



**Makarim Limited v Ndago (Commercial Appeal E024 of 2023)
[2023] KEHC 19997 (KLR) (Commercial and Tax) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E024 OF 2023**

EC MWITA, J

JULY 14, 2023

BETWEEN

MAKARIM LIMITED APPELLANT

AND

EVE NDAGO RESPONDENT

(Appeal from the judgment and decree of the Small Claims Court at Milimani Commercial courts (Hon. Caroline Ndumia, SM) dated 17th January 2023 in SCCOMM NO. E6706 OF 2022)

JUDGMENT

1. The respondent filed a claim before the Small Claims court at Nairobi for Kshs. 89,000, compensation for loss of property valued at Kshs. 89,000, namely a refrigerator.
2. The refrigerator purchased from the appellant was to be delivered to the claimant's residence in Kwale County by Fargo Courier Services Ltd. However, when the refrigerator was delivered, it was found to be damaged and the respondent declined to accept it.
3. The appellant filed a statement of defence denying the respondent's claim. The appellant stated that the respondent contracted Fargo Courier Services Ltd to deliver the refrigerator to her residence without involving the appellant which was a different contract since the appellant did not offer transportation of goods purchased from them to customers.
4. The trial court heard the dispute and delivered a judgment on 17th January 2023 in favor of the respondent allowing the claim for Kshs. 89,000.
5. The appellant was aggrieved and filed this appeal raising 10 grounds of appeal. However, these grounds of appeal can be summarised as follows:



- i. That the trial magistrate erred in failing to consider the evidence adduced before her.
 - ii. The trial magistrate erred by failing to find that the respondent did not prove that the goods (refrigerator had been damaged
 - iii. That the trial magistrate erred by failing to find that the respondent did not discharge the burden of proof
 - iv. That the trial court erred by shifting the burden of proof the appellant thus enforced obligations against the appellant that belonged to a third party.
6. This appeal was disposed of through written submissions. Both parties filed written submissions and cited decisions which this court has read and considered. The issues that arises for determination are whether the respondent proved her claim and whether the trial court erred in allowing the respondent's claim.
7. This being a first appeal, it is by way of a rehearing. This court's duty as the first appellate court, is to reconsider, reevaluate and reanalyze the evidence afresh make its own conclusions on that evidence. The court should however bear in mind that it did not see the parties testify and make due allowance for that. (*Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR).

Whether the respondent proved the case

8. In order to determine this issue, the court should resolve who contracted Fargo Courier Services Ltd to deliver the refrigerator,
9. The main facts of this appeal are undisputed. The respondent purchased a refrigerator from ted appellant at Kshs. 89,000. The refrigerator was delivered to the respondent by Fargo Courier Services Ltd in Kwale County.
10. The disputed fact is who contracted Fargo Courier services Ltd to deliver the refrigerator to the respondent. According to the respondent, it was the appellant while the appellant maintains that it was the respondent.
11. I have gone through the record and evidence adduced before the trial court. The Refrigerator was purchased on 2nd July 2021 from the respondent's shop in Nairobi.
12. In the witness statement, the respondent stated that the appellant had agreed to have the refrigerator delivered to her place through Fargo Courier Services Ltd. The refrigerator was indeed delivered by Fargo Courier Services Ltd but on arrival, it was found to have been damaged and that was why the respondent filed the claim.
13. The question is who instructed Fargo Courier Services Ltd to deliver the refrigerator from Nairobi to the respondent place in Kwale County. The appellant argued that the arrangement to transport the refrigerator was made by the respondent while the respondent maintained that the appellant made the arrangementst.
14. I have perused the record of the trial court and the evidence of both parties before that court as well as the witness statements filed in that court. The respondent stated that after she purchased the refrigerator, the respondent assured her that Fargo Courier Services Ltd would deliver the item to her residence in Kwale.
15. On 24th July 2021, she received a call Fargo Courier's personnel informing her that they had been tasked to deliver the refrigerator. When the refrigerator was delivered, it was found to be damaged and she



- declined to take possession of the refrigerator. Fargo Courier Services Ltd's personnel went back with the refrigerator.
16. On the other hand, the appellant's witness Naseer Ahmed stated that the respondent first paid a deposit for the refrigerator and later paid for the balance after inspecting the refrigerator and make arrangements for transportation. The respondent contracted Fargo Courier Services Ltd to transport the refrigerator to her place, since the appellant did not offer transport services. According to Mr. Ahmed, Fargo Courier Services Ltd only distributes goods to the appellant's outlets and not to customers.
 17. The trial court considered the issue of who instructed Fargo Courier Services Ltd and concluded, referring to the letter dated 21st February 2022, that since the appellant had a contract with Fargo Courier Services Ltd it instructed Fargo Courier Services Ltd to transport the refrigerator to the respondent's residence in Kwale County. For that regard, the trial court found in favour of the respondent that the appellant was responsible.
 18. I have considered the appellant's grounds of appeal and arguments that the respondent did not discharge its burden of proving the case on a balance of probability. The respondent does not deny that she purchased the refrigerator from the appellant. She does not also deny that the refrigerator was purchased at Kshs. 89,000.
 19. A perusal of the invoice dated 2nd July 2021 shows the breakdown of the purchase price. The cost of the refrigerator was Kshs. 76,724.14. VAT (16%) was Kshs. 12,275.86. This amount was also confirmed in the ETR Receipt. The respondent did not state that the cost of the refrigerator included transport from Nairobi to Kwale. The receipt issued by the appellant did not also show that the cost of transport was included in the price of Kshs. 89,000.
 20. The respondent did not show that she had paid the appellant for purposes of transporting the refrigerator from Nairobi to Kwale or that the price of Kshs. 89,000 was inclusive of transport. It would not make sense for the appellant to transport goods to the respondent's residence in Kwale unless she had paid for transport.
 21. I have read the letter dated 2nd February 2022 from Fargo Courier Services Ltd which the trial court heavily relied on to hold that the appellant had contracted Fargo courier Services Ltd to generally transport goods for the appellant. With respect, that letter did not state that the appellant had contracted Fargo Courier Services Ltd to transport the refrigerator in question to the respondent's place or was to transport customers' goods generally.
 22. The tone of the letter was that Fargo Courier Services Ltd has had a contract with the appellant since 2018 for provision of courier services. This must be read and understood to mean that the transport was in respect of the appellant's goods and that was why the appellant was to have insurance cover for the value of its goods. The refrigerator was not the appellant's property once the sale had been concluded and the property passed to the respondent.
 23. There was also no evidence that the refrigerator was damaged. That is; where the refrigerator was damaged. The respondent did not also state where the refrigerator went other than stating that she did not take possession. If the refrigerator was damaged was a question of fact to be proved. Any damage in the course of transportation while in the hands of Fargo Courier Services Ltd, was an issue to be taken up with the transporter and not the appellant.
 24. I do not agree with the trial court that the appellant was responsible for the transport of the refrigerator to the respondent's place and was to blame for whatever happened to the refrigerator.



Whether the trial court erred in allowing the claim.

25. Having determined that there was no proof that the appellant was responsible for transportation of the refrigerator to the respondent's premises, the next issue is whether the trial court was right in allowing the claim. The answer to this issue must be clear by now.
26. The trial court allowed the claim for Kshs. 89,000 on the basis that the appellant contracted the transporter of the goods which were damaged in the course of transportation. This court has held that there was no proof to that effect. In other words, the appellant was under no obligation to transport the respondent's goods from Nairobi to Kwale free of charge.
27. If the goods were damaged during transportation, only the transporter would be held liable for any damage. The respondent did not allege that the refrigerator was damaged before it was handed over for transportation. Any argument that the appellant's technician was responsible in connecting the respondent with Fargo Courier Services Ltd, did not transfer responsibility to the appellant as long as it was the respondent who wanted the refrigerator transported to her rural home in Kwale County. In that regard, this court is persuaded that the trial court fell into error in allowing the claim against the appellant.
28. The respondent did not join Fargo courier services Ltd in this suit and claim against it for the damage to the refrigerator because Fargo Courier Services Ltd was responsible for safe transportation of the refrigerator to the assigned destination. That would perhaps have yielded to a different result.
29. Having considered the appeal submissions and reevaluated the evidence, the conclusion I come to is that this appeal has merit and is allowed.

The judgment and decree of the trial court dated 17th January 2023 is set aside. costs of the appeal to the appellant.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2023

E C MWITA

JUDGE

