Palm Oil Transporters Limited v Kenfreight EA Limited (Commercial Case E028 of 2020) [2023] KEHC 3117 (KLR) (Commercial and Tax) (6 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3117 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E028 OF 2020

DAS MAJANJA, J

APRIL 6, 2023

BETWEEN

PALM OIL TRANSPORTERS LIMITED ..... PLAINTIFF

AND

KENFREIGHT EA LIMITED ..... DEFENDANT

RULING

1. The Plaintiff has invoked, inter alia, Order 40 rule 1, 2 and 5 of the *Civil Procedure Rules* ("the Rules") in its Notice of Motion dated August 23, 2021 seeking the following reliefs:

   (1) Thatthe honourable court be pleased to stay execution of the Decree that has been, or might be issued by this Hon. Court pursuant to that portion of its ruling issued on August 13, 2021to wit, "that judgment on Admission for USD 94,948.45 and Kshs, 1,300,000.00 be entered against the Plaintiff."

   (2) That this application be listed before and heard by the Hon. D. Majanja J.

   (3) Thatupon hearing the application, the hon. court be pleased to dismiss the summary judgment application dated November 30, 2020save that a fresh order be substituted, "the defendant to pay the plaintiff the sum of Kshs. 56,640/=".

   (4) Thatcosts be in the cause.

2. The application is supported by grounds on its face and the supporting affidavit of counsel for thedefendant, Timothy Bryant, sworn on August 13, 2021. It is opposed by the plaintiff through the affidavit of its director, Mehari Kefela, sworn on February 18, 2022. The parties were content to leave the determination of the application based on the material on record without highlighting the same or filing written submissions.

3. Before I consider the application and by way of background, the relationship between the parties is based on a Road Carriage Agreement dated March 15, 2011("the Agreement") under which the Defendant engaged the plaintiff to transport several consignments of Robusta Coffee to/from various destinations including Kampala, Uganda and to/from the Port of Mombasa, Kenya between 2011 and 2019.

4. The plaintiff claims that the defendant failed to make payments for some consignments in accordance with the terms set out in the Agreement and has approached the court by the Plaint dated February 6, 2020demandingthe sum of USD 309,247.32 and KES 174,000.00 plus interest at court rates.

5. The plaintiff then filed a notice of motion datedNovember 30, 2020 under Order 13 rule 2 of the Rules seeking judgment on admission against the Defendant for USD 199,600.00 together with interest from June 26, 2019until payment in full. The defendant opposed the application. After consideration I delivered a ruling dated August 13, 2021("the Ruling") on the following terms:

> I therefore allow the plaintiff's application dated November 30, 2020 and order as follows:
>
> a. Judgment on admission be and is hereby entered for the Plaintiff against the defendant for USD 94,948.45 and Kshs. 1,300,040.00.
>
> b. The balance of the claim shall proceed to trial.
>
> c. The defendant shall bear the costs of the application.

6. In support of its application, the defendant avers that while the Ruling was correct in reference to the admission of the USD 94,948.45 and Kshs. 1,300,040.00 ("the Decretal Sum"), it contains an error apparent on the face of the record, which is that the Decretal Sum was actually paid to the Plaintiff prior to filing the suit. That the record contains evidence of payment and therefore execution of the decree issued would amount to double payment, unjust enrichment and a gross mistake of accounting.

7. In the deposition, the defendant refers to a letter dated December 19, 2019where the Defendant, "committed to pay and indeed did paid, the sum of USD 95,200.00 and Kshs. 1,214,400.00 as follows:

   i. Kshs. 983,400 payment on September 27, 2019

   ii. USD 10,400 payment on December 27, 2019

   iii. USD 20,000 payment on October 4, 2019

   iv. Kshs. 66,000 payment onOctober 7, 2019

   v. USD 19,900 payment on October 11, 2019

   vi. USD 21,000 payment on October 28, 2019

   vii USD 23,900 payment on November 4, 2019

   viii Kshs. 165,000 payment onNovember 4, 2019."

8. The defendant contends that this letter was referred to in the Ruling and that the payments were made as stated and no evidence exists in any filed pleadings by the plaintiff rebutting or opposing the fact that these payments were made. The defendant therefore avers that these payments were made in accordance with the Agreement and the ledger of accounts evidencing these payments were produced in response to the application for judgment on admission. That since the evidence is on record and is admitted, then it has established an error on the face of the record.

9. In response to the allegation that the Decretal Sum has been paid, the Plaintiff points out that the letters dated September 16, 2019 and December 19, 2019are not evidence that thedefendant made any payment to the plaintiff as alleged. that the letters only speak to indebtedness and that in fact no such payments were made and that the defendant did not produce any evidence of payment when required to do so in response to the application.

10. The plaintiff contends that the defendant's ledgers produced in evidence are internal documents which do not in any case prove conclusively that the sums were paid to the plaintiff. It states that on its own analysis, the ledger shows as follows:

    i. On the alleged payment Kshs. 983,400/= payment on September 27, 2019, the same appears as a Net Receipton the applicant's own ledger's

    ii. No such entry exists for the USD 10,400 payment onDecember 27, 2019

    iii. No such entry exists for the USD 20,000 payment on October 4, 2019

    iv. No such entry exists for the Kshs. 66,000 payment on October 7, 2019

    v. No such entry exists for the USD 19,900 payment on October 11, 2019

    vi. No such entry exists for the USD 21,000 payment on October 28, 2019

    vii No such entry exists for the USD 23,900 payment on November 4, 2019

    viii No such entry exists for the Kshs. 165,000 payment on November 4, 2019

11. Theplaintiff adds that the defendant misconstrues the contents of the letter dated December 19, 2019as it does not state that the amount was actually paid but is an admission of indebtedness and it states that the defendant was, "ready willing and able to pay". The plaintiff therefore urges that there was no mistake or error on the face of the record as alleged by the defendant

12. Based on the parties' contentions, did the court commit an error on the face of the record? Order 45 Rule 1 of the Rules which the defendant has invoked provides as follows:

> 45 Application for review of decree or order
>
> (1) Any person considering himself aggrieved-
>
> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

13. The principles governing the exercise of discretion to review a decree or order are now settled. As regards this case, the Defendant is required to show that there is an error apparent on the face of the record. In *National Bank of Kenya Limited v Ndungu Njau* [1996] KLR 469, the Court of Appeal

explained what constitutes an error apparent on the face of the record and the scope of review as follows:

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.

14. In short, the court will not review its own order if what is required is re-evaluation of the facts on record. An applicant cannot ask the court to reconsider its decision by analysing the evidence on record in order to reach a different conclusion. In *Chandrakant Joshibhai Patel v Republic* [2004] TLR 218 it was held that an error apparent on the face of the record, "...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

15. The issue placed before the court by the defendant is whether the court ought to have reached a conclusion that the letter dated December 19, 2019amounted to an admission in light of the evidence in the ledgers that showed that the amount was paid. Both parties have given their own interpretation of the evidence on record. This calls upon the court to re-evaluate the evidence which is the province of the appellate court and not this court on an application for review.

16. Finally, and putting the Defendant's case in perspective, this is what I stated in the Ruling before entering judgment on admission:

> (16) From the totality of the evidence, the amount claimed by the plaintiff is largely disputed although the defendant admits that it owes some amount. Thus, in as much as the defendant issued cheques to the plaintiff, which ordinarily would have amounted to an automatic admission of indebtedness and entitled the Plaintiff to a judgment, the same were discounted and the debt was disputed the moment thedefendant discovered and alleged theft of the consignments on the plaintiff's part.
>
> I am in agreement with the decision of the Court of Appeal for Eastern Africa when dealing with section 30 of the *Bills of Exchange Act* (Tanzania) which is in pari materia with our section 30(2) of the *Bills of Exchange Act* in the case of *Hassanah Issa & Co v Jeraj Produce Store* [1967] EA 55 when it held that:
>
> > [I]n this case in as much as the suit was upon a cheque and in as much as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled. [Emphasis mine]

(17) From the aforesaid decision, it is clear that although issuing of a dishonoured cheque amounts to an admission, the defendant is entitled to show facts that would disentitle the plaintiff to judgment. I find and hold that the defendant has been able to demonstrate why theplaintiff is not entitled to a judgment based on the cheque Nos 345779, 345780, 345781, 345782, 345786 and 345787. The defendant has however made express admissions not only in the replying affidavit but also in the correspondence it has produced. There is an email dated August 29, 2019from thedefendant to the Plaintiff in which the defendant admits that it owes USD 94,948.45. In a letter dated September 16, 2019addressed to theplaintiff's advocates, the defendant admits to owing USD 94,948.45 and KES. 1,300,040.00 and promises to pay in five installments. Finally, in a letter dated December 19, 2019addressed to the plaintiff, the defendant admits that it owes and it is committed to paying USD 95,200.00 and KES 1,214,400.00 in instalments between September 27, 2019andNovember 4, 2019.

(18) While I find that the defendant has set out a bona fide defence why judgment on admission should not be entered on the entirety of the cheques, it has expressly admitted its indebtedness on account of part of the monies covered by those cheques. It is in that respect and to that extent that I will enter judgment. [Emphasis mine]

17. It is clear therefore the court considered the evidence before it and came to a conclusion based on the entirety of evidence. If there is any error, it is not self-evident or obvious and any contrary conclusion requires a reconsideration of the evidence. I therefore find and hold that the defendant has not made out a case for review of the Ruling.

18. The application dated August 23, 2021 is dismissed with costs to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Rita Joyce instructed by Ahmednasir Abdullahi Advocates LLP for the Plaintiff

Ms Wanjiru instructed by Bryants Law LLP Advocates for the Defendant.