Awero t/a Chevin Enterprises v DHL Exel Supply Chain (K) Limited (Commercial Appeal E018 of 2020) [2024] KEHC 13780 (KLR) (Commercial and Tax) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13780 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E018 OF 2020

JWW MONG'ARE, J

NOVEMBER 4, 2024

BETWEEN

JOHN AWERO T/A CHEVIN ENTERPRISES ..... APPELLANT

AND

DHL EXEL SUPPLY CHAIN (K) LIMITED ..... RESPONDENT

JUDGMENT

1. The Appellant dissatisfied with the judgment of the Milimani Chief Magistrate Hon. Gicheha delivered on 29th May 2020 in CMCC No 1693 of 2014, filled his Memorandum of Appeal dated 25th June 2020 on the following grounds:

    a. The Learned Magistrate erred in law and in fact by sustaining the Counterclaim against the Appellant when in fact the said Counterclaim was never prosecuted at all.

    b. The Learned Magistrate erred in law and in fact in awarding a judgment amount in respect of the Counterclaim which amount is different from what had been pleaded/claimed in the Counterclaim whereas it is trite law that parties are bound by their pleadings.

    c. The Learned Magistrate erred in fact and in law by failing to take into account the evidence adduced by the Appellant thereby arriving at a wrong conclusion;

    d. The Learned Magistrate erred in fact and in law by disregarding the submissions made by the Appellant's counsel and thereby basing the Judgment on the wrong principles.

    e. The Learned Magistrate erred in law and in fact by failing to consider and to make a finding on the Appellant's Defence to the Counterclaim and submissions in support of the Defence of the said Counterclaim and in particular the following points:

i. That the Learned Magistrate erroneously determined the value of the lost goods to be what was stated by the Respondent without the actual evidence of their true value which could have been determined by a valuation report;

ii. That the Learned Magistrate ought to have apportioned part of the liability for the loss of the goods on the Respondent by dint of the principle of contributory negligence since it is the Respondent who was responsible for tracking the movement of the trucks ferrying the goods on its computer monitors as they are the ones who fitted the said trucks with Tracking devices; and

iii. That the Learned Magistrate failed to find and hold that the amount paid by the Insurer as compensation for the goods lost was less than the Kshs. 5 Million that was the value of the said insurance cover.

f. The Honourable Magistrate erred in fact and in law by failing to take into account the authorities relied on by the Appellant thereby arriving at a wrong conclusion.

2. The Appellant prayed for Orders that: -

a. this Appeal be allowed;

b. the portion of the Judgment on the Respondent's Counterclaim be set aside and the Respondent's Counterclaim against the Appellant be dismissed; and

c. the costs be borne by the Respondent.

3. Upon being directed by the court, the parties herein filed were directed to file written submission and the Appeal was to be canvassed by way of written submissions. Subsequently, the Appellant filed the written submissions but at the time of writing this judgment, the Respondent was yet to file a response to the Appeal or put in its written submissions. The court therefore proceeded to determine the appeal herein as unopposed.

Analysis and Determination

4. Having carefully considered the Memorandum of Appeal, the Record of Appeal as well as the Appellant's written submissions I note that the issue that arises for determination by the Court is whether the appeal as filed herein was merited.

5. This being a first appeal the court relies on a number of principles as set out in Selle and Another Vs Associated Motor Boat Company Limited & Others (1968) EA 123. Among those principles is the requirement by the first appellate court to relook at the evidence adduced at the trial court during its consideration of an appeal before it.

6. It was the Appellant's case that the Defendant did not prosecute the counterclaim in CMCC No. 1693 of 2014 and intended to file a separate suit at the High Court to pursue the counterclaim. Secondly, the Appellant pointed out that the court awarded the Defendant the amount of Kshs. 6,413,080.63/ = based on the loss of cartons after the deduction of insurance payment and excess and that the Respondent in the statement of Defence dated 3rd June 2014 never pleaded for the loss of the cartons nor asked for compensation for the lost cartons.

7. This then begs the question, what was the Defendant's claim in the counterclaim? The said counterclaim was drafted as below:

a. The Defendant claims against the Plaintiff the sum in excess of the Court's Jurisdiction (Kshs. 8,898,386.86/=) to be filed in the High Court as a separate suit.

b. The Defendant further seeks an order against the Plaintiff to remove his trucks from its premises where they have been packed for the last 2 years.

c. The Defendant also claims from the Plaintiff damages for blockage of its entry to its premises for the last 2 years.

d. The Defendant further claims from the Plaintiff loss of business arising from his withdrawal of the fleet of vehicles that he had assigned to the Company in breach of the contractual terms that had been executed by the parties.

e. The Defendants admits the contents of Paragraph 17, 18 and 19 of the Plaint.

8. Having considered the excerpt of the counterclaim it is clear that the Respondent intended to prosecute as a separate suit its counterclaim in the High Court. In addition, an evaluation of the testimony adduced at the trial of the suit in the lower court reveals that there was no mention of loss of cartons by the Respondent. An analysis of the impugned judgment shows that the trial Magistrate proceeded to determine the counterclaim when in deed it was not prosecuted at all. On this the court agrees with the Appellant that it is trite that parties are bound by their pleadings.

9. This principle was reiterated in the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

10. Indeed, the Learned Magistrate erred in awarding a judgment amount in respect of the counterclaim.

11. Further, the Appellant argued that the Learned Magistrate erred in fact and law by disregarding the submissions by the Appellant's counsel and thereby basing the judgment on the wrong principles. That there was no mention of the Plaintiff's nor the Defendant's submissions.

12. It is the court's understanding that submissions do not qualify as evidence, courts are not obligated to consider them, as many rulings have been issued without them. The court reiterates the holding in Ngang'a & Another vs. Owiti & Another [2008] 1 KLR (EP) 749, the Court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

13. In light of the above, and upon considering the Memorandum of Appeal and the Record of Appeal as filed, I find merit in the Appeal and allow the same to the extent that the portion of the Judgment on the Respondent's Counterclaim is set aside and the Respondent's Counterclaim against the Appellant is dismissed. Costs of this Appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4TH DAY OF NOVEMBER 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Gakuru for the Appellant.

2. Mr. Kahura for the Respondent.

3. Amos - Court Assistant