



Munyua & another (t/a Munleo Hardware & Metal Fabricators) v Equity Bank Ltd (Civil Appeal E170 of 2020) [2023] KEHC 19193 (KLR) (Civ) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E170 OF 2020

CW MEOLI, J

JUNE 22, 2023

BETWEEN

LEONARD MUNYUA 1ST APPELLANT

GRACE SIMALOI SAKUNTA 2ND APPELLANT

T/A MUNLEO HARDWARE & METAL FABRICATORS

AND

EQUITY BANK LTD RESPONDENT

*(Being an appeal from the judgment of Mmasi, SPM delivered on
17th July, 2020 in Nairobi Milimani CMCC No. 1046 of 2016)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 17.07.2020 in Nairobi CMCC No. 1046 of 2016. The suit was commenced by a plaint filed on 24.02.2016 by Leonard Munyua and Grace Simaloi Sakunta t/a Munleo Hardware & Metal Fabricators, the plaintiff in the lower court suit (hereafter the Appellant).
2. They were seeking a declaration that Equity Bank Ltd, the defendant in the lower court (hereafter the Respondent) owed them a duty of care regarding the finance facility accorded to the Appellants on account of the letter of credit No. OLCF000011815; an order that the Respondent was in breach of contract and duty of care owed to the Appellant on account of the said finance facility over the letters of credit No. OLCF000011815; a mandatory injunction restraining the Respondent from making any payment against the bank facility issued to the Appellant by the Respondent on account of letter of credit No. OLCF000011815 issued in respect of Proforma Invoice No. 10500172 drawn by Prima Equipment BV; and costs of the suit.



3. It was averred that on or about 27.05.2015 the Appellant was offered for sale a machine described in specifications as Caterpillar D6H, 1996, Hours; 15000; 40% UC with 610MM Pads; Su blade; ms ripper at a price EUR 47,000 CFR Mombasa to be exported by Prima Equipment BV (hereafter the supplier) of Netherlands. That the supplier issued a Proforma Invoice No. 10500172 dated 27.05.2015 indicating the said specifications of the machine and the serial number 5HF05745.
4. Further that, the Respondent by a letter dated 19.06.2015 for a consideration offered the Appellant a banking facility for importation of the said machine which facility specified the particulars of the machine against which credit facility was issued and quoted the Proforma Invoice No. 10500172. Based on which the Respondent issued an irrevocable letter of Credit No. OLCF000011815 to Commerzbank AG. Frankfurt to guarantee payment to the supplier of the purchase price of the machine by the Appellant. That the Appellant while relying on the agreement with the supplier submitted the Import Declaration Form (IDF) No. E1507101443 specifying the machine to be supplied.
5. It was further averred that the Respondent on 29.12.2015 drew a letter addressed to the Appellant purported to be importation documents for the machinery the Appellant had contracted to import, but upon presentation for clearance at the port, the documents were found to have discrepancies and Customs & Excise Department declined to clear the machine against the documents presented.
6. That it subsequently became apparent to the Appellant that the supplier and the shipping company contracted by the supplier, conspired to vary particulars of the serial number of the machine that was the subject of the sale agreement in the material documents and substituted it with that of the different machine, other than that which had been offered for sale to the Appellant by the supplier.
7. That the Appellant having discovered the discrepancies in the importation documents received by the Respondent and the different machine supplied and intended to be passed off as the machine agreed upon to be imported by the Appellant, drew the attention of the discrepancies to the Respondent and instructed the Respondent not to honor the Letter of Credit (LC) issued to the supplier's bank.
8. Despite the foregoing being in the Respondent's knowledge, it defied the Appellant's instructions not to accept the discrepant documents and insisted on going ahead to honor the LC despite the Appellant having not been supplied with the machine offered for sale. An act which constituted a breach of duty of care owed to the Appellant both in contract and tort which facilitated the perpetration of fraud against the Appellant to its detriment as it stands debited with a loan against the finance facility offered to them by the Respondent. By reason which the Appellant stands to suffer loss and damage.
9. The Respondent filed a statement of defence and counterclaim on 21.08.2017 denying the key averments in the plaint meanwhile sought reliefs in the counterclaim inter alia that there was breach of contract on the part of the Appellant and claimed Kshs. 4,067,573.00/- as of 25.11.2016 on account of expenses incurred by the Respondent in storage charges levied in respect of the machine as a result breach of contract and the Appellant's failure to collect the machine as agreed; and interest accruing on the Appellant's LC account due to failure by the Appellant to service the said account as agreed in the contract with the Respondent.
10. The Respondent averred that it discharged its obligation under the subject contract and in accordance with the governing rules being, Article 5 of the Uniform Customs and Practice Version 600 (UCP 600) wherein it was obliged to deal with documents and not with goods, services or performance to which the documents related. Hence as far as the documents in issue were concerned, they were in conformity with the irrevocable LC.



11. The suit proceeded to trial during which evidence was adduced by both parties. In its judgment, the trial court dismissed the Appellant's suit and found in favour of the Respondent's by allowing its counterclaim to the effect that the Respondent is entitled to the sums counterclaimed, interest rate on Euro 37,187 on a default rate of 3% per annum from 26.11.2016 as per the facility letter.
12. 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 magistrate erred in law and fact in consideration of the banking law and customs related and applicable to the subject matter before the court and or properly interpret and apply the said law and customs.
 2. The learned magistrate erred in law and fact to consider and or properly interpret and apply the law with regard to the contractual obligations and the duty of care owed to the Appellants by the Respondent in the contract subject of the appeal between the parties.
 3. The learned magistrate erred in law and fact in failing to consider and or properly consider all the evidence before the court and leaving out material evidence of the Appellant's witness the customs services department of the Kenya Revenue Authority who appeared and testified before the court to the prejudice of the Appellant in the determination of the Appellant's case.
 4. The learned magistrate erred in law and fact in taking into consideration inadmissible hearsay evidence of alleged storage charged purported to be owed by the Appellants and making an award in favour of the Respondent against the Appellant of the amount of Kshs. 4,067,573 on account of purported storage charges.
 5. The learned magistrate erred in law and fact in making awards in the nature of special damages in favour of the Respondent of Kshs, 4,067,573 and interest on facility at 3% from 26.11.2016 until payment in full against the Appellants which claims were neither specifically pleaded and or specifically proved by the Respondent against the Appellants by standards of the law required and or provided.
 6. The learned magistrate erred in law and fact in taking into consideration in the judgment irrelevant matters and or matters that were not before the court and thereby arrived at the wrong decision which was biased against the Appellants.
 7. The learned magistrate erred in fact and law in finding against the weight of the evidence before the court that the Appellant had not proved their case against the Respondent.” (sic)
13. The appeal was canvassed by way of written submissions. Counsel for the Appellant began by restating the pertinent events of the dispute and for purposes of submissions before this court argued grounds consolidated grounds 1, 2 & 3 on one hand and on the other, grounds 4, 5, 6 & 7 of the memorandum of appeal.
14. Addressing the former set of grounds, counsel argued that the Appellants did not change the specifications of the machine in the Proforma Invoice nor the Import Declaration Form (IDF) hence the trial court erred when it stated that the Appellant agreed to a vague description of the



- consignment and signed off on the same. That on the contrary, it was the Respondent who took charge of preparation of the LC and accompanying documents and if there were to be any changes, the Respondent bore the duty of advising the Appellant. Thus, the said Respondent could not abdicate the duty by absolving itself concerning the defects in documents it prepared.
15. It was further argued that the trial court failed to consider the Appellant's evidence demonstrative of the fraudulent acts of the exporter in attempting to change the (IDF) to vary the description of the machine under importation. That the exporter's fraudulent action was duly acknowledged by the Respondent and the trial court erred in finding that Respondent was bound to honor the LC and was therefore not in breach of contract and or duty of care owed to the Appellant.
 16. Concerning grounds 4, 5, 6 & 7 it was contended that the trial court's award in favour of the Respondent to the tune of Kshs. 4,067,573/- for alleged storage charges in respect of the invoice was not specifically proved for the foregoing reasons. In addition, the invoice in question was not addressed to the Respondent but was purportedly addressed to the Appellant; that there was no evidence of payment or demand for payment made to the Respondent in respect of the invoice; that the Respondent was under no obligation whatsoever to pay any of the Appellants' debt there being no contractual agreement between the parties; and that the Respondent did not store the machine in question or the one purported on the invoice. That on account of the foregoing the trial court allowed the counterclaim on inadmissible hearsay evidence on storage charges.
 17. In reiterating submissions on the Respondent's breach of duty of care, counsel relied on the decision in *Scope Telematics International Sales Limited v Stoic Company Limited & Another* [2017] eKLR in contending that the Appellant did not vary the entries on the description of the imported machine in the Proforma Invoice or (IDF). And that the Respondent was negligent in receiving documents from the corresponding bank without a certificate of conformity to ascertain the details of the imported machine.
 18. That had the Respondent declined to receive the discrepant documents in issue from the corresponding bank upon advance notification of the discrepancies by the Appellant, the losses herein would not have arisen. It was further argued that the Respondent was aware the Appellant had not received the subject machine of importation. Hence it acted negligently in effecting payments for non-delivered goods and should take responsibility. In conclusion, the court was urged to allow the appeal as prayed.
 19. The Respondent defended the lower court's findings. Counsel for the Respondent also started by restating the relevant history and condensed his submissions into five issues for the court's consideration. Submitting on whether the Respondent breached its duty of terms of the contract between the parties, counsel relied on the definition of breach of contract and definition of LC in *Black's Law Dictionary*, 9th Ed., the decisions in *Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki* [2018] eKLR and *SAJ Ceramics Limited v HMS Bergbau AG & Another* [2018] eKLR.
 20. He asserted regarding the foregoing question that the purported discrepancies alluded to by the Appellant were not specifically pleaded in the plaint. Further that pursuant to the provisions of UCP 600, which were mutually incorporated in the LC by the parties herein, upon receipt of the importation documents by the Respondent, the Respondent was required to honor the payment obligations to the supplier's bank. That the Appellant, having willingly signed the LC and confirmed the terms therein, is precluded from resiling therefrom. That the Respondent was not in breach of contract between the parties, and it is trite that a court can only interfere with a LC where fraud has been established or where cashing of the LC would result in irreparable harm or injustice to one of the parties.



21. Concerning whether there was breach of duty of care on the part of the Respondent, counsel argued that in the instant transaction the relationship between the parties was a creditor/debtor relationship, and therefore, the Respondent had no fiduciary duty obligating the bank to exercise more than reasonable skill and care. That the Respondent exercised reasonable skill and care by having the documents verified by Commerzbank AG and upon the documents being found to be in conformity, payment in respect of the LC could not be stopped. The decision in *Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust bank Limited (In Liquidation)* [2016] eKLR was cited.
22. On whether the Appellants are entitled to an injunction allowing them not to repay a bona fide loan, counsel while calling to aid the decision in *Onesmus Mutinda t/a J Amutt Agencies v Kenya Commercial Bank* [2019] eKLR submitted that the Appellant had failed to meet any the requisite threshold to warrant issuance of the said injunctive reliefs.
23. Addressing the sum claimed in respect of storage charges, counsel asserted that the LC required the imported asset to be registered in the name of the parties hereto. That with the outstanding storage charges registration of the asset could not be finalized, forcing the Respondent to settle any storage payments in favour of Mitchell Cotts. That the Respondent proved this payment, and the trial court did not err in so finding. Finally, placing reliance on the decision in *Stanley Kaunga Nkarichia v Meru Teachers College & Another* [2016] eKLR counsel urged the Court to dismiss the appeal with costs.
24. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. 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.”

25. 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). The salient issue that arises for consideration is whether the trial court’s findings were well founded.



26. 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.”

27. The parties’ respective pleadings were summarized earlier in this judgment. The dispute revolves around a LC No. OLCF000011815 issued in respect of Proforma Invoice No. 10500172 drawn by Prima Equipment BV (hereafter the supplier) for the sale of a machine that was described in the specifications as Caterpillar D6H, 1996, Hours; 15000; 40% UC with 610MM Pads; Su blade; ms ripper (hereafter the machine) at a price EUR 47,500.
28. The Appellant generally asserted that the documents in respect of the foregoing and what was eventually presented for clearance at Customs & Excise Department related to two different machines. And therefore, and the Respondent breached the LC and duty of care owed, by going ahead to honor the LC despite the Appellant having not been supplied with the specific machine offered for sale. The Respondent asserted firstly that, it discharged its duty and was bound by UCP 600, and secondly that the Appellant was the party in breach of the LC by failing to settle the interest on the contract; and storage charges for the imported machine to the tune of Kshs. 4,067,573.00.
29. The trial court after restating and examining the respective parties’ pleadings and evidence made a determination in its detailed judgment as follows:-

“.....In my disposition above, I have held while giving reasons that no such further duty on the Defendant Bank existed and I have noted the case law proving such guidance that in undertaking such as the one the Defendant undertook in issuing the ILOC, banks have no other duty outside the terms of the letter of credit. Having failed at establishing that extra duty by dint of my finding herein, noting that this court having found that the Defendant was not in breach of any of its contractual obligations to the Plaintiffs, the Plaintiff claim would inevitably fail as there would be no nexus between the loss suffered and the Defendant. For the avoidance of doubt this finding settles the 3rd issue of this determination in the negative. For that reason, the Plaintiff’s claim fails.

The Defendant’s counter claim

.....The Defendant adduced an invoice indicative of the costs met on account of the Plaintiff’s uncollected caterpillar machine it therefore prayed for its counterclaim to be upheld with costs. As stated above the Plaintiffs did not lay challenge to the averments made in the counter claim outside denying the claims therein and inviting the Defendants to strict proof thereof in the manner that they did in their reply to defence. To this court’s understanding the counterclaim is based on the facility as evidenced by the particularized terms of the relevant facility letters, wherein the Plaintiffs took a facility to the tune Euro



37,187 which had terms that while not attracting an interest, 3% per annum default interest rate would be charged in the event of default.

.....On a balance of probabilities therefore, the court finds in favour of the Defendant as to its entitlement the sums counter claimed, interest on Euro 37,187, of which I find that it would be based on the default rate of 3% per annum from 26.11.2016 the date as per the facility letter dated 19/6/15. Noting the pecuniary jurisdiction of this court, the court shall limit its determination to the interest rate regime that would be 3% on the facility as per contract.

....In the end the Plaintiff's suit is dismissed with cost to the Defendant, the Defendant's counter claim is upheld and the court enters judgment in favour of the Defendant against the Plaintiff as follows:

1. Kshs 4,067,573 as storage costs as at 25/11/2016;
2. Interest on facility at 3% interest from 26/11/2016 until payment in full;
3. The costs of the suit to be borne by the Plaintiff, I make no orders as to cost regarding the Defendant's counter claim." (sic).

30. 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 parties' respective pleadings lay squarely with them. 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)

31. During the trial, Susan Chebet Orgut testified as PW1. She identified herself as a supervisor with Kenya Revenue Authority (KRA) Customs Department. The substratum of her evidence was that vide an IDF S/No. E1507101443 – PExh.7, one Leonard Munyua requested to import a used Caterpillar S/ No. 5HF05745 valued at 47,500 Euros. That on 13.01.2016 KRA received a letter from Diamond Shipping Services Limited (PExh.14) seeking to amend the consignment that had arrived at the port of Mombasa.
32. That the request sought to amend the Chassis No. from 5HF05745 to 4LG00888. That the Proforma invoice issued by the seller as per the inspection report and the Chassis No. of the Caterpillar machine did not tally with the Chassis No. in the documents that KRA had received. Essentially, the documents in KRA's possession could not clear the Caterpillar Chassis No. 4LG00888 that was at port.
33. Leonard Munyua testified as PW2. It was his evidence that he purposed to purchase a caterpillar machine and having obtained a Proforma Invoice - PExh.3 from the supplier and IDF invoice he approached the Respondent for financing and was issued with an offer letter - PExh.4 and LC - PExh.8. That for purposes of preparation of the LC he gave the Respondent the requisite documents to facilitate the purchase and importation being the IDF & Proforma Form.



34. That when the machine arrived at port, he gave the clearing agent the documents as received from the Respondent - PExh.12. That he realized upon checking the same while at the port that the machine at the port bore Chassis No 4LG00888 instead of Chassis No. 5HF05745 the latter which he had intended to import. That the LC documented the machine Chassis No. as 5HF05745 and he never received the machine that he intended to import. Upon receiving the said importation documents, he returned them to the Respondent and wrote to them on 12.02.2016 - PExh.16 instructing them not to honor the LC but was informed that the LC had already been settled - PExh.17. He stated that the LC was not due for settlement as of 25.02.2016 and no evidence of alleged settlement was supplied by the Respondent.
35. The Respondent called one witness in support of its case. Charles Mugo, testifying as DW1 identified himself as a Credit Manager for the Respondent. The gist of his evidence was that their role in respect to the Appellant was limited to facilitating financing vide a LC. Upon being approached by the Appellant they evaluated his documents and issued him with a final LC after necessary amendments to the same.
36. It was his evidence that the consignment was specifically described in the initial LC. However, at the behest of the client the initial description was altered to reflect Proforma Invoice 10500172. He stated that a certificate of conformity was not among the documents required in the LC. That the discrepancy regarding details of the machine was only realized after shipment by the supplier after the bank had issued an irrevocable letter of credit that was to be paid within (90) days.
37. He further stated that he was not aware who initiated an amendment of the importation documents subsequently attempted to reflect the machine already at port. He confirmed that he did not have a receipt for payment of the storage charges of Kshs. 4,067,053/- to Mitchel Colts whilst producing the documents in the Respondent's list of documents marked as DExh.1-15. In conclusion it was his evidence that documents as received from the confirming bank conformed to the LC approved by the client hence the bank was bound to settle the LC upon its maturity.
38. This court proposes to deal with the grounds of appeal simultaneously. It is undisputed that a letter of credit was issued in favour of the Appellant to facilitate the importation of a Caterpillar D6H, s/n 5HF05745 40% UC with 610MM Pads; Su blade; ms ripper Y.O.M 1996 at a price EUR 47,500 as described in the Proforma Invoice No. 10500172 as per PEXh.2. It is further undisputed that the machine that eventually arrived at port was not the one initially intended to be imported by the Appellant and per PExh.12, the machine was a bulldozer s/n 4LG0088.
39. The Appellant's claim before the trial court as I understand it is premised on alleged breach of contract and breach of duty of care by the Respondent. Paragraph 11 of the plaint captures the gist thereof as follows:

“ 11. The defendant in declining to return the discrepant documents and insisting on honoring the disputed letter of credit is in breach of a duty of care owed the Plaintiff's both in contract and tort and is aiding and abetting the perpetration of a fraud against the Plaintiff's to the Plaintiff's detriment in that the Plaintiff's stand to be debited with a loan against the finance facility offered them by the Defendant and by reason of which the Plaintiff's stand to suffer loss and damages.

Particulars of breach of contract and or duty of care on the part of the Defendant

-failure to take note of the discrepancies in the documents received from the supplier



-failure to return the discrepant documents to the sender despite the Plaintiff's instructions to decline accepting the documents

-failure to heed the instructions of the Plaintiff not to honor the letters of credit for no consideration rendered

-Perpetrating, aiding or abetting the commission of a fraud by the supplier against the Plaintiffs." (sic)

40. For purposes of the subject transaction the relationship of the parties herein was governed by the LC. In adjudicating a dispute between contracting parties, the court's duty is as stated in the oft-cited decision of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, it was stated that; -

"A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

41. The respective parties' obligations were set out as the Respondent's Facility Offer dated 19.06.2015 – PExh.4 and the LC dated 06.08.2015, amended on 19.08.2015 and further amended on 28.10.2015 (PExh.8, PExh.9 & PExh.10 respectively). The Respondent's obligation in respect of the transaction between the Appellant and the supplier was to finance the importation of the machine described as Proforma Invoice No. 10500172 in the letter of credit. Concerning the specific duties of the Respondent, item 40E of PExh.8 expressly provided that the applicable Rules governing the LC were "UCP Latest Version" (Uniform Customs and Practice Version 600 UCP 600).

42. The Court of Appeal in Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] eKLR while considering the nature of a letter of credit, and the application of the UCP Rules thereto and to international trade, expressed itself as follows :-

"What is the nature and effect of a Letter of Credit? Black's Law Dictionary, 9th Ed. defines a letter of credit as follows: -

"An instrument under which an issuer (usually a bank), at a customer's request, agrees to honour a draft or other demand for payment made by a third party (the beneficiary), as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied."

In a bid to promote and facilitate the flow of international trade at a time when nationalism and protectionism posed serious threats to the world trading system, the International Chamber of Commerce, of which Kenya is a member, established the ICC Uniform Customs and Practice for Documentary Credits UCP 600 to create a set of contractual rules that would establish uniformity in letters of credit and alleviate the confusion and uncertainty created by conflicting national regulations. Those rules inform the usage of letters of credit. Article 2 of the rules provides that letters of credit or however named are irrevocable and constitute a definite undertaking of the issuing bank to honour a complying presentation. Further, Article 4 of the said rules provides that,

"A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if by



reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.”

43. The Court proceeded to state that:

“That Article goes further to provide that an issuing bank should discourage any attempts by the applicant to include as an integral part of the credit, copies of the underlying contract. The import of that statement is clear to us that a letter of credit exists separately and distinct from an underlying contract and it’s not dependent or based upon such a contract in any manner. This also appears to be in line with many decided cases. In *Hamzeh Malas & Sons v British Imex Industries Ltd* (supra) the court refused to grant an injunction to the buyer, which would have prevented the bank from paying the seller upon receipt of the relevant documents. The buyer had alleged that the goods were substandard and wished to prevent the bank from paying the seller, similar to the scenario here. The court held that the documentary credit was an ‘absolute obligation to pay, irrespective of any dispute there might be between the parties whether or not the goods were up to contract’ and that the court lacked the jurisdiction to prevent the payment, unless fraud had been established. Similarly, in *Power Curber International Ltd v National Bank of Kuwait* (supra) Lord Denning MR held that: -

“It is vital that every bank which issues a letter of credit should honour its obligations. The Bank is in no way concerned with any dispute that the buyer may have with the seller. The buyer may say that the goods are not up to contract. Nevertheless, the bank must honour its obligations. A letter of credit is like a bill of exchange given for the price of the goods. It ranks as cash and must be honoured.”

44. Ultimately the Court stated that:

“This appears to be the accepted position, custom and norm in many of the decided cases. See also *Loomcraft Fabrics CC v Nedbank Ltd & Another* Case No. 70/94 mb; and *Howe Richardson Scale Co. Ltd v Polimex Cekop* [1978] 1 Lloyds Rep 161. The rationale of the irrevocable nature of Letter of Credit was espoused in the case of *R. D. Harbottle (Mercantile) Ltd.* (supra) as below:below: -s only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.”



45. The relevant preliminary provisions the Uniform Customs and Practice Version 600 UCP 600 to the LC and are Article 4, Article 5 and 34 as read with Article 15 and 16. Article 4 provides as follows; -

“Credits v. Contracts

- a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary. A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.
- b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like.

46. Article 5 provides that; -

“Documents v. Goods, Services or Performance Banks deal with documents and not with goods, services or performance to which the documents may relate.”

47. Whereas Article 34 states that; -

“Disclaimer on Effectiveness of Documents

A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.”

48. Based on the foregoing, it is difficult to find the Respondent at fault regarding the alleged breach of contract, in this case the LC. The averred particulars of breach by the Respondent regarding the discrepancies in documents and failure to withhold settlement of the LC as instructed by the Appellant cannot stand the weight of the immunity provided under the UCP 600 and case law thereon. Allegations of aiding and facilitating fraud made against the Respondent were not particularized in the plaint or proven at the trial.

49. Regarding alleged breach of duty of care, I would say that it would be difficult to consider this aspect without bearing in mind the provisions of the UCP 600 regarding the obligation imposed upon the bank to honor an LC when it becomes due and the bank’s protected position regarding defects in the financed transaction between its customer and a third party.



50. That said, this court in the case of *Shalimar Flowers Self Help Group v Kenya Commercial Bank* [2016] eKLR that related to local transactions considered the duty of care owed by a banker to its customer. The court considered some decisions of superior court as follows:-

“ 41. In the *Barclays Bank of Kenya* case (Supra), the learned Judge (Aburili J) cited a portion of the judgment in *Simba Commodities Ltd versus Citibank N.A.* Civil Case No. 236 of 2003 (2013) eKLR wherein the case of *Karak Brothers Company Ltd versus Burden* (1972) ALLER was quoted.

42. The cited passage demonstrates the scope of the duty of a paying banker to its customer and is worth reproducing in extenso:

“ as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation’s duly authorized signatories the conclusion reached by Ungoed-Thomas J was as follows:

‘... a bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client’s shares) of necessity does not suggest that it is out of the ordinary course of business. If “reasonable care and skill” is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.’

As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal



obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and no to the authorized signatories. Moreover, it extends over the whole range of banking business within the contract. So the duty of skill and care applied to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, *omnia praesumuntur rite esse acta*, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course.” (Emphasis supplied)

51. Reviewing the evidence on record, the Court is not satisfied that the Appellant demonstrated that the Respondent failed to exercise reasonable skill and care especially given the protocols encapsulated in the UCP 600. Conversely, the Respondent showed that it had adequately satisfied its key obligation under the LC and cannot be held liable for an error in documenting the description of goods in the LC.
52. Considering the above findings, the Court finds no merit in the appeal in respect of the Appellant's suit in the lower Court.
53. Moving on the Respondent's counterclaim, the Respondent had averred at paragraph 21 of its defence and counterclaim as follows; -

“ 21. The Defendant by this counterclaim claims against the Plaintiff the sum of;-

- a. Kshs. 4,067,57300 as at 25th November 2016 on account of the expenses incurred by the Defendant in storage of the machine as a result of the Defendant' breach of contract and failure to collect the machine as agreed in contract.
- b. Interest accruing on the Plaintiff's letter of credit account due to failure by the Plaintiff to service the said account as agreed in the contract with the Defendant.

Particulars of breach of contract on the part of the Plaintiff

- i. Failure to pick the imported machine from the storage facility as agreed in the contract thereby occasioning the Plaintiff loss in paying for the storage charges.
- ii. Breach of contractual terms by not servicing loan account with the defendant.” (Sic)

54. The Respondent did not adduce firm evidence regarding the Appellant's default, hence breach of the terms of respect of the LC and therefore breach of contract entitling them to the reliefs sought. The outstanding interest accruing on the LC was neither pleaded in the plaint nor demonstrated with any particularity by DW1.



55. Besides, the claim for storage charges was not supported by evidence of payment of the charges. DW1 during trial confirmed that he did not have any receipt evidencing payment of the storage charges of KShs. 4,067,053/- to Mitchel Colts. Further, beyond the invoice, no material was tendered before the trial court to prove payment of the purported storage charges. The party bearing the legal burden must adduce evidence which in the absence of rebuttal evidence convinces the court that on a balance of probabilities a claim has been proved.
56. In Hahn -v- Singh [1985] KLR 716 the Court held that:
- “...special damages must not only be specifically claimed but also strictly proved. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves...”
57. The trial court erred in allowing the Respondent’s counter claim and its findings cannot stand. In the result, the appeal in respect of the Appellant’s suit in the lower court must fail and is dismissed. However, the appeal partially succeeds regarding the Respondent’s counterclaim. The judgment of the lower court in the said regard is set aside and the court substitutes therefor an order dismissing the Respondent’s counterclaim in the lower court. The parties will bear their own costs in this appeal and in the lower court.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Chege

For the Respondent: N/A

C/A: Carol

