trial court in its determination of the claim.

33. Upon reviewing the Statement of Claim filed by the 1st Respondent in the trial court, it is clear that the 1st Respondent specifically pleaded those 311 pieces of manhole covers were missing, and that others were found to be broken. This demonstrates and acknowledges that only the 311 missing pieces were explicitly pleaded. The Final Adjustment Report dated 5th February 2018 further clarified the damage, listing the number of manhole covers that were damaged, with 311 pieces noted as missing. According to established legal principle that special damages must be both specifically pleaded and strictly proven. The Appellant should have specifically pleaded the number of pieces that were damaged, as this was clearly indicated in the report. The failure to do so is contrary to this well-established principle. Therefore, the award should be limited to the amount of special damages specifically pleaded and duly proven.

34. In light of the foregoing, the court is of the opinion that the 1st Respondent is only entitled to the sum for the 311 pieces of manhole covers that were missing, amounting to USD 1,161.05, in addition to the loss adjustment fees of Kshs.42,340.

35. In conclusion, the appeal partially succeeds. Accordingly, the trial court's award of Kshs.515,326/= is hereby set aside and substituted with an award of USD 1,161.05 for the missing manhole covers and Kshs.42,340/= for the loss adjustment fees.

36. The final award will therefore read as follows Judgment is entered against the Appellant and the 2nd Respondent for:-

    a. Special damages of USD 1,161.05 /=.

    b. Costs of the trial court shall be borne by the Appellant and the 2nd Respondent

    c. Interest on (a) and (b) above at court rates from the date of filing the trial suit is awarded until payment in full.

    d. Each party to bear the costs of the appeal.

37. Orders accordingly

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 23RD DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....For Appellant

.....For 1st Respondent

.....For 2nd Respondent

Sam Court Assistant