REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 71 OF 2017

CMA – CGM KENYA LIMITED .....APPEALLANT

VERSUS

1. **DIAMOND GATE GENERAL TRADING LLC**
2. **MISONA HOLDING LIMITED**
3. **GEORMAN CARGO SERVICES LIMITED**
4. **SKYLIFT METRIC CONSULTANS LIMITED**
5. **KENYA POWER & LIGHTING CO. LIMITED.....RESPONDENTS**

J U D G M E N T

1. Before the trial court, the current appellant sued the Respondents for the recovery of the sum of **USD 54,343 [Kshs.4, 468,081]** on account balance of storage charges incurred at Ports Luis and Kelang. The plaint was subsequently amended to the effect that the sum claimed was a resultant of delays occasioned by need to carry out cross-stuffing exercise at the said ports of Luis and Kelang all totaling USD 104,343 out of which the Respondents paid USD 50,000 leaving the suit sum outstanding.

2. When served the 1st, 2nd 3rd and 4th Respondents filed a joint statement of defence in which they denied in entirety the appellant's claim and raised a counter-claim in which it alleged, blackmail, arm-twisting, negligence and fraud against the Appellant and sought the recovery of some USD 197,721 together with interests as well as general damages.

3. For the 5th Respondent a defence was filed in which all the allegations of the plaintiff in the amended plaint were denied together with the allegations that it became liable to the Appellant in terms of the respective bills of lading to pay any freight and storage charges on account of lack of privity of contract with a contention that there was no cause of action revealed against it with a notice that it would seek the striking out of the suit.

4. The last pleading to be filed was the Reply to defence and defence to counter-claim by the Appellant, as defendant in the counter-claim, dated 18/9/2013, in which all the allegations in the counter-claim were denied, the contents of the plaint reiterated with a stress that the consignment was found to have been an overload necessitating cross-stuffing to achieve acceptable weights.

5. All the parties filed lists of witnesses, witness statements and bundles of document basically detailing the contractual documents and extensive correspondence by letters and email. At trial the Appellant called one witness, Nicholas Mwangi Wandeto, the 1st – 4th Respondents called 2 witnesses, while the 5th Respondent called a single witness.

6. With that quantum of evidence the trial court ordered parties to file and exchange submissions before making his judgment now appealed against. In the judgment now appealed against, the court dismissed the appellants claim and allowed the counterclaim by the 1st and 2nd Respondents.

7. In coming to it said decision, the court rendered itself in the following words:-

> **"The finding of the Surveyor whose appointment the Plaintiff itself suggested is that there was no evidence of overloading of the containers. No evidence or deposition of the officials of the ports, concerned was given to back up the allegation of excess weight of the consignment. On the contrary it would appear that it was the Plaintiff that was in breach of contract by**

detouring to Port Kelang in Malaysia which was not port of the agreed voyage route. For the reason given, I find that CMA failed to prove the 1st Defendant's breached of the contract on a balance of probability.

Given the courts finding on issue (b) it follows that none of the Defendants is liable for any costs or charges incurred by C.M.A as a result of the delay in delivering the consignment. The obligations of the 2nd, 3rd, 4th and 5th Defendants if any, under the contract. F lowed from the 1st Defendant who has been found not to have breached the contract. The Court accordingly finds all the Defendants not liable herein.

The upshot is that the main suit is dismissed with costs to the Defendants. Turning to the 1st and 2nd Defendants Counterclaim, the two claim refund of USD 50,000 paid to the Plaintiff to cater for the alleged extra costs of cross-stuffing storage and freight.

The Plaintiff acknowledged receipt of the payment which the court has found unjustified in light of lack of proof of the 1st Defendants breach of contract.

The 1st Defendant alleges that the sum was paid under duress as the Plaintiff threatened to auction the consignment if the additional costs were unpaid. The plaintiff urges the Court to invoke the doctrine of unjust enrichment and find that no element in proof thereof or establishing duress are evident in the circumstances of this case. It was referred to the case law of Madhupaper international Limited & Anor versus Kenya Commercial Bank Limited & 2 others [2003] eKLR which explains the elements of unjust enrichment as receipt of a benefit at the expense of another in an unjust manner. The 1st Defendant relies on the same case law in proof of its Counterclaim".

8. From that excerpt of the judgment it is clear to me that the court allowed the counter claim on the basis of the sum of USD 50,000 which the court found the 1st defendant was made to pay out of the direct breach by the Appellant. That judgment can thus not be said to have awarded to the 1st and 2nd Respondent anything over and above the sum of USD 50,000/=. I would therefore proceed with my determination of the appeal on the basis that over and above dismissing the Appellants suit the court awarded to the 1st and 2nd Respondents the sum of the USD 50,000.

9. In this appeal parties did file and exchanged submission pursuant to the court directions of 19/9/2017. The submissions by the Appellant are dated 30/01/2018 and filed on 2/02/2018, those by the 1st – 4th Respondents were dated 6/3/2018 and filed on 7/3/2018 while those by the 5th Respondent were dated and filed on 5/3/2018.

10. In their submissions the Appellant has placed quite a premium on the question of lack of jurisdiction. My reading of the record of Appeal reveal that the same was never pleaded at trial, was never decided by the trial court and was equally not a ground in this appeal. The established position of the law in this jurisdiction is that parties as well as the court are bound by the pleadings and that a court of law has no power to purport to determine an issue not brought before it by the parties. The rationale of this otherwise uncompromising principle of the law must be viewed in the light and context of the right to a fair hearing which include the right to know in advance the allegations made and opportune time to respond thereto.

11. In **Ushago Diani Investment Limited v Jabeen Manan Abdulwahab [2018] eKLR** the Court of Appeal in Reiterating the law said;-

"As for the issues of *estoppel* and constructive trust, we cannot help but note that they were neither pleaded nor raised at the trial court. As such, they are being raised for the first time in this appeal. We find that considering the same would cause prejudice to the respondent who did not have an opportunity to tender evidence to counter those allegations at the trial court. Moreover, the trial court was not given an opportunity to address its mind on the same. Our position is fortified by the case of *Sarah Jelangat Siele vs. Attorney General & 3 Others [2018] eKLR* where we held:

> **"It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings "**

12. A matter not pleaded by parties is thus alien to court and the parties themselves, as far as the specific litigation is concerned. To this court therefore that is a question that should not take court's time in this appeal

13. That notwithstanding, I do consider this point to be one that must be dealt with preliminarily and prior to the merits of the appeal owing to the equally established principle of law that a question of jurisdiction can be raised at any time owing to the fact of its fundamental nature coupled with the fact no acquiesced or consent can confer the jurisdiction upon a court where none exists.

14. While the appellant has cited to court known decision of the superior courts and section 23 (3) of Cap 2 on how to decide on the question of jurisdiction, the 1st – 4th Respondents have equally cited to court other decisions, I consider apply more on the facts at hand. Here it is not in dispute that was at the time the suit was filed the highest limit in pecuniary jurisdiction of the magistracy was 7(seven) million. However in 2015, before trial commenced, on 17/3/2015, the law was amended which enhanced the jurisdiction of the Chief Magistrate, and Hon Nang'ea was then a Chief Magistrate, to shilling twenty (20) million. The statute came into commencement on the 2/01/2016 well before the trial commenced. I am guided and bound by the Court of Appeal decision in ***Joseph Muthee Kamau vs David Mwangi Gichuru [2013] eKLR*** for the enunciation of the law that jurisdiction ought to exist at the time hearing commences at the latest. In that matter the court of appeal said:

"Jurisdiction must exist at the time of filling suit *or latest at the commencement of hearing"*

15. In the cited matter, even though the Court of Appeal found that the trial court awarded damages in excess of its pecuniary jurisdiction, the court did not order striking out of the suit before the trial court but substituted a judgment within the court's jurisdiction. In my view this is the pragmatic, forward looking and purposive application of the law the Kenyan courts have adopted since the promulgation of the new constitution with it robust guarantees and dictate that justice be administered without undue regard to technicalities.

16. This is not to say that the question of jurisdiction is a mere technicality. No. It merely means that instead of the court striking out a matter on appeal when the same was never raised at the earliest opportunity to enable the litigant take mitigating action like transfer or amendment, the court looks at the matter holistically and delivered what substantive justice of a particular case dictates.

17. Applying that position to the facts in this appeal, it is not in dispute that by the time the court commenced the taking of evidence, it had the jurisdiction to determine the aggregate liquidated claim amounting to some USD 18,831,709.82 equivalent to Kshs.14,677,995.11 at that time according to the Appellants submissions at paragraph 20 thereof. Even though there were other unliquidated claims pleaded, that did not take the claim outside the jurisdiction of the court because such could only be determined at the conclusion of the matter. At the time of such conclusion, the court would be minded to observe the limit of its jurisdiction and only when it surpasses some can it be faulted. I find that Hon. Nange'a, had jurisdiction in this matter when the same was placed before him and therefore I find no merit in this new and unpleaded ground of appeal.

18. I may only wish to add that even when it is established that jurisdiction can be raised at any time, it behooves a party to litigation and his advocate under Section 1 A(3) to raise such objection at the earliest opportunity so that the just determination of the dispute may be achieved. I have asked myself the question how the just determination of a matter like this could be achieved within the understanding of a fair hearing when the appellant expressly submitted to the jurisdiction of the trial court, did not take the issue up on his grounds of appeal only from the same to emerge at on submissions. Can't such be seen and viewed as an ambush? Where goes then the need never to ambush the other side in litigation and the equally important principle of law that parties are bond by pleadings?

19. Since the new constitutional dispensation, the Kenyan courts have moved and established a long line of jurisprudence that disputes need not be terminated technically and summarily before the parties are heard on the merit. In fact there are instances where, for example, between the high court and courts of equal status matters are transferred between the court without the resort to the drastic and draconian order of striking out. A reading of that emerging jurisprudence moves away for the old position established in the Ugandan decision in **Kagenyi vs Musivamo** & **Another [1968] EA 43,** by which court routinely dismissed cases on the simple argument that a matter filed in a court without jurisdiction was incapable of being transferred

20. The new position that there ought to be merit decision as a way of furthering fair hearing and right to access justice is not entirely novel. A reading of decisions stretching back to ***Mukisha Biscuits vs west End Distributors Ltd*** **(1969) EA 696** as well as the *locus classicus* in this subject, **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** show that the courts have always underscored the need to raise objections touching on jurisdiction at the earliest opportunity. While I do not doubt that an objection on jurisdiction can be raised at any time, I entertain the view that at times, that practice can be employed mischievously to waste both courts and parties time and ultimately deny the party his day in court when it is raised too late in the day and by the time the matter is defeated, prior to hearing on the merits, the party is left with no legal alternative for redress.

21. Before I delve into the merits of the appeal there are preliminary issues raised by the 1st -4th Respondent which I consider demand disposal beforehand. Those issues as submitted by the respondents accuse the appeal for being incompetent on the basis that the Record does not include the decree appealed from and that the record is shoddily prepared with indistinct index of contents. I see no substance in such submissions on account of two reasons. The first reason is that unlike before the court of appeal where the Rules mandatorily require that a decree is made part of the record as a primary document, the same is not the case with the Civil Procedure Rules governing this appeal. To the contrary, **section 2 of the Civil Procedure Act** define a decree, for purposes of an appeal, to include the judgment with a further provision that a judgment is appealable notwithstanding that a formal decree has been drawn or incapable of being drawn.

22. On the second limb alleging shoddy compilation of the record that equally has no legal foundation because no law provides how a Record of Appeal before this court must be compiled. What we now routinely call a record of appeal before the high court is a rule of convenience developed out of practice and largely copying from the Court of Appeal Rules but with no legal underpinning. I say no legal underpinning because Order 42 rule 13(4) merely obligates the court, and not the appellant, to ensure that the enumerated documents are in the court file. That must be seen to demand that the record at trial be availed and thus contrasts with Rule 87, Court of Appeal Rules, which obligates the appellant to prepare and serve the record and defines what must be contained therein.

23. To this court those objections are in the nature of technicalities which should never sway a court of law from persisting and endevouring to hear a party's appeal on the merits. They lack merit and substance and are therefore disregarded as untenable.

24. On the merits, the Appellant's memorandum of Appeal set out eight grounds, with three of such grounds truncated into 2, 3 and 4 sub-grounds, all of which, in substance, fault the trial court on three broad grounds:-

> **a) The trial court erred in finding that the Appellant had not proved his case on a balance of probabilities by ignoring the evidence led.**
>
> **b) In ordering the refund of USD 50,000 the trial court erred by re-writing the contract between the parties in particular the undertaking by the 1st Respondent to pray extra freight and storage charges.**
>
> **c) The decision of the trial court was made upon and grounded on unpleaded issues.**

18. Even though the issues can be so isolated based on the grounds set out, the same are fairly closely intertwined such that the analysis and determination of one will definitely run into the other hence it may not be easy to keep a neat and bold demarcation. For that reason I will

carry out my analysis wholesomely and arrive at a global conclusion that should serve to answer and resolved all the issues.

19. As pleaded, the Appellant's cause of action was based not on the bills of lading but on the correspondence exchanged once the transaction ran into troubled waters. I so say so having read paragraphs 8 and 9A and 17A where the Appellant pleaded as follows:

> **Paragraph 8: The plaintiff avers that by reason of the foregoing the defendants' consignment eventually attracted additional storage and extra-freight charges during the cross-stuffing exercise at the Ports of Louis and Kelang all totaling to USD 104,343.00 which was promptly brought to the attention of the defendants by the plaintiff's principals.**
>
> **Paragraph 9A: After much negotiations and correspondence, the Plaintiff agreed with the 1st Defendant the following:-**
>
> **a) That the defendant makes arrangements to remit USD 50,000 (United States Dollars Fifty Thousand) to cover part of the storage charges at Port Louis and Port Kelang to the Plaintiff's Bank Account.**
>
> **b) The 1st Defendant was to give an undertaking/guarantee to pay the balance of storages and extra-freight before the release of**
>
> **cargo to Mombasa.**
>
> **c) The 1st Defendant was to manage the cross- stuffing operations of overweight containers at the Ports of Transshipment at their costs.**
>
> **d) The Plaintiff was to make arrangements with the plaintiff's principal to ship the consignment on earliest available vessel destined to Mombasa.**
>
> **Paragraph 17A: At all times and upon delivery of the Consignment to the 5th defendants agents, the 5th defendant thereby became liable per the Terms and Conditions of the respective Bills of Lading to pay the plaintiff freight all storage charges and/or costs herein in accordance with the terms of the respective bills of lading.**

20. From those pleadings and the entire amended plaint it cannot be denied that the dispute was largely upon the additional freight and storage charges occasioned by what the parties termed the need for cross-stuffing at the two ports of Luis and Kelang. The question of cross-stuffing was not addressed by the parties till the goods had been discharged at the two ports not envisaged to be their destination. The same was thus not a matter capable of being addressed in the initial contract documents before the post- shipping correspondence ensued.

21. An analysis of the evidence adduced by both parties show that the big question was whether there was need for cross-stuffing and whether it was anticipated that the carriage by sea would include a detour to Port Kelang. Those facts were tried by the court that took the evidence and observed the witnesses testify and in its analysis the court found as a fact that the claim of overweight container was not genuine. The court in coming to its determination considered the two issues and found, based on record, that there was no breach of any of the terms of the agreement by the defendants/Respondents; that it was in fact the appellant who alleged overstaffing a fact disproved by the Marine surveyor; and that it was the plaintiff who breached the agreement by detouring outside the agreed voyage route.

22. It is the law that an appellate court will normally be disinclined to interfere with factual findings by the trial court unless the same are perverse for being contrary to the evidence on record. In the case of **MWANGI VS WAMBUGU, [1984] KLR 453:**

> ***"A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

23. In this appeal there was never a demonstration that the finding by the trial court was against the evidence led. To the contrary I do find that the findings were properly in accordance with the evidence on record for which reason I find no merit in the appeal and dismiss the same with costs.

24. This being a first appeal, proceeding by way of rehearing, the courts mandate is to re-evaluate and reappraise the entire evidence and come to own conclusions. I have executed that mandate and wholly agree with the trial court that the agreement by with the 1st and 2nd Defendants paid the USD 50,000, leaving the sum claimed in the plaint, was obtained by coercion and thus not enforceable. I may only add that the 1st and 2nd defendants incoming to that agreement must be seen to have opted to mitigate own losses then looming open with the prospects and threat of sale of the whole cargo at the ports they were lying .

25. However before I conclude there was a concern I consider very genuine and legitimate on what judgment the trial court actually entered in favour of the respondents. This has become an issue owing to the decree extracted by the court below to be found at page 485 of the Record of Appeal. The judgment by the trial court should have been worded better in its rendition. Rather the court did say:-

> **"The upshot is that the main suit is dismissed with costs to the Defendants.**
>
> **Turning to the 1st and 2nd Defendants Counterclaim, the two claim refund of USD 50,000 paid to the Plaintiff to cater for the**

alleged extra costs of cross-stuffing storage and freight.

The Plaintiff acknowledged receipt of the payment which the court has found unjustified in light of lack of proof of the 1st Defendants breach of contract…

C.M.A breached the contract as shown herein before consequently it caused the 1st defendant to make payment to it to cover costs directly flowing from the breach. The claimant threatened to abandon and /or auction the consignment if the demanded payment was not made. C.M.A admits receiving payment of USD 50,000 towards the said additional costs. Clearly this is unjust enrichment by duress in law. In the end the counter-claim is allowed with costs to the 1st and 2nd Defendant"

26. The underlined words would suggest, and it appears it did appear to the two defendants/Counter-claimants, that their counter-claim was allowed as prayed hence he decree as drawn. However, a reading of that judgment and the flow of reasoning show that it is only the sum of USD 50,000 the court made a decision upon. Even on my mandate as a first appellate court I do find that there was not availed sufficient proof on the other prayers in the counter-claim. In particular there was never proof of the loss allegedly occasioned to them on account of the plaintiff's wrongs; no evidence on how the interests was calculated for the 8 months of delay just as much as there was not enough proof on the sums said to have been spent on travelling and cross-stuffing. Those were in fact special damages that demanded strict proof a burden not discharged.

27. Those prayers were never proved to the standards required and it becomes axiomatic that the same were not allowed because no specific mention is made of them in the judgment. When such happens, the court must be guided by the provision of Section 7, explanation 5, to the effect that '*any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of the section, be deemed to have been refused'*.

28. Does the position change owing to the fact that the decree drawn gives those reliefs? It does not. A decree cannot stand on its own but must agree with the judgment. It is such happenings which informed the law to mandate that a decree must be drawn with the participation of all the parties unless one becomes unco-operative. Here it is clear the provisions of Order 21 Rule 8(5) were never complied with or just ignored. In my view a decree drawn contrary to the explicit mandatory provisions of the law is no decree capable of enforcement by a court of law and must thus be set aside. I do set aside the decree dated the 12th April 2017 for the reasons that it does not agree with the judge just as much as it was drawn without the participation of the judgment-debtor as the law dictates.

29. The upshot is that this appeal fails but for clarity purposes the decree is set aside to enable a decree be drawn to agree with the judgment of the trial court awarding the sum of USD 50,000 to the 1st and 2nd defendants. That judgment sum shall attract interest at 14% from the date the payment was made to the plaintiff till payment in full. The appeal having failed, I order that the appellant pays the costs to the Respondents.

Dated, **signed** and **delivered** at **Mombasa** this **20th** day of **May 2019.**

P.J.O. OTIENO

JUDGE