



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 278 OF 2011**

**EXPRESS KENYA LIMITED....APPELLANT**

**VERSUS**

**AUTO EXPRESS LIMITED.....RESPONDENT**

**(Being an appeal from the Ruling delivered on 9<sup>th</sup> June, 2011 by Hon. A.K. Ndung'u (Senior Principle Magistrate) Chief Magistrate's Court at Milimani Commercial Courts in CMCC No. 7806 of 2009).**

**JUDGMENT**

1. The Appellant was sued by the Respondent for the sum Ksh.1,012,244.25 plus interest at commercial rates. The claim was stated to have arisen on or about the 10<sup>th</sup> June, 2009 when the Respondent discovered that some of the tyres in the consignment of imported tyres it had stored at the Appellant's Bonded Warehouse upon payment of storage charges were missing. The Respondent blamed the Appellant for negligence and breach of duty as a Bailee of the said goods. The Ksh.1,012,244.25 was pleaded as the value of the tyres plus loss of profit at 25%.
2. The Appellant denied the Respondent's claim. In the alternative the Appellant blamed the Respondent as having wholly caused or materially contributed to the loss of the goods.
3. The Respondent subsequently filed the application dated 14<sup>th</sup> April, 2010 under OXXXV rule 1 & 8 of the then Civil Procedure Rules seeking entry of judgment in its favour. It was stated in the grounds and the affidavit in support of the application that the claim was a liquidated one and that the defence filed did not raise any triable issues.
4. It was further averred that the Respondent delivered the goods in question to the Appellant's Customs Bonded Warehouse in Industrial Area and was issued with certificates of receipt of the goods. That the storage and handling charges were paid amounting to Ksh.1,012,680/=. That the tyres were removed from the warehouse as needed and cleared with the Customs Department and delivery notes issued upon the release of each consignment. That a total of 91 tyres valued at Ksh.809,745.40 were discovered missing while in the custody of the Appellant. That the sum of Ksh.202,448.85 had been paid as duty for the missing tyres. That the Respondent had no access to the missing goods at the Appellant's warehouse and cannot be blamed for the loss.
5. The application was opposed. It was contended in the replying affidavit that the tyres were delivered to the Appellant's Customs Bonded Warehouse but payment of Ksh.1,012,680/= as storage charges was denied. That the payment for storage as per the documents exhibited amounted to Ksh.651,700/= leaving a balance of Ksh.350,080/=. That the release of the stored goods was made in the presence of a Customs Officer and officials from both sides and delivery notes issued. That there were no documents exhibited that reflect that the goods in question were missing or that not all the goods requested were delivered. That no receipts have been exhibited in support of the claim for payment of the sum of Ksh.202,448.85 as Customs Duty. That the claim for loss of profit at 25% can only be determined during the trial. It was contended that there was a good defence to the claim and that this case was not suitable for entry of Summary Judgment.
6. The Appellant filed a supplementary affidavit and exhibited documents for the payment of Ksh.1,012,680/= comprising of the sum of Ksh.1,012,680/= paid as storage and handling charges and Ksh.180,367.90 being bond charges. The documents in support of payment of Customs Duty were also exhibited.
7. The trial court allowed the application and entered judgment for the Plaintiff/Respondent as prayed in the plaint. That it what triggered the appeal herein.

8. The grounds of appeal are as follows:

- 1. The Learned Magistrate erred in law and in fact in concluding that the Respondent's claim was for a liquidated sum, when the loss of profit was computed at 25% of an unknown amount.**
- 2. The Learned Magistrate erred in law and in fact in failing to appreciate the triable issues raised in the Defence.**
- 3. The Learned Magistrate erred in law and in fact in preferring the Respondent's Affidavit to that of the Appellant in spite of the discrepancies evident therein.**
- 4. The Learned Magistrate erred in law and in fact in allowing the Respondent's application for summary of judgment in not taking into account the authorities submitted/cited by the appellant herein.**
- 5. The Learned Magistrate erred in law and in fact in denying to grant leave to the Appellant to defend the suit in the Lower Court hence fundamentally disregarding the overriding objective of the law.**

9. The appeal was argued by way of written submissions which I have considered.

10. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)”**

11. The conditions for the entry of a summary judgment have been set out in a myriad of cases among them the case of **ICDC v Daber enterprises Ltd (2000) 1 EA 75** where the Court of Appeal stated:

**“To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination.”**

12. From the affidavit evidence, it is not in dispute that the motor vehicle tyres in question were delivered by the Respondent to the Appellant's Customs Bonded Warehouse. The payment of Ksh.1,012,680/= to the Appellant as storage and handling charges; the loss of the goods ; the amount paid as Customs Duty and the 25% profits are denied.

13. The Forms C63 exhibited by the Respondent reflect that 91 tyres requested by the Respondent's were not released by the Appellant to them. The bank transaction vouchers annexed by the Respondent in support of payment of Customs Duty are for Ksh.118,553/=; Ksh.27,549/=; Ksh.69,838/= and Ksh.38,623/=. The total comes to Ksh.254,563/= whereas the Respondent's claim was for Ksh.202,448.85 Customs Duty paid for the lost tyres. There is no evidence to explain this disparity nor any evidence to directly link the said payment as payment of Customs Duty specifically for the lost tyres. There is also no clear evidence on how the figure of Ksh.809,795.40 pleaded as the value of the tyres in paragraph 6 of the plaint was arrived at.

14. Paragraph No. 11 of the plaint reflects the particulars of special damages as a total of Ksh.809,795.40 as the value of the tyres inclusive of the Customs Duty paid. Ksh.202,448.85 is reflected in the same paragraph as 25% loss of profit. In paragraph 7 of the supporting affidavit, the Ksh.202,448.85 is reflected as payment for Customs Duty. The Ksh.202,448.85 does not find support in the documents exhibited herein in support of payment of Customs Duty as the same comes to a total of Ksh.254,563/=. As observed herein above, it is noteworthy that the tabulation in paragraph 11 of the plaint in respect of the particulars of special damages for the Customs Duty paid totals up to Ksh.147,134/=. The affidavit evidence is inconsistency with the plaint. This is therefore not a claim that is ascertainable through the documents produced.

15. As stated in the case of **Proline Supaquick Limited v Kenya Oil Company Limited [2006] eKLR**:

**“I have always understood it to be the law, that when faced with such inconsistent depositions by the protagonists in a legal battle, the most prudent action which the court can make is to give the said protagonists an opportunity to face-off at trial. It is only through the process of a trial that the witnesses would not only say their bit, but would also go through the rigors of cross-examination, which is intended to give the court the opportunity to have more complete assessment of the evidence as well as the witnesses.”**

16. What if this court was to leave out the claim of Ksh.202,448.85 to go to trial. As observed above, the documents in support of the claim for Ksh.809,795.40 do not also add up. As observed in the case of **Standard Chartered Bank Kenya Ltd v Arjan [2001] KLR 368**:

**“A liquidated demand is in the nature of a debt; i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the**

**ascertainment of a certain 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.”**

17. From the foregoing, some of the triable issues that stand out is the question of the value of the goods stored, the amount paid as Customs Duty for the lost tyres and what comprises the Respondent’s total claim of Ksh.1,012,244.25.

18. The appeal has merits and it is hereby allowed with costs. The ruling of the Lower Court is hereby set aside. The case to proceed to the hearing of the main suit.

Dated, signed and delivered at Nairobi this 1<sup>st</sup> day of Oct. ,2019

**B. THURANIRA JADEN**

**JUDGE**