Unifreight Cargo Handling Limited v Limma (K) Limited (Civil Appeal E051 of 2021) [2021] KEHC 189 (KLR) (Commercial and Tax) (3 November 2021) (Judgment)

Neutral citation: [2021] KEHC 189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E051 OF 2021

DAS MAJANJA, J

NOVEMBER 3, 2021

BETWEEN

UNIFREIGHT CARGO HANDLING LIMITED ..... APPELLANT

AND

LIMMA (K) LIMITED ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. E. M. Kagoni, PM dated 21st June 2021 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 95 of 2020)

JUDGMENT

1. The Appellant has filed to this court challenging the ruling of the Subordinate Court dated 21st June 2020 dismissing its Notice of Motion dated 14th April 2021 made under Order 22 rule 22 and Order 10 rule 11 of the Civil Procedure Rules ("the Rules") seeking the following main order:

    (3) THAT the Defendant be granted leave to prosecute the Preliminary Objection which has been fixed for mention for directions on 26th April 2021, which consequently, will determine the entire suit.

2. After considering the depositions on both sides together with written submissions, the trial magistrate dismissed the application on the ground that the Appellant did not explain why it failed to prosecute the preliminary objection when it had the opportunity to do so. Further, the court rejected the Appellant's argument that the judgment was irregular on the ground that the notice of entry of judgment was not served. The court observed that the notice had nothing to do with the judgment. Finally, the trial magistrate held that from the prayers sought, the application could not succeed as the Appellant had not sought to set aside the interlocutory judgement.

3. The Appellant has filed its memorandum of appeal dated 16th June 2021. Both parties have filed written submissions in support of their respective positions. In order to resolve this appeal, I think it is important to set out the context and background of the matter.

4. The Plaintiff's case against the Defendant as set out in the Plaint dated 7th February 2020 and is for KES. 1,305,672.21 being the amount due and owing upon termination of a Labour Supply Agreement dated 2nd January 2018. Upon service of the process, the Defendant filed a Memorandum of Appearance dated 12th March 2020 together with a Preliminary Objection dated 20th March 2020 in which it stated that the court's jurisdiction was ousted by an arbitration clause in the agreement between the parties.

5. Upon filing the Notice of Preliminary Objection, the Appellant set it down for mention on 8th April 2021 whereupon it was fixed for directions on 26th April 2021. When the parties appeared before the court on that date, the Appellant realized that judgment had been entered against it on 8th July 2020. The Appellant thereafter filed the application which is now subject of this appeal.

6. From the record and parties' submissions, the issue for resolution concerns the discretion of the trial magistrate. In such an instance, the appellate court will only interfere within the parameters set out in *Mbogo and Another v Shah [1968] EA 15* where it was held that:

> An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

7. I would agree with the trial magistrate that the application before the court suffered from inelegant drafting and would not succeed unless the interlocutory judgment in force was set aside. In this instance, the Appellant did not seek to set aside the ex-parte judgment. This however is not decisive. Although I have not seen the application for interlocutory judgment on record, the fact that the judgment entered on 8th July 2020 was, "as prayed" leaves no doubt that the Respondent was granted final judgment as evidenced by the resultant decree.

8. I have looked at the proceedings and I am satisfied that the judgment entered was irregular for the reason that it was final judgment when the amount sought in the plaint was not a liquidated claim. A final judgment is entered under the provisions of Order 10 Rule 4(1) as read with Order 10 rule 10 of the Rules which states as follows:

> 4(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

9. In the *Cimbria East Africa Limited v Kenya Power & Lighting Co. Limited [2017] eKLR*, Ochieng J., considered what constitutes a liquidated claim and observed as follows:

> A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic. I adopt the following definition

of a debt or liquidated demand from THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33;

A liquidated demand is in the nature of debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a „debt or liquidated demand? but constitutes, damages?"

10. From the plaint and accompanying documents, the sum claimed was for amounts the Respondent invoiced the Appellant and which amounts would need to be ascertained at a trial. In this case, the proper provision for interlocutory judgment was Order 10 rule 6 of the Rules under which the matter would have to be set down for assessment of damages or formal proof and which provides:

> 6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

11. From what I have set out above, it is evident that the judgment against the Appellant, in so far as it was a final judgment for the amount prayed in the plaint, was irregular and ought to have been set aside as a matter of right: ex-debito justiciae.

12. The next point worth mentioning is that the Appellant was clearly wrong in filing a Notice of Preliminary Objection. The law is clear on the manner of approaching the court when it seeks to invoke an arbitration clause in an agreement. I agree with the Respondent that the Appellant ought to have invoked section 6 of the *Arbitration Act*, 1995 which provides:

> 6.(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:-..... [Emphasis mine]

13. The Respondent correctly cites Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] eKLR where Githinji J., upheld the following interpretation of section 6(1) aforesaid and stated that:

> In my view, section 6(1) of the *Arbitration Act*, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. [Emphasis mine]

14. Once the Appellant had filed its Memorandum of Appearance, it had the option of either applying for stay of the suit pending reference to arbitration or filing its defence. Without the Appellant filing any of either document, the Respondent was entitled to apply for judgment in default of defence as it did. Since the Appellant failed to file the application for stay as required by section 6 of the *Arbitration Act* and proceeded to file a Notice of Preliminary Objection, it waived its right to seek arbitration.

15. The Appellant also misapprehended the meaning of a Preliminary Objection. The law in this regard was clearly stated on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696* by Law J.A. who observed that;

> So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point may dispose of the suit.

In the same case, Newbold P. stated that;

> A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

16. The only pleading before the court was the Plaint. It is does not allege that the agreement contained an arbitration clause hence there was no evidence upon which the court would allow let alone consider the preliminary objection simply because there was no evidence of it. The Preliminary Objection had no basis and was indeed bound to fail. It is for this reason that a party seeking to invoke an arbitration clause must file an application which is supported by appropriate documents to support the plea for stay.

17. Without belaboring the matter further, I agree with the trial magistrate that the application before the court was incompetent and would not assist the Appellant. However, the final judgment entered in favour of the Respondent was irregular and cannot stand in the eyes of the court. Even if this appeal is dismissed, the Appellant would be entitled to apply to set aside the irregular judgment and it would likely succeed. Further and in terms of section 6 of the *Arbitration Act*, the Appellant having failed to file the application for stay pending reference to arbitration within the stipulated time, has waived its right to seek arbitration. It shall therefore file its Statement of Defence.

18. Although the Appellant has succeeded, it is to blame for the mess it has found itself in. It has also imposed unnecessary costs on the Respondent. In the circumstances and for the reasons I have set out above, I allow the appeal on the following terms:

    a. The ex-parte judgment entered against the Appellant be and is hereby set aside.

    b. The Appellant shall file and serve its Statement of Defence within 14 days from the date hereof.

    c. The Appellant shall pay costs of this appeal and of the proceedings in the Subordinate Court assessed at KES. 50,000.00 within 14 days.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Ms Okeyo instructed by Otieno Asewe and Company Advocates for the Appellant.

Mr Irungu instructed by Irungu Maina and Advocates for the Respondent.