



Multitrade Industrial Suppliers Limited v Prime Steel Mills Limited (Civil Appeal E069 of 2020) [2023] KEHC 2487 (KLR) (Commercial and Tax) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E069 OF 2020**

EC MWITA, J

MARCH 24, 2023

BETWEEN

MULTITRADE INDUSTRIAL SUPPLIERS LIMITED APPELLANT

AND

PRIME STEEL MILLS LIMITED RESPONDENT

(Appeal from the Judgment and Decree (Hon L. L. Gicheha (Mrs) (CM), dated 30th October 2020 in CMCC No. 5145 of 2018 at the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi)

JUDGMENT

Background

1. Prime Steel Mills Limited (the respondent) filed a suit against Multitrade Industrial Supplies Limited (the appellant) to recover Kshs 17,744,660 for supply of steel products. It was the respondent's case that it supplied goods worth Kshs 26,677,550 between August 28, 2015 and December 24, 2015. The appellant paid leaving the outstanding. According to the respondent, the goods were supplied based on the understanding of the parties since the contract was partly written, oral and implied by conduct the parties. The respondent would issue invoice, ELV/VAT receipts and delivery notes which the appellant would sign and stamp on receiving goods but some delivery notices were not stamped. The appellant would then make payment through cheques within sixty days after delivery. Any amount unpaid would attract interest of 4% for late payment.
2. Following the default in payment, respondent reported the matter the Police. The appellant's officers were arrested and detained at the police station. The appellant issued two postdated cheques dated 31st November 2016 for Kshs 990,000 each and agreed to settle the outstanding amount in order to secure freedom for its officers. When the respondent presented the cheques for payment, they were returned



unpaid because payment had been stopped. The respondent file CMCC No 5145 of 2018, claiming the outstanding amount of Kshs 17,744,660 with interest at contract rates and costs.

3. The appellant filed a statement of defence dated March 8, 2017, admitting that a relationship existed between the parties for the supply and purchase of goods but the goods were paid for. The appellant, however, denied that there was an agreement for supply of MS twisted steel bars and denied the amount claimed therefor.
4. The appellant admitted issuing the post-dated cheques but stated that they were issued by its officials while in illegal police detention and confinement on the respondent's instructions, not because the amount was due. The appellant denied owing Kshs 17,744,600 claimed in the plaint.
5. The respondent filed a reply to deface admitting that it launched a complaint at the Embakasi Police Station on October 22, 2016 and that indeed the appellant issued the two cheques towards settlement of the claim. The respondent denied being party to the illegal detention and confinement of the appellant's officials. The respondent reiterated that the appellant owed the amount claimed.
6. During the hearing, both the appellant and respondent called one witness each in support of their respective cases. The trial magistrate considered the evidence and delivered judgment on October 30, 2020 in favour of the respondent for Kshs 17,744,600 with interest at court rates from the date of filing suit. The court also awarded the respondent costs of the suit. Appeal
7. The appellant was aggrieved and filed this appeal through a memorandum of appeal dated 20th November 2020, raising the following grounds, namely:
 - 1) That the learned trial magistrate erred in law and in fact by failing to evaluate and consider the appellant's evidence in totality.
 - 2) That the learned trial magistrate erred in law and fact in failing to find that the appellant had proved their claim against the respondent (sic).
 - 3) That the learned trial magistrate erred in law and fact in finding that the appellant had been unable to tender any evidence to controvert the respondent's evidence.
 - 4) That the learned trial magistrate erred in law and fact in finding that the respondent had proven on a balance of probabilities that the appellant owed the amount claimed.
 - 5) That the learned trial magistrate erred in law and fact in failing to find that the respondent had not furnished any evidence of performance and/or the supply of goods amounting to the claim tendered by the respondents.
 - 6) That the learned trial magistrate erred in law and fact in failing to find that the appellant had proven on a balance of probabilities that there had been no performance and/or contractual relationship established with the respondents warranting the claim made by the respondent.
 - 7) That the learned trial magistrate erred in law and fact in failing to find that the respondent had not established the contractual parameters and extent for the amounts claimed and that the contractual parameters and claim was limited to the respondent's performance in the delivery of the goods subject of this case.
 - 8) That the learned trial magistrate erred in law and fact in failing to find that the respondent had not established the contractual basis for their claim of interest in the amounts claimed by them.



- 9) That the learned trial magistrate erred in law and fact in disregarding and failing to consider the appellant's evidence that there was no performance on the part of the respondent in part or in totality for the claims made by the respondent.
 - 10) That the learned trial magistrate erred in law and fact in finding that the conduct of the respondent causing the officers, servants and/or employees of the appellant to be arrested in order to extract undue payment from the appellant did not amount to coercion and duress.
 - 11) That the learned trial magistrate erred in law and fact in finding that the respondent had discharged its standard and burden of proof against the appellant.
 - 12) That the learned trial magistrate erred in law and fact in entering the judgment for the respondent for the sum of Kshs 17,744,600/- together with costs and interest from the date of filing.
8. The appellant urged the court to allow the appeal with costs, set aside the trial court's judgment and award them costs of this appeal and before the trial court.
 9. This appeal was disposed of through written submissions. The appellant filed written submissions dated April 11, 2022 while the respondent's submissions were dated April 19, 2022.

Appellant's Submissions

10. The appellant argued that the trial magistrate was wrong in holding that the respondent had proved a valid oral contract for the supply of steel bars. The appellant asserted that some of the invoices and delivery notes produced were unreliable since they were not stamped. The appellant relied on *Aloona Industries Kenya Limited v Crown Beverages Limited* (Nairobi Civil Appeal No 66 of 2018) [2019] eKLR for the proposition that stamped and received invoices by themselves are not a confirmation of delivery of goods and services.
11. The appellant again relied on *Nutcracker v Air Kenya Aviation Ltd* (HCCC No 448 of 2003) [2004] eKLR for the assertion that in ascertaining the amount owing, the trial court ought to consider the weight of the stamped vis a vis the unstamped invoices and delivery notes. The appellant also blamed the trial court for shifting the burden of proof to it to disprove receipt of the steel bars.
12. The appellant submitted that the trial court failed to consider its evidence with on the customary practice between the parties with regard to the handling of invoices. The appellant again relied on *Nutcracker v Air Kenya Aviation Ltd* (supra) and *Frank Mwangi Wanyeki v Bata Shoes (K) Ltd* [2010] eKLR (Nakuru Civil Case 160 of 2003), on the relevance of customs in setting the background of contractual relationships.
13. The appellant blamed the trial court for unfairly criticizing it for failure to reconcile its accounts with the respondent. According to the appellant, the trial court also wrongly accused it of acting in bad faith, even though it had denied the allegations in court. Similarly, the appellant faulted the trial court for holding it responsible for the detention of its officials by the police on the respondent's instructions, and accepting the detention as proof of contractual liability.

Respondent's Submissions

14. The respondent supported the trial court's decision and argued that it discharged the burden of proof as required under sections 107(1)(2), 108 and 109 of the *Evidence Act* and relied on *KN v JMT* (Kitui Civil Appeal No 51 of 2016) [2018] eKLR.



15. The appellant asserted that it had proved existence of the contract between the parties; that the appellant's witness conceded that a business relationship existed between the parties and that between August 28, 2015 and December 24, 2015 it supplied goods worth Kshs 26,677,550 to the appellant but only Kshs 8,932,950 was paid, leaving a balance of Kshs 17,744,600. The appellant argued that lack of stamp on invoices and delivery notes did not invalidate those invoices and Delivery notes and that it is entitled to Kshs 4,061,800 since invoice Nos. INV-A-4057/2015, INV-A- 4058/2015, INV-A-4071/2015, INV-A-4092/2015, INV-A-4110/2015 and INV-A- 4114/2015 were stamped by the appellant as "Received."
16. The respondent submitted that even though the appellant's witness intimated that the unstamped invoices were undergoing reconciliation, he made no allegation that they were forgeries. The respondent relied on *Karak Brother Company Ltd v Burden* [1972] 1 ALL ER 1210, cited in *Simba Commodities Limited v Citibank NA* (Civil Case No 236 of 2003) [2013] eKLR, where the court held the payer, under its duty of care, ought to make appropriate and practical enquiries where it has reasonable grounds to suspect that authorized signatories were misusing their authority.
17. The respondent contended that the appellant's claim that the trial court shifted the burden of proof was unfounded and a mere tactic aimed at declining to settle the debt. Citing the maxim 'equity looks at the intent or substance rather than the form', the respondent argued that while it fulfilled its obligations to supply the goods, the appellant failed to settle the debt.
18. Regarding costs, the respondent urged that the appeal be dismissed with costs, and relied on *Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others* (HCCC 191 of 2008) [2014] eKLR, that costs ordinarily follow the event unless there is good reason to deprive the successful party of costs as a result of its conduct.

Determination

19. I have considered this appeal, submissions and the decisions relied on. I have also read the trial court's record and the impugned judgment. This being a first appeal, it is the duty of this court, as the first appellate court, to re-evaluate, reanalyse and reconsider the evidence afresh and come to its own conclusion on that evidence. The court should, however, bear in mind that it did not see the witnesses testify and give due allowance for that.
20. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal observed that a first appeal is by way of a retrial and the principles upon which the court acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it neither saw nor heard the witnesses and make due allowances in that respect. (See *Peters v Sunday Post Ltd* [1958] EA 424).
21. Notwithstanding the many grounds of appeal, the issues that arise for determination are two: Whether the respondent proved its case on the balance of probability and whether the trial court shifted the burden of proof to the appellant.
22. The respondent testified through Ravi Gada, its financial manager, who adopted his witness statement filed in court and dated January 25, 2017. He also produced documents in their list of documents as exhibits. The witness testified that parties had entered into both oral and written agreement for supply of goods. Goods were delivered to the appellant on request and were received. Invoices and delivery notes would be sent together with ELV/VAT receipt. The appellant would pay for the goods within sixty days and, in default, the amount would attract interest at 4%.



23. Between November 2015 and December 2015, the respondent supplied to the appellant MS twisted bars of various millimeters worth Kshs 17,744,600. The deliveries were attached to invoices and were received on behalf of the appellant but the appellant did not pay. The respondent lodged a complaint with the police following which the appellant issued two post-dated cheques dated 31st November 2016 for Kshs 990,000 and committed to pay the balance. The cheques were, however, returned unpaid on being presented for payment. In cross examination, the witness admitted that he was not the one who delivered the goods and that indeed some invoices and delivery notes were not stamped but that did mean goods were not supplied.
24. The appellant testified through its accountant, Joseph Ywaya, who also adopted his witness statement dated February 21, 2017 and produced documents as exhibits. The witness admitted that the respondent supplied goods to the appellant but were paid for and that the appellant issued the two cheques through coercion while its officials were in police custody so that the officials could be released. The witness stated in cross examination that he did not know who received that goods; that the appellant had paid Kshs 8.9 million; that there was to be reconciliation of accounts which had not been done and that the invoices that were due for payment should be for Kshs 4,061,800. The witness also admitted that the appellant issued the two cheques which were payment for the Kshs 4,000,000; that the engagement between the appellant and the respondent was from August 28, 2015 up to December 24, 2015 to the tune of Kshs 26,677,550 and that the outstanding balance was Kshs 17,744,600.
25. After considering the evidence, the trial court held that the respondent had proved that goods were supplied to the appellant and the appellant's witness had admitted in cross examination that some invoices that were not stamped had also been paid. According to the trial court, the person who received the goods and who should have been the right witness was not called to testify on whether or not he received the goods and signed the disputed invoices.
26. The trial court also noted that the disputed invoices were for less amount than what had been claimed and, therefore, a reconciliation should have been done. The trial court observed that the report made to the police following which the appellant's officials issued the cheques could not be ignored, stating that if the amount was owing, there would have been no reason to issue the cheques as there would have been no basis for the respondent to make the report. The trial court allowed the amount claimed in the plaint.
27. The dispute revolved around supply goods by the respondent to the appellant following written and oral arrangements and conduct of the parties. According to the appellant, there was a relationship between the parties was between August 2015 and November 2015 during which goods were supplied. However, the appellant maintained that all goods supplied were paid for. According to the appellant, the amount claimed was in invoices that were disputed as some did not have receiving stamps.
28. The respondent on its part maintained that not all goods were paid for and that the unpaid invoices were for Kshs 17,744,600. Regarding the appellant's claim that invoices were not stamped, the respondent argued that lack of a stamp would not be a good reason to decline to pay for the invoices since even some of the invoices that had been previously paid had no receiving stamp.
29. I have perused the invoices and considered the evidence on record on behalf of the appellant. The appellant's witness admitted that some invoices had been paid even though they had no receiving stamp. Receiving stamp on its own may not be the basis of determining whether or not goods had been supplied or not. There must be other evidence received in this regard more so where there was evidence that the appellant had also settled invoices that had no stamps.



30. The record shows that the appellant's witness admitted that he was not the one who received the goods. Similarly, the respondent's witness admitted that he was not the one who delivered the goods. However, the appellant's witness admitted in cross examination that there was engagement between the appellant and the respondent from August 28, 2015 up to December 24, 2015 and goods supplied were to the tune of Kshs 26,677,550 and that the outstanding balance was Kshs 17,744,600.
31. This was the appellant's own witness and the outstanding balance admitted was the amount claimed in the plaint. This witness did not receive the goods and could not testify that goods were not supplied. I agree with the trial court that the right witness should have been the person said to have received the goods since he would have been the one to either verify that he received the goods or did not. Any other witness would be speculating on facts that were not within his knowledge.
32. Even though the respondent's witness was not also the one who delivered the good, the task was made easier by the appellant's witness who admitted on the amount outstanding. I therefore agree with the trial court that the respondent not only proved that goods were supplied but this fact was admitted by the appellant's own witness.
33. On whether the trial court shifted the burden of proof to the appellant, I am unable to agree with the appellant that this was the case. The fact that the trial court stated that the appellant did not call the witness who received the goods did not amount to shifting the burden of proof. I also note that the trial court alluded to the issue of reconciliation of account and stated that the appellant should have conducted reconciliation of accounts, seemed to pass the blame to the appellant for not reconciling the accounts. Taking into account the evidence on record, this failure to reconcile accounts alone would not be sufficient to conclude that the trial court shifted the burden of proof to the appellant. It would have been for the benefit of both parties to reconcile accounts but that did not shift the blame to the appellant.
34. There is also the issue of the cheques that were issued by the appellant's officials while in police confinement. The trial court did not see anything wrong with this and remarked that there would have been no reason to issue the cheques if there was no debt. With respect, this was an unfortunate statement. The issue between the parties was a civil debt. The police had nothing to do with a civil debt and could not arrest and detain a person because he owed a debt. A cheque issued by a person in police custody for reason of gaining his freedom was unwillingly issued and could not amount to admission of a debt. Had this been the only reason why the suit had been allowed, that decision would not have stood.
35. Having considered the appeal, submissions and re-evaluated the evidence, the conclusion I come to is that I am unable to find fault on the part of the trial court. Consequently, this appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH 2023

E C MWITA

JUDGE

