



Keda (Kenya Ceramics Company Limited) v Netcol Freight Logistics (Civil Appeal E168 of 2022) [2024] KEHC 85 (KLR) (Commercial and Tax) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 85 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E168 OF 2022
A MABEYA, J
JANUARY 17, 2024**

BETWEEN

KEDA (KENYA CERAMICS COMPANY LIMITED) APPELLANT

AND

NETCOL FREIGHT LOGISTICS RESPONDENT

(Being an appeal from the judgment and orders of Hon. V. M. Mochache delivered on 21/10/ 2022 at Small Claims Court Milimani in SCCCOM.E3472/2022)

RULING

1. This is an appeal against the decision of the Small Claims Court delivered on 21/10/2022. The dispute between the parties emanated from the contract dated 25/2/2021 between the parties by which the appellant was tasked with transporting goods for the respondent. An accident occurred while on transit and the goods were damaged. The respondent sued for damages and judgment was entered against the appellant for Kshs. 670,480/-.
2. Aggrieved by the said decision, the appellant preferred this appeal via a Memorandum of Appeal dated 11/11/2022. It cited 11 grounds which can be summarized into 3 as follows: -
 - (a) That the Learned Adjudicator erred in law and in fact in failing to consider the terms of the contract entered by the parties.
 - (b) That the Learned Adjudicator erred in law in failing to consider the evidence given during cross examination.
 - (c) That the Learned Adjudicator erred in law and fact in failing to consider the evidence provided by the defendants.



3. The appeal was canvassed by way of written submissions where those of the appellant were dated 12/4/2023 and those of the respondent 29/5/2023.
4. The appellant submitted that clause 4.8 of the contract provided that the respondent would meet the costs of the damage. The appellant stated that the respondent had admitted that at the time of the accident, the vehicle was not in its proper state and had no insurance. That the trial court failed to interrogate the contract with respect to its breach. Counsel submitted that clause 4.5 of the contract provided that any breakage during transportation was to be met by the agent/respondent. That the respondent was in breach of the contract and was not entitled to payment as it did not perform its part of the contract.
5. On the other hand, the respondent submitted that clauses 3.2, 4.5, 4.7 and 4.8 of the agreement for provision of transportation services did not attach any liability on the respondent. That the accident was caused by mechanical defects and was not as a result of negligence. Counsel submitted that the appellant had not proved breach of contract on the part of the respondent.
6. I have considered the Memorandum of Appeal, the record and the submissions. The main issue for determination is the interpretation of the contract between the parties.
7. According to *Selle v Associates Motor Boat & Co* [1968] EA 123), this Court has a duty to examine matters both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that it did not have an opportunity to see the witnesses testify.
8. The appeal before Court is with respect to breach of contract. I note that the record is incomplete as the documents in the lower court are missing. This omission is critical as the Court is not in a position to scrutinize the whole evidence to ascertain whether the court below erred in its decision.
9. In *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR: the Supreme Court of Kenya addressed itself thus: -

“The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it. If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine “the appeal” on the basis of these two, such an appeal would be incomplete and hence incompetent.”
10. I will import that here and hold that the appeal before me is incompetent and I strike it out with costs. The appellant may lodge a competent appeal if it so desires in accordance with the law.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

