



REPUBLIC OF KENYA



**Zomu Global Logistics Limited v Ital Plastic Africa (K) Limited (Civil Appeal
145 of 2020) [2023] KEHC 18496 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18496 (KLR)

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

CIVIL

CIVIL APPEAL 145 OF 2020

AN ONGERI, J

JUNE 15, 2023

BETWEEN

ZOMU GLOBAL LOGISTICS LIMITED APPELLANT

AND

ITAL PLASTIC AFRICA (K) LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. P. N. Gesora
(CM) in CMCC No. 726 of 2017 delivered on 13/02/2020)*

JUDGMENT

1. The appellant's case was dismissed by the trial court on 13/02/2020 and judgment was entered against the appellant in the counterclaim.
2. The appellant filed CMCC No. 726 against the respondent seeking a sum of ksh.1,305,282.00 in respect of services rendered to the respondent by the appellant.
3. The respondent filed a defence denying the appellant's claim and raised a counter claim in the sum of 16,170,782.06 in respect of losses suffered when the appellant declined to clear its goods and coerced the respondent to pay kshs.4,000,000.
4. The evidence of the appellant in brief was that the appellant was to ship, clear and deliver goods to the respondent as per an oral agreement entered into by the parties.
5. The respondent paid ksh.4,000,000 and after clearing the goods, the appellant raised a fee note of kshs.1,305,282 which the respondent failed to pay hence the filing of this suit.
6. The respondent on their part said the total amount agreed on for the job was ksh.2 million.



7. The respondent said the appellant coerced them to pay 4,000,000 and as a result of the delay occasioned by the appellant, the respondent suffered a loss of Kshs.16,170,782.08. The respondent raised the counter claim of the said amount.
8. The trial court found that the appellant did not prove its case and dismissed it and entered judgment for the respondent as prayed in the counter claim in the sum of kshs.16,170,782.08.
9. The appellant has filed this appeal in the following grounds;
 - a. The trial magistrate erred in law and in fact by failing to appreciate the appellant's claim as detailed in the plaint taking into account all the material evidence placed before the court justifying the demand therein.
 - b. The learned trial magistrate erred in law and fact by entering judgement in favour of the respondent's counter claim despite the fact that the same had not been specifically proved before the honorable trial court.
 - c. The learned trial magistrate erred in law and fact by failing to thoroughly and meticulously evaluate the evidence presented by both parties, the testimonies at trial and documentary evidence before the honorable trial court and opted to entirely recreate his own evidence as contained in the judgement herein.
 - d. The learned trial magistrate erred in law and fact by failing to appreciate the basic principles of law of contract and hence openly applied the wrong principles in favour of the respondent's counter claim.
 - e. The learned trial magistrate erred in law and in fact by wholly disregarding the inconsistencies of evidence by the respondent herein during the trial and particularly during cross examination thereof.
 - f. The learned trial magistrate erred in law and in fact by finding that the appellant had failed to prove its case on a balance of probability but instead ruled in favour of the respondent by placing a lower evidential burden in as far as the counter claim is concerned.
 - g. The learned trial magistrate erred in law and fact by wholly ignoring the plaint and submissions by the appellant who led cogent evidence to prove that the respondent had breached the contract and as such warranted the prayers sought in the material claim.
 - h. The learned trial magistrate erred in law and in fact by ignoring the evidence that was adduced and relying on irrelevant considerations during the entire trial and gave an unreasonable and dissatisfying judgement against the weight of evidence.
10. The parties filed written submissions in the appeal as follows;

The appellant submitted that there existed a contractual relationship between it and the respondent. That the contractual relationship between the parties can be inferred from the conduct of the parties and in particular the letter of authorization. The respondent also hinged its counter claim on the very same inferred contract that it was disputing. It follows therefore that a contract between the parties does exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. There was good faith on the part of the appellant to complete its obligations under the contract. In support the appellant cited *Ali Abdi Mohamed v Kenya Shell & Company*



Limited [2017] eKLR where the court of appeal took note of the English case in Lamb v Evans [1893] 1 Ch 218 in which Bowen Lj stated thus;

“The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile”.

11. The appellant added that on good faith the respondent made good on the required deposit since it had requested for an invoice with itemized costs and the appellant’s bank details. The appellant on July 22, 2016 proceeded to pay all requisite customs duty totaling Kshs. 2,777,769 as evidenced from the copies of receipts produced in the trial court. the respondent made the deposit of Kshs. 4,000,000 on or about 25th July 2016 upon which the clearance and release of the consignment was facilitated by the appellant.
12. The appellant subsequently sent to the respondent 2 separate invoices detailing the total costs for the entire assignment due owing to the appellant as follows;
Invoice No. 1163 - Kshs 4,481,682
Invoice No. 1164 - Kshs 823,600
Sub Total; Kshs. 5,305,282
Less Amount Paid – Kshs 4,000,000
Total Balance due – Kshs 1,305, 282
13. The appellant on the counter claim argued that the delay in shipment was solely attributed to the respondent and despite the fact that the appellant had initially intimated that the shipment of the consignment, clearing and transportation would be completed before May 22, 2016, the same was frustrated by the actions of the respondent. That there was change in orders as evidenced from the certificate of conformity which the respondent was well aware of.
14. The respondent on the contrary submitted that the appellant failed to prove their claim for Kshs. 1,305,282 as it did not provide sufficient evidence as proof of the same. That the produced invoices were unjustified and untimely as the appellant only produced receipts totaling Kshs. 2,777,769.
15. The respondent further argued that paying import duty in the sum of Kshs. 2,777,769 did not prove that the parties had agreed on a sum of Kshs. 5,305,282. That taxes are independent from the all-inclusive amount that had been agreed in delivering the materials which was Kshs. 2,000,000.
16. The respondent further submitted that invoices alone cannot prove that an amount is owed. That the appellant did not prove that the contractual balance remained. That the balance could only be proved by evidence of a contractual agreed amount and although invoices can form part of evidence, past court decisions are that an invoice is insufficient in of itself. In support the respondent cited Harbour Vessel Contractors Co Ltd v Inchcape Shipping Services Kenya Limited [2020] eKLR where it was held;

“In this case other than the invoices, which are said by both parties to have been settled in full when presented and as presented, there is nothing more to show what the rate of reward for the service and the duration of that relationship was to be. In fact, even if one was to



take it that there was always a written and renewed contract on a yearly basis, a matter that could have been easily established by showing such copies, the written agreement itself has no rate of remuneration.

.....

Having come to court on the basis that there was an agreement to pay Kshs 40 per ton and that a portion of that sum was withheld, it was the plaintiffs duty and ever present obligation to prove every fact to support its claim.”

17. The respondent argued that as best practice there was need to ensure that there was a quotation before shipping and this would ensure that those shipping costs can be determined accurately and in a timely manner. That any margin difference can thus be determined to be reasonable or unreasonable. That in this case transparency was lacking which caused that appellant to throw figures without attaching them to any agreed rate.
18. The respondent submitted that there was delay in delivering the goods. That as per the email dated May 3, 2016 it was clear that the goods would be picked up on May 13, 2016 and arrive in Mombasa on June 13, 2016. That pre-inspection and issuance of certificate of conformity are not pre-requisite of shipping and are not a prospective buyer’s responsibility and that the appellant is therefore being disingenuous by stating that it was impossible to ship the goods due to the certificates of conformity.
19. The respondent indicated that the delay in delivering the materials caused it to suffer loss as it was single sourcing its materials from Italy and had no alternative source to try and mitigate the awkward situation it was placed in by the appellant’s delay.
20. The respondent submitted that it was able to prove ongoing contracts by producing Local Purchase orders which were evidence of an agreement. That an LPO once acted upon amounts to a contract. That the respondent acted on the LPO when it sought to import the materials to perform those agreements. That therefore it proved its case on a balance of probabilities.
21. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held;

“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.”

22. The issues for determination of this appeal are as follows
 - i. Whether the appellant proved its case against the respondent.
 - ii. Whether the respondent proved its counter claim against the appellant.
 - iii. Whether the trial court ignored the appellant’s evidence and relied on irrelevant considerations against the weight of evidence.



- iv. Whether the appeal should be allowed.
- v. Who pays the costs of the appeal?
24. On the issue as to whether the appellant proved its suit, the trial court found that the appellant did not account for the 4 million it was paid by the respondent.
25. The respondent said they had agreed on a figure of 2 million only for the work but were coerced to pay 4 million.
26. The respondent also submitted that the appellant failed to prove their claim for Kshs. 1,305,282 as it did not provide sufficient evidence as proof of the same. That the produced invoices were unjustified and untimely as the appellant only produced receipts totaling Kshs. 2,777,769.
27. I find that the parties entered into an oral agreement and therefore it was the word of the appellant against that of the respondent.
28. It was held in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR that;

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.
29. The court of Appeal in *William Muthee Muthami versus Bank of Baroda* (2014) eKLR, stated that for a contract to be valid under the law of contract, it must be proved that there was offer, acceptance and consideration.

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”
30. Further, in *Charles Mwirigi Miriti v. Thananga Tea Growers Sacco Limited and another* (2014) eKLR the court of appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration.
31. I find that the oral contract was for payment of 2,000,000 shillings and the Appellants had no basis for raising a fee note for Ksh. 1,305,282.00 after the respondents had paid 4,000,000.
32. There is evidence that the appellant was to ship, clear and deliver goods to the respondent as per an oral agreement entered into by the parties.
33. I find that the trial court was right in holding that the appellant did not prove its claim against the respondent of ksh. 1,305,282.00.
34. On the issue as to whether the respondent proved its counterclaim, I find that the trial court found that the appellant conceded the delay in the delivery of the goods but they blamed the respondent for the delay due to change in orders as evidenced from the certificate of conformity.
35. I find that there is no evidence that the respondent incurred a loss of Kshs. 16,170,782.08 which the respondent was claiming in the counterclaim.
36. The law requires that special damages be specifically pleaded and proved.



- 37. The respondent pleaded that they lost orders placed by Sportan Developers with them worth 9,183,278.36 and with Nairobi Safari Club valued at ksh. 6,987,503.72 which totaled to a sum of ksh. 16,170,782.08 which were cancelled as a result of the delay.
- 38. However, the goods were delivered to the respondent and there is no evidence that the respondent incurred the huge loss in business as alleged.
- 39. I find that apart from stating the said figures in the counterclaim there was no other evidence documentary or otherwise to support the allegation that the respondent made the huge loss they are claiming against the appellant.
- 40. There is evidence that the goods were delivered and no credit has been given in respect of the value of the goods delivered.
- 41. In the circumstances, I find that the respondent did not prove its counterclaim against the appellant to the required standard and the same ought to have also been dismissed by the Trial court.
- 42. I accordingly set aside the Judgment and Decree of the Trial court in respect of the counterclaim and I substitute it with an order dismissing the counterclaim.
- 43. On the issue as to whether the appeal should be allowed, I find that the appeal partially succeeds to the extent that the judgment in favor of the respondents in respect of the counter-claim is set aside.
- 44. On the issue as to who pays the costs of this appeal, since both the respondent and the appellant's claims have failed, I direct that each party bears its own costs of the appeal and of the original suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF JUNE, 2023.

A. N. ONGERI
JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

