M'tuamwari v Elite Trailers Limited (Civil Appeal 51 of 2018)
[2023] KEHC 17286 (KLR) (Civ) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17286 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 51 OF 2018

CW MEOLI, J

MAY 4, 2023

BETWEEN

JOSEPH NTONGAI M'TUAMWARI ..... APPELLANT

AND

ELITE TRAILERS LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Hon. G.A Mmasi, SPM delivered on 12th January, 2018 in Nairobi Milimani CMCC No. 1527 of 2014)

JUDGMENT

1. This appeal emanates from the judgment delivered on 12.01.2018 in Nairobi CMCC No. 1527 of 2014. The suit was commenced by a plaint filed on 21.03.2014. Joseph Ntongai M'tuamwari, the plaintiff in the lower court suit (hereafter the Appellant) was seeking a mandatory injunction to compel Elite Trailer Limited, the defendant in the lower court (hereafter the Respondent) to admit liability for breach of contract on the company's part and the replacement of the chassis frame in respect of trailer registration number ZE 1553 High Drop side trailer; in the alternative an order to compel the Respondent to refund the Appellant the sum of Kshs. 2,800,000/-; and costs of the suit.

2. It was averred that on or about 26.11.2012, the Respondent entered into an agreement with the Appellant for the sale of the Elite High Drop side Trailer Registration Number ZE 1533 Chassis Number ET-1520-12 (hereafter the trailer) for which the Appellant paid the Respondent the sum of Kshs. 2,800,000/- as consideration. That the contract between the parties was subject to inter alia fundamental or statutory terms, conditions and warranties namely, that the trailer was fit for purpose being use in long distance and bulk haulage of grain and other cargo; that the trailer was of merchantable quality; and the Respondent would replace the chassis frame of the trailer if it failed due to defects in material or workmanship within a period of one (1) year from the date of collection.

3. It was further averred that on 12.03.2013, the trailer failed due to defects in material workmanship and the Appellant had to stop using it for long distance bulk haulage business and returned it to the Respondent. That on or about the 13.03.2013 the Respondent repaired the trailer and issued a new warranty on terms similar to the earlier warranty; that on or about the 09.07.2013 the trailer failed again occasioning loss and inconvenience to the Appellant and the Respondent was liable for breach of contract due to the total failure of consideration.

4. The Respondent filed a statement of defence on 17.04.2014 denying the key averments in the plaint and asserted that it had received a Local Purchase from Kenya Grange Vehicle Industries Limited, to fabricate a HDS Trailer chargeable to their account to the specifications of the Appellant and therefore was not liable for breach of contract and failure of consideration. The suit proceeded to full hearing during which evidence was adduced by both parties. In its judgment, the trial court found that the Appellant had not proved his case on a balance of probabilities and proceeded to dismiss the suit with costs to the Respondent.

5. Aggrieved with the outcome, the Appellant preferred this appeal challenging the finding of the lower court based on the following grounds in his memorandum of appeal:-

> " 1. The learned trial magistrate erred in law and fact in basing her judgment on speculation and mere conjecture.
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> 2. The learned trial magistrate erred in law and fact in failing to allow the Appellant's suit hereof.
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> 3. The learned trial magistrate erred in law and fact in failing to consider the unshaken evidence of the Appellant herein.
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> 4. The learned trial magistrate erred in law and fact in failing to consider the submissions of the Appellant herein.
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> 5. The learned trial magistrate erred in law and fact in holding that a third party ought to have been enjoined hereof.
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> 6. The learned trial magistrate erred in law and fact in failing to uphold the agreement of the parties particularly the warranty issued by the Respondent hereof.
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> 7. The learned trial magistrate erred in law and fact in failing to find that the Appellant has proved his case on a balance of probabilities as required by the law.
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> 8. The learned trial magistrate erred in law and fact in failing to judiciously analyze and answer the issues raised in the suit.
>
> 9. The learned trial magistrate erred in law and fact in acting bias against the Appellant such bias occasioning miscarriage of justice." (sic)

6. The appeal was canvassed by way of written submissions. Counsel for the Appellant submitted on the twin issues of liability and damages. On the first issue counsel addressed the question of joinder of a third party, citing the principles enunciated in *Laisa Mpoye & 2 Others v Kajiado Central Milk Project "The Board" & 5 others* [2012] eKLR, *John Kenneth Wroe v AAR Health Service Ltd* [2015] eKLR and *Crescent Distributors Services Ltd v Engine Technologies Ltd & Another* [2013] eKLR. Regarding the warranty, counsel relied on Section 16 of the *Sale of Goods Act*. Asserting breach of the said warranty

by the Respondent, counsel urged the court to award damages in the sum of Kshs. 5,000,000/-, relying on Section 53(1) (b) of the *Sale of Goods Act* and the case of *Great Lakes Transport Company (U) Ltd v Kenya Revenue Authority* [2019] eKLR. In conclusion, the court was urged to allow the appeal as prayed.

7. The Respondent defended the lower court's findings. Submitting on whether the Appellant had proved his case on a balance on probabilities, counsel cited Section 107 (1), 109 7 112 of the *Evidence Act*, and several decisions including *William Kabogo Gitau v George Thuo & 2 Others* [2010] eKLR, *Palace Investment Limited v Geoffrey Kariuki Mwenda & Another* [2015] eKLR. He contended that the only piece of evidence relied on in proof of the Appellant's case was a report prepared long after the Appellant had damaged the trailer through misuse, and that given the duration between delivery and the report, it could not be established that the subject trailer was the one bought from the Respondent. Restating the evidence before the trial court, counsel argued that Respondent's evidence was cogent, plausible and believable and the trial court cannot be faulted for making a finding that the Appellant failed to prove his case on a balance of probabilities. Counsel thus urged that the appeal be ought to be dismissed with costs.

8. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 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."

9. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278).

10. The court has considered the record of appeal, the pleadings, and the original record of the proceedings as well as the submissions by the respective parties. The salient issue for determination is whether the trial court's findings were well founded. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof

is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

11. The parties' respective pleadings were summarized earlier in this judgment. The dispute between the respective parties relates to the sale of the trailer, the Appellant's case being that the Respondent failed to deliver a trailer that was fit for purpose and of merchantable quality. The Respondent asserted firstly that, there was no contract of sale between the parties herein, and secondly that the trailer in question was inspected and released through the third party in good order and condition.

12. The trial court after restating and examining the respective parties' pleadings and evidence stated in its judgment that:-

> "……..I have considered the evidence on record and the defence of the Defendant, first and foremost from the exhibits tendered the trailer was released to Ms. Kenya Garage Vehicles Industry Limited to whom the trailer was released and they gave out the local purchase order to the Defendant if indeed the trailer was not given out in good order and condition then the above cited company Ms. Kenya Garage Vehicle Industries Limited should be in a position to explain, as they are the one who received the trailer. This company has not been enjoined in this suit to set the record right.
>
> The upshot of the evidence on record and observation of the court is that the damages to the trailer was occasioned by the manner in which the Plaintiff's driver were driving the said trailer. It is my considered view that the Plaintiff has not proved his case on a balance of probabilities, the same is dismissed with costs to the Defendant." (sic).

13. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely on the Appellant whereas those in the statements of defence lay on the Respondent. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

> "The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. 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 defendants' 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…--. 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." (Emphasis added)

14. The evidence of the Appellant who testified as PW1 was that on or about pursuant to an agreement between the parties on 26.11.2012 the Respondent was to fabricate an Elite High Drop Side (HDS) Trailer and the Appellant paid the Respondent the sum of Kshs. 2,800,000/-. That three months after delivery the trailer failed due to defects in material and workmanship. And as a result, PW1 was constrained to return the trailer back to the Respondent who repaired the trailer and issued a new warranty to wit, that the Respondent undertook to replace the chassis frame if it failed within one year from the date of collection. It was the Appellant's evidence further that on 09.07.2013 the trailer failed once more due to defects in material and workmanship occasioning him loss. Charles

Kariuki Mwangi testifying as PW2 identified himself as a mechanical engineer. The gist of his evidence is comprised of the technical inspection report dated 16.08.2014 and photographs produced as PExh5a&5b respectively. It was his evidence that the quality of the fabricated trailer was sub-standard.

15. The Respondent called two (2) witnesses in support of its case. Usward Singh testified as DW1. He identified himself as a managing director of the Respondent. It was his evidence that the Respondent received the order from Kenya Grange Vehicles Limited to manufacture a trailer for the Appellant as per specifications given. That upon manufacture of the trailer the same was inspected and certification issued that the trailer was fit for purpose; that when returned by the Appellant, the trailer bore evidence of overloading or misuse. Jerad Kanali testified as DW2 and identified himself as) as a motor vehicle inspector with the National Transport Safety Authority (NTSA) attached to Machakos motor vehicle inspection unit. It was his evidence that the trailer passed registration requirements when it was inspected. He asserted that overloading could accelerate the rate of wear and tear of the trailer.

16. Was the trailer fabricated by the Respondent fit for purpose? Section 16(a) of the *Sale of Goods Act* provides that;-

> " Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—
>
> a. where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:
>
> Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;"

17. Section 28 of the *Act* further provides that it is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. Section 35 and 36 state that;-

> " 35
>
> (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
>
> (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.
>
> 36. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership

of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them".

18. There is no dispute that the Appellant was for the most part in possession of and using the trailer after the initial and subsequent deliveries. It is common ground that the Respondent issued two warranties dated 13.03.2013 and 22.07.2013 the latter after repairs undertaken on the trailer by the Respondent. Concerning the question whether the trailer in question was indeed fit for purpose, the Appellant relied on his own testimony and the evidence of PW2, and his report dated 16.06.2014 in support of the trailer's non-suitability for the intended purpose.

19. However, PW2's report was prepared after more than a year of usage of the trailer in question. The Appellant did not tender any expert report on the trailer's condition prior to the initial collection and or at the time of its return to the Respondent for repairs after its purported failure in March 2013, and upon re-delivery after repairs. Coming almost a year after re-delivery of the trailer to the Appellant, PW2's report had remote probative value as to the fitness of the trailer at times material to this suit.

20. The Respondent on its part relied on various documents in support of its case. Of particular relevance was the delivery note dated 04.12.2012 (D.Exh.6.) documenting delivery between Kenya Grange Vehicle Industries (on behalf of the Appellant) and the Respondent. It appears therein that at the collection of the trailer, the Appellant inspected the trailer and or was accorded the said opportunity and he duly executed the delivery note signifying receipt of the trailer in good order and condition. The Respondent also called DW1 whose evidence was that the trailer was passed for registration by the NTSA having satisfied the necessary requirements. Further, the duration between delivery of the trailer and its first failure was approximately three (3) months, the Respondent attributing the failure of the trailer to misuse in that period.

21. The onus was on the Appellant to prove the allegation in his plaint and the loss incurred. And as held in Karugi & Another (supra) the burden of proof does not shift and lay in this case with the Appellant to adduce evidence which, in the absence of rebuttal evidence by the Respondent persuades the court that on a balance of probabilities the claim is proven. The Appellant's evidence was riddled with serious gaps and loose ends that seemed to give credence to the Respondent's denials and assertions that the cause of the failure of the trailer probably lay with the use to which the Appellant put it after delivery.

22. Hence, the Appellant's complaint that the trial court's finding was erroneous does not appear justified. The trial court correctly apprehended and weighed the evidence tendered by the respective parties and its findings cannot be faulted. The appeal is therefore without merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF MAY 2023.

C. MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Nyaga h/b for Mr. Kurauka

For the Respondents: Mr. Muli

C/A: Carol