



Total Kenya Limited v Project Allied Consultants Limited (Commercial Appeal E147 of 2022) [2023] KEHC 19993 (KLR) (Commercial and Tax) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E147 OF 2022**

EC MWITA, J

JULY 14, 2023

BETWEEN

TOTAL KENYA LIMITED APPELLANT

AND

THE PROJECT ALLIED CONSULTANTS LIMITED RESPONDENT

(Appeal from the Judgment and Decree of the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi (Hon S. M. Opande (PM), dated 23rd September 2022 in CMCC No. 4557 of 2014)

JUDGMENT

Background

1. The respondent filed a suit before the trial court against the appellant for damages for breach of contract and sought general damages for negligence; illegal detention and emotional distress.
2. The appellant had issued a Bon Voyage Fuel Card No 00048998 to the respondent for use at various the appellant's petrol stations within Kenya.
3. On 17th January, 2011, Joseph Mukuna Ekhuya Simekha (Mr. Simekha), the respondent's director, ordered fuel worth Kshs 5,000 for the respondent's motor vehicle KBL 245C at South City (Total) Service Station within South B Shopping Centre in Nairobi.
4. An attendant at the petrol station stopped fueling the vehicle when the meter was reading Kshs 2,960. Mr. Simekha presented the fuel card which he thought was loaded with sufficient funds but the point of sale returned a negative credit balance when the card was swiped.



5. Mr. Simekha was briefly detained by the management of the petrol station because he had no funds to pay for the fuel. He requested to be driven to a friend's place to get cash to which the management agreed on condition that the fuel card and his national identity card would be retained.
6. The respondent claimed before the trial court that the petrol station's actions were demeaning and portrayed the respondent and Mr. Simekha as impecunious and unable to meet their financial obligations. This, the respondent claimed, reduced its business standing in the eyes of the public. Simekha was with his 5 year old son whom he had picked from school and was to drop home before returning to work to attend a scheduled an important business meeting.
7. The appellant filed a defence denying the respondent's claim for breach of contract, negligence and emotional stress. The appellant argued that it was not aware of the alleged failed fuel card transaction and that the alleged transaction did not occurred as any failed transaction would have been captured in the statement of account. The appellant took the view that the respondent did not prove its case against it.
8. In a judgment delivered on 23rd September 2022, the trial court held that the appellant breached the contract since it had issued the fuel card and was therefore negligent.
9. The trial court awarded the respondent general damages of Kshs 2,400,000 for illegal detention and emotional distress. The respondent was also awarded costs of the suit and interest.

Appeal

10. The appellant was aggrieved and filed a memorandum of appeal dated 11th October 2022 raising a total of 11 grounds of appeal which can be summarized to 6 grounds as follows:
 1. The learned magistrate erred in law and in fact in finding that there was breach of contract, yet there was no evidence of the breach.
 2. The learned magistrate erred in law and in fact in failing to take into account the documentary evidence produced by the appellant, the testimony of the appellant's witness and submissions.
 3. The learned magistrate erred in law and fact in shifting the burden of proof to the appellant contrary to law
 4. The learned magistrate erred in law and in fact in awarding general damages for illegal detention and emotional distress, which are remedies founded on tort, despite having made a finding that such a claim was untenable as the same was statute barred under 4 (2) of the *Limitation of Actions Act*.
 5. The learned magistrate erred in law and in fact in failing to find that a Company cannot suffer illegal detention and emotional distress.
 6. The learned magistrate erred in law and in fact in assessing general damages for the alleged illegal detention and emotional distress at Kshs 2,400,000.00 without providing the factual and legal basis of arriving at the said damages.
11. This appeal was disposed of through written submissions.



Appellant's submissions

12. The appellant argued through written submissions that the trial court was wrong in holding that the respondent had proved breach of contract which was not the case. The appellant's position is that the respondent did not lead evidence to prove that it had breached a contract between the parties, thus the burden of proof was not discharged.
13. The appellant relied on *Alfred Kioko Muteti v Timothy Mibeso & another* (Nairobi HCCC No 232 of 2002) [2015] eKLR and sections 107 and 109 of the *Evidence Act* to argue that the respondent had the burden to prove breach of contract.
14. The appellant again argued that the trial court shifted the burden of proof to it. According to the appellant, the trial court erred by stating that it was in a position to explain why Motorways Caltex Service Station Ltd and South City Service Station Ltd were not connected with to it, thus shifted the burden of proof to the appellant. The appellant faulted the trial court for failing to consider documentary evidence, namely; the statement of account the appellant produced showing that the card was not used on the material day and there was no failed transaction in the use of that card.
15. The appellant asserted that the handwritten note/document was not proof that the appellant breached the contract was not also evidence that there was a connection between the appellant and Motorways Caltex Service Station Ltd.
16. The appellant blamed the trial court for failing to make an adverse finding against the respondent for failing to call Simekha's son who was present at the material time and, therefore, a crucial witness. The appellant relied on *Mwanzani Mwakitu v Chandaria Industries Co. Ltd* (Civil Appeal No 156 of 2007) [2015] eKLR that if a party possesses evidence which he fails to call, the presumption is that the evidence is adverse to him.
17. Regarding damages, the appellant argued that the trial court erred in awarding damages for the tort of illegal detention and emotional distress when the respondent's claim was for breach of contract. The appellant maintained that a claim for damages for illegal detention and emotional distress was unfounded since the appellant, as a company, could not be illegally detained or suffer emotional distress.
18. The appellant faulted the trial court for awarding general damages of Kshs 2,400,000 for illegal detention and emotional distress when there was no factual and legal basis for it. The appellant relied on *Kenya Women Microfinance Ltd v Martha Wangari Kamau* (Civil Appeal No 14 of 2020) [2021] eKLR that general damages are not awardable for breach of contract. Damages for breach of contract are claimed as special damages and must be specifically pleaded and strictly proved.
19. The appellant pointed out that a claim based on tort would be statute barred by virtue of section 4(2) of the *Limitation of Actions Act* since the alleged incident occurred on 17th January 2011 while the suit was filed on 7th August 2014.
20. The appellant relied on *Standard Chartered Bank Kenya Ltd v Intercom Service Ltd & 4 others* (Civil Appeal No 37 of 2003) [2004] eKLR for the argument that once an illegality is brought to the attention of the court, the court has a duty to investigate it whether it was pleaded or not.
21. The appellant again relied on *Peter Umbuku Muyaka v Henry Sitati Mmbasu* (Civil Appeal No 91 of 2015) [2018] eKLR, that if a specific loss is to be compensated and the party was given a chance to prove the loss but did not, he cannot have more than nominal damages.
22. The appellant urged that the appeal be allowed with costs and costs of the suit before the trial court.



Respondent's submissions

23. The respondent also submitted through written submissions that an opposing party has a corresponding duty to adduce evidence depending on the evidence presented by the other party. The appellant cited the decision in *Mbutia Macharia v Annab Mutua Ndwiga & another* (Civil Appeal No 297 of 2015) [2017] eKLR to support this position.
24. The respondent asserted that the appellant did not contested the authenticity of the handwritten note or call evidence to controvert its validity. The respondent took the view, that since the appellant's witness testified that the appellant engaged in marketing license agreements, the appellant should have demonstrated that it had no agreement with Motorway Caltex Service Station or South City Service Station Ltd.
25. The respondent contended that Simekha's son was not a suitable witness because he was just 5 years old at the time of the incident. On its part, the respondent faulted the appellant for not calling the agent who was also an eye witness to the incident.
26. Regarding the award of damages, the respondent supported the trial court's decision and faulted the appellant for not raising a counterclaim. The respondent relied on *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (Presidential Election Petition 1 of 2017) [2017] eKLR, for the argument that the court cannot frame an issue not arising from the pleadings.
27. According to the respondent, the issue of negligence was intertwined with the claim for breach of contract. For that reason, breach of contract having been proved, the award of damages was properly allowed and the court should not interfere with the award. The respondent relied on *Rahma Tayab & another v Anna Mary Kinaru* [1987-88] 1 KAR 90 on the principles upon which an appellate court may disturb quantum of damages awarded by a trial court.
28. The respondent urged the court to uphold the judgment of the trial court and dismiss the appeal with costs.

Determination

29. I have considered this appeal, submissions made on behalf of the parties and decisions relied on. I have also read the record of the trial court and the impugned judgment. This being a first appeal. it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence and make its on informed decision on that evidence. The court should, however, bear in mind that it did not see the witnesses testify and give due allowance for that. (See *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123; *Peters v Sunday Post Ltd* [1958] EA 424).
30. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal observed that a first appeal is by way of a retrial. The the court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it neither saw nor heard the witnesses and make due allowances in that respect.
31. From the grounds of appeal and arguments before this court, I have distilled two issues for determination. First; whether there was breach of contract and, second; whether the award of damages was justified.

Breach of contract

32. The dispute before the trial court was triggered by a failed fuel card use transaction at the appellant's petrol station in South B where the respondent's officer stopped to fuel using a fuel card issued by



- the appellant. Although Mr. Simekha thought there were sufficient funds to cover the cost of the fuel drawn (Kshs 2,960), it turned out that when the card was swiped, it had a negative balance.
33. The management of the petrol station detain the respondent's officer before he got help from a friend. The respondent argued that the appellant was at fault because the fuel card amount was capped at less than the amount the respondent had directed. This, the respondent argued, was not only a breach of contract but also negligence.
 34. The appellant denied breaching the contract and maintained that the fuel card was not used on that day. According to the appellant, the card had been used on 6 occasions in that month and all the transactions had been successful.
 35. The trial court considered the evidence and found in favour of the respondent. The trial court took into account the handwritten document that showed that the card had been detained by South City Service Station Ltd until the card was unlocked by the appellant to allow the running of fuel sale of Kshs 2,960.
 36. The trial court observed that the respondent's case was premised on the fuel card application form, the contract and the handwritten note on the detention of the vehicle. The trial court was of the view, that there was association between the appellant and the dealers of the petrol station in south B where the fuel card was detained.
 37. The trial court further stated that it was up to the appellant to show that there was no connection between the authors of the handwritten document, Motorway Caltex Service Station Ltd and the appellant. The trial court held, therefore, that the appellant was in breach of contract.
 38. I have gone through the evidence on record and evaluated it myself. There was no dispute that the respondent had a fuel card issued by the appellant. There was also no dispute that the respondent's car was fueled at the petrol station concerned. The issue was whether the fuel card had sufficient funds to cover the fuel drawn.
 39. The evidence before the trial court was that the amount of the fuel drawn was worth Kshs 2, 960. When the card was swiped, it turned out to have no money (had a negative balance). The issue for the trial court determination should have been whether the respondent proved that the card had sufficient funds to cover the fuel drawn but the appellant declined to allow use of the card to pay for the fuel.
 40. Whether or not there was a contract between the respondent and the appellant on the use the card was not the issue. Use of the fuel card was dependent on the card being loaded with sufficient funds to cover the cost of fuel at the point is purchase. Having a card that is not loaded with funds would amount to nothing when it comes to use of the card at the point of sale. This is so because the contract between the card hold and the card issuer is based on the understanding that the card issuer would allow the card holder to use the card at select points of purchase/sale while the card holder would maintain sufficient funds in the card to meet the cost of purchases at any particular time. This fact was acknowledged by the respondent in its witness' statement filed together with the plaint.
 41. I have gone through the evidence and witness statements. Although the respondent's witness stated that the fuel card had sufficient funds, he nonetheless stated that the card did not reflect credit balance when the fuel pump meter was at Kshs 2,960 and the pump attendant had to stop fueling. That would only imply one thing; that the card had ran out of funds. The respondent did not lead evidence to show when the card was last loaded, how much was loaded and when the card was last used and what the balance was.



42. The appellant's evidence was that the card had been used 6 times that month and all transactions had been successful. It was, therefore, up to the respondent to prove that the card had money on the material day but the petrol station management acted in a manner that would make the appellant liable for breach of contract.
43. In civil proceedings, the law places the burden of proof on the plaintiff to prove his case on a balance of probability. In that regard, section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
44. Section 109 adds that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In this respect, the respondent wanted the trial court to believe that it had the right to use the fuel card. It was, therefore, incumbent upon the respondent prove that the card was loaded with sufficient funds for use at the petrol station. That is why section 108 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. (See also *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* (Civil Appeal No 342 of 2010[2013] eKLR).
45. The burden of proof would have shifted to the appellant if the respondent alleged that the card had sufficient funds at the time of fueling, thereby shifting the burden to the appellant to prove that the card was not loaded. (See *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others* (Presidential Election Petition 1 of 2017) [2017] eKLR).
46. The trial court misapprehended the issue before it and, in particular, how a fuel card operates and obligations on the part of the card holder (respondent) and that of the card issuer (appellant). The trial court failed to address its mind to the real issue before it namely, whether the respondent had funds in the fuel card to meet the cost of fuel at the petrol station on the material day and time.
47. I am unable to agree with the trial court that the respondent proved that the appellant was in breach of contract.

Damages

48. The appellant again argued that the trial court was wrong in awarding general damages for illegal detention and mental distress. According to the appellant damages for illegal detention and mental distress arise from tortious claims and could not be allowed in favour of a company.
49. The respondent supported the trial court's decision to award damages for illegal detention and mental distress.
50. I have perused the plaint and the relief sought. The respondent sought general damages for illegal detention; damages for emotional distress; costs of the suit and interest on the damages.
51. In its judgment, the trial court stated as follows:

(16) As I earlier said, the particulars of breach of contract have been proved. The question is whether there is remedy or not. In as much as the claim under negligence is untenable, it is my considered opinion that the wrong committed by breach of contract resulted into the detention and emotional distress which the plaintiff has rightly sought for in general damages.



52. The trial court proceeded to assess general damages for illegal detention and emotional distress at Kshs 2,400,000.
53. The appellant faulted the trial court on this arguing first, that general damages are not awarded in cases of breach of contract, and second, that damages for illegal detention and emotional distress are related to tort and are not awardable to a company. The respondent supported the trial court's decision in awarding the damages.
54. Illegal detention occurs where a person is arbitrarily arrested, kept in confinement without his permission or imprisoned without being formally charged with an offence or without being put through trial, for an indefinite period. On the other hand, a person will be under mental distress if he is subjected to psychological distress or held under troubling circumstances.
55. In that regard, illegal detention can only be committed against an individual. It is also an individual who would suffer mental distress but not a corporation. As the appellant correctly argued, a company cannot suffer illegal detention or mental distress. Only the person who alleged to have been illegally detained could claim damages for illegal detention and mental distress, which would of course be subject to proof as required by law.
56. In the circumstances of this case, the trial court could not award general damages to the respondent, a corporate entity, for illegal detention and mental distress. The argument that illegal detention and mental distress was founded on the breach of contract would also have no legal basis. This is so, because as this court has already held, there was no breach of contract which would be the foundation of a claim for damages under the head of illegal detention and or mental distress. The trial court erred in this regard.

Conclusion

57. Having considered the appeal and reevaluated the evidence, the conclusion I come to, is that the respondent did not prove breach of contract. The respondent did not prove that the appellant failed to discharge its obligations on the use of the fuel card despite the card having sufficient funds on 17th January 2011 at the time the card was to be used for purchase of fuel.
58. The trial court was therefore in error in holding that there was breach of contract and wrongly awarded damages for illegal detention and mental distress to the respondent, a company.

Disposal and orders

1. The appeal is allowed.
2. The judgment and decree of the trial court dated 23rd September 2022 is set aside.
3. The appellant shall have costs of the appeal and before the trial court.

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

E C MWITA

JUDGE

