



Bollore Africa Logistics Kenya Ltd v Tilton Investmetn Limited (Civil Appeal E036 of 2021) [2024] KEHC 131 (KLR) (Civ) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E036 OF 2021
AN ONGERI, J
JANUARY 19, 2024**

BETWEEN

BOLLORE AFRICA LOGISTICS KENYA LTD APPELLANT

AND

TILTON INVESTMETN LIMITED RESPONDENT

(Being an appeal from the judgement and decree of Hon. B. J. Ofisi (RM) in Milimani CMCC No. 7885 of 2017 delivered on 18/12/2020)

JUDGMENT

1. The respondent Tilton Investment Limited was the plaintiff in Milimani CMCC No. 7885 of 2017 where it sued the appellant Bollore Africa Logistics Kenya Limited seeking special damages of kshs.1,709,299 together with costs and interest.
2. The claim was in respect of transport services allegedly rendered to the appellant by the respondent.
3. It was the respondent's case that the appellant became indebted to the appellant to the sum of ksh.1,700,229.
4. The appellant field a defence and counter claim in the sum of ksh.4,104,000 made as follows;
 - (i) An order of set off in the sum of ksh.1,600,229.
 - (ii) Judgment for the sum of ksh.2,403,771.
 - (iii) Costs of the suit and interest.



5. The evidence adduced before the trial court was that the respondent's drivers would take trucks to East African Breweries Limited (EABL) where beer would be loaded to be delivered to various distributors of EABL.
6. At EABL, KK Security would inspect the truck and provide a pre-entry checklist to confirm the truck was empty.
7. The truck would then be issued with a weighbridge ticket and it would proceed to the loading bay.
8. At the loading bay, the order number was created and the delivery note was generated after the order number.
9. After loading, a dispatch note and invoice in EABL's name were generated and given to the driver together with a delivery note from the respondent.
10. The truck is then driven back to the weighbridge where KK Security weights it and the goods were delivered to the distributor.
11. The distributor would receive the goods and check the dispatch note and the delivery note and also check the goods.
12. The distributor would then stamp the dispatch note to confirm delivery and make comments on the dispatch note if the goods did not correspond with the quantity in the dispatch note.
13. After offloading the truck would be loaded with empty bottles for delivery back to EABL and the distributor would issue his own delivery note indicating the number of empties loaded and the truck driver was issued with the same for delivery of the empty bottles to EABL.
14. Back to EABL, the KK Security would first weigh the truck to confirm its weight and generate a weighbridge ticket as well as a gate pass to allow the driver to proceed to the loading bay.
15. The truck would then be off loaded at the loading bay by DHL and issue an Empties Return Note (ERN) to the driver.
16. It was the ERN that would be used to process payment to the respondent.
17. The trial court found that the appellant failed to produce the original copies of the ERN since the drivers were only left with copies.
18. The trial court found that in the circumstances, the respondent was entitled to the amount of ksh.1,700,299.
19. The trial court dismissed the appellant's counter claim with costs.
20. The appellant was aggrieved with the judgment and has appealed on the following grounds;
 - (i) That the honourable learned magistrate erred in law and fact by failing to appreciate the facts and evidence tendered by the appellant in support of its defence and counterclaim and instead, proceeding to enter judgment in favour of the respondent.
 - (ii) That the honourable learned magistrate erred in law and in fact in failing to appreciate the fact that the Empties Return Note (ERN) must not be an original copy but must bear a clearance stamp from KK Security to confirm that the empty bottles loaded by the distributor were returned in the same quantities by the respondent.



- (iii) That the honourable learned magistrate having found that the who alleges must prove erred in law and in fact in failing to appreciate the fact that he respondent had failed to prove that it delivered all empty bottles collected from the distributor to disproof East Africa Breweries Limited claim for the missing empty bottles that were not delivered to hem by the respondent for which they debited the appellants account with a sum of kshs.4,104,000/=.
 - (iv) That the honorable learned magistrate erred in law and in fact by ignoring and/or failing to appreciate the facts and evidence put forward by the appellant in support of its defence and counterclaim.
 - (v) That the honourable magistrate consequently erred in law and in fact in failing to take into consideration the totality of the evidence tendered and consequently arriving at a decision not supported by the acts and evidence on record.
21. The parties filed written submissions as follows; The appellant submitted that there was and is compelling evidence in support of the Appellant's counterclaim which was overlooked. The Appellant's letter dated 4/11/2016 provided details of the non-delivery of empties by the Respondent herein and the specific shipments for which such ERNs had not been provided for by the Respondent. The letter further revealed that as a result of the non-delivery of the empties the Appellant had been debited an amount of Kshs. 4,104,000 for which the Respondent was required to pay.
 22. The appellant submitted that the respondent provided a fake ERN as proof of delivery as it did not bear the crucial KK Security stamp which was issued at the gate of the site. The appellant's witness testified on the process of loading and return of empties and the general practice involved in the business. According to DW1 Bonface Muresia Barasa there was a clear procedure on how the respondent was to execute its duties to enable the appellant to pay for services delivered.
 23. The appellant indicated that investigations revealed that there was theft by the respondent's employees since the missing empty bottles could not be accounted for by the respondent. On cross examination the respondent's witness John Muguyi a director admitted that he knew there was a big syndicate that had led to various people being fired. He admitted further that that the appellant had been surcharged by EABL for failure to deliver empty crates.
 24. The appellant argued that the parties herein executed a road carriage agreement dated 15/6/2015 which provided for the terms and obligations of the parties. Clause 3 of the agreement provides that in the event of loss/damage or theft, the Respondent as the carrier is liable to indemnify the Appellant for the loss. According to the parties' agreement in clause 8, payment could not be made by the Appellant where the Respondent is in breach of the said agreement and where a statement is not accompanied by where the duly signed dated and stamped documents especially the ERNs which is used to acknowledge the receipt of empties at the destination.
 25. The Appellant provided evidence in terms of pro-forma invoices from EABL, which invoices were forwarded to the Respondent for payment as per contract which requires the Respondent to indemnify the Appellant in such event of loss resulting from their inactions. Evidence was presented in terms of emails showing requests made to the Respondent to provide ERNs to show that empties were delivered and for payments to be made. None were provided by the Respondent.
 26. The respondent alternatively submitted that the Appellant herein did not meet the required threshold for discharge of its burden of proof neither in the trial court nor at this Appeal. That the appellant in its submission claimed that it was surcharged Kshs. 4,104,000 by East African Breweries Limited (EABL) on account of missing empty bottles the Respondent failed to return but failed to produce any evidence in support of the allegation.



27. The appellant further failed to provide evidence that the invoices adduced in court was surcharge against their account by EABL and more specifically that the sawm was a result of any action or omission by the respondent. the invoices were prepared by EABL to a company known as SDV Transami Kenya LTD.
28. This being the first appellate court, the duty of the first appellate court is re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -
- “An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
- An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
- In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
29. The issues for determination in this appeal are as follows;
- (i) Whether the respondent proved its claim to the required standard
 - (ii) Whether the appellant proved its counter-claim to the required standard.
 - (iii) Whether the trial court was right in dismissing the counterclaim.
 - (iv) Who pays the costs of this appeal?
30. On the issue as to whether the respondent proved its case, I find that there were other parties involved in the loading and the issuing of the ERN being KK Security and DHL who issued the ERN.
31. I find that the respondent’s evidence was that they would not have been allowed to offload the empties if there was a discrepancy.
32. The respondent also said that the distributors did not raise any complain on failure to return the empty bottles.
33. I find that the respondent proved its claim to the required standard in civil cases.
34. On the issue as to whether the appellant proves its counter-claim, I find that the trial court was right in holding that the original ERNs were not availed to show that the ones the respondent had were fraudulent.
35. In the circumstances, I find that the appellant did not prove their counterclaim to the required standard.
36. I find that the trial court was right in dismissing the counter-claim.



37. The appellant having sought an off-set in respect of the respondent’s claim, they admitted the claim but failed to prove their counterclaim by failure to produce the original ERNs.

38. I find that this appeal lacks in merit and I dismiss it with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF JANUARY, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

