



Colombus Stainless (PTY) Ltd v Global Logistics Company Ltd & 2 others (Civil Case E088 of 2022) [2024] KEHC 16927 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 16927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E088 OF 2022
F WANGARI, J
FEBRUARY 7, 2024**

BETWEEN

COLOMBUS STAINLESS (PTY) LTD PLAINTIFF

AND

GLOBAL LOGISTICS COMPANY LTD 1ST DEFENDANT

HUDSON KEMBO 2ND DEFENDANT

GREENERITY VENTURES LIMITED 3RD DEFENDANT

JUDGMENT

1. The Plaintiff, a company incorporated in South Africa engaging in steel manufacturing business received a request for quotation for the supply of 200 tons of steel coils from the 2nd Defendant, on behalf of their client BOC Kenya PLC.
2. The Plaintiff and the 1st Defendant entered into a contract for the sale of the said steel for USD 605,350, where BOC Kenya PLC would pay for the goods within 60 days from the date of Bill of Lading. The 3rd Defendant was the consignee of the shipment which was to be done in 3 consignments.
3. After the manufacturing of the said order, the Plaintiff released the consignment to Mediterranean Shipping Company for shipment to the 3rd Defendant through the Port of Mombasa. The original Bills of Lading No. MEDUJ1890089, MEDUJ1898363 and MEDUJ1924300 and other documents to facilitate the shipping and the clearance of the goods were released. Invoice amounting to USD 686,480.26 were issued to BOC Kenya PLC for settlement.
4. Upon arrival to the Port of Mombasa, the Defendants cleared 2 consignments under the Bills of Lading No. MEDUJ1890089 and MEDUJ1898363. The consignment under the Bill of Lading MEDUJ1924300 remained uncleared.



5. Since the invoices remained unsettled, the Plaintiff reached out to BOC Kenya PLC for settlement, and that is when they were informed that the company had not ordered any steel nor authorized the 1st Defendant to transact on its behalf. That is when the Plaintiff realized that they had been dealing with fraudsters.
6. The Plaintiff filed this suit via the Plaint dated 9th November, 2022, seeking for the following orders;
 - a. A declaration that the Plaintiff is the legal and rightful owner of the goods in containers No. TCLU5718236, MSDU5730070, TRHU344706 under the Bill of Lading No. MEDUJ1924300.
 - b. A Permanent injunction to be issued restraining the Defendants and the Kenya Ports Authority whether by themselves, their employees, servants or agents from taking and/or parting with possession of the Plaintiff's consignment in containers TCLU5718236, MSDU5730070, TRHU7344706 under the Bill of Lading No. MEDUJ1924300 shipped to the Port of Mombasa.
 - c. That an order for the release of the Plaintiff's consignment in containers No. TCLU5718236, MEDU5730070, TRHU7344706 under the Bill of Lading no. MEDUJ1924300, to the Plaintiff for the shipment back to South Africa.
 - d. Cost of the suit and interest thereon at court rates until payment in full.
7. The Defendants were served with the pleadings but failed to enter appearance nor file their statement of defence. Interlocutory judgment was entered and matter fixed for formal proof.
8. The Plaintiff called one witness. Bertus Griesel, the General Manager in the Plaintiff's Commercial Department adopted his Witness Statement dated 30/1/2023 as his evidence in chief. He produced as exhibits the documents as per the list of documents dated 14/2/2022. These are the email correspondences between the Plaintiff and the 2nd Defendant, copies of order, acceptance and contract, shipping documents including the Bills of Lading.
9. I have considered the pleadings, evidence on record including the documentary evidence filed by the Plaintiff, and identify the following issues for determination;
 - a. Whether the Plaintiff has proved ownership of the goods under the Bill of Lading No. MEDUJ1924300
 - b. Whether the Plaintiff ought to be granted the orders sought

Analysis

10. Whereas the Defendant failed to defend the suit, the burden of proof still remains with the Plaintiff. The Court of Appeal in the case Charterhouse Bank Limited (under Statutory Management v Frank N. Kamau (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case: -

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited,



judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

11. This court shall consider the Plaintiff’s case on merits. It is a fact that the Defendants were fraudsters who passed as genuine buyers of the Plaintiff’s goods. They managed to clear two consignments save for the 3rd consignment currently held at the Port of Mombasa. In Black’s Law Dictionary (Eighth edition) fraudulent misrepresentation is defined as;

“ A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it”.

12. The Plaintiff acted on the Defendants misrepresentation by shipping the goods. They have already suffered loss of two consignments which were cleared by the Defendants prior to the discovery that this was a fraudulent transaction on the part of the Defendants. Particulars of fraud were pleaded and proved.

13. In the case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, it was stated as follows;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

14. Having proved fraud (see exhibit 3 and 4, as read with exhibit 10), I find that the Plaintiff still retains the title to the goods at the Port of Mombasa. By denying the Plaintiff the reliefs sought, would be condemning it to further loss.

15. The Plaintiff also sought for costs and interest. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the Civil Procedure Act. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR.

16. In the present circumstances, I see no reason why I should deny the Plaintiff costs of the suit.

17. The upshot is that this court makes the following orders: -

- i. A declaration that the Plaintiff is the rightful owner of the goods under the Bill of Lading No. MEDUJ1924300.
- ii. That the above consignment be released to the Plaintiff for re-shipment back to South Africa, but subject to payment of demurrage charges and other statutory charges within 45 days.
- iii. That the Kenya Ports Authority/ Kenya Revenue Authority to waive charges for the period within the 45 days’ timeline.
- iv. That costs of the suit awarded to the Plaintiff.

It is so ordered.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of: -

M/S Mugenyu Advocate h/b for Odhiambo Advocate for the Plaintiff

N/A by the Defendant

Barile, Court Assistant

