



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 83 OF 2013

THREWAYS SHIPPING SERVICES (K) LIMITED.....APPELLANT

VERSUS

YUSSUF HUSSEIN HAILE.....RESPONDENT

(an appeal from the original judgment and decree of Hon. Wamae delivered on 1st February, 2013 in
Milimani CMCC No. 3679 of 2009)

JUDGMENT

1. The Appellant has filed this appeal on the following grounds:-
 - i. *That the learned magistrate erred in law and in fact in finding that the court had territorial jurisdiction to hear the suit.*
 - ii. *That the learned magistrate erred in law and in fact in awarding a sum of USD 26,300 equivalent to KShs. 2,117,150/= plus costs and interest at the rate of 12% without taking into consideration that the Respondent failed to prove his case on a balance of probability.*
 - iii. *That the learned magistrate erred in law and in fact in awarding a sum of USD 26,300 without ascertaining whether the Respondent had fulfilled his part of the contract.*
 - iv. *That the learned magistrate erred in law and in fact in awarding a sum of USD 26,300 without taking into consideration that the Appellant lost 537 goods whilst in the Respondent's possession and due to the Respondent's negligence.*
 - v. *That the learned magistrate erred in law and in fact in dismissing the Appellant counterclaim of USD 26,997/70 equivalent of KShs. 2,173,314.85 with costs to the Respondent .*
 - vi. *That the learned magistrate erred in law and in fact in finding that the Appellant failed to prove negligence as against the Respondent.*
 - vii. *That the learned magistrate erred in law and in fact in failing to make any or any proper finding on the facts placed before her in the light of the submissions.*
 - viii. *That the learned magistrate erred in law and in fact in failing to find that the container hinges causing the loss of 537 goods shortlanded.*
 - ix. *That the learned magistrate erred in law and in fact in finding that the Appellant did not prove particulars of the alleged breach of contract despite the evidence adduced.*
 - x. *That the learned magistrate erred in law and in fact in awarding the Respondent USD 26,300 and dismissing the Appellant's counterclaim.*
 - xi. *That the learned magistrate erred in law and in fact in delivering a judgment not supported by law and weight of evidence on record.*
 - xii. *That the learned magistrate erred in law and in fact in awarding the Respondent costs of the suit and the counterclaim.*
2. The Respondent's claim against the Appellant was that on diverse dates in the month of December,

- 2008 and April, 2009, the Appellant contracted the Respondent to transport the Appellant's client's cargo from the port of Mombasa to Kampala, Uganda. That it was a term of the contract that the Respondent would be paid transport charges upon delivery of the said consignment to the destined terminal. He claimed that the sum payable was USD 26,300 at an agreed exchange rate of KShs. 80.50 per dollar. The Respondent claimed that he delivered the consignment with all seals intact and in good order. That the said cargo was opened by the Appellant's employee in the absence of the Respondent's employees. The Respondent prayed for payment of the agreed sum plus costs and interest at court rates.
3. The Appellant admitted to having contracted the Respondent but claimed that the Respondent breached certain articles of their agreement. It was specifically claimed that the Respondent did not deliver the consignment as agreed resulting to loss of goods totalling to 537 bags shortlanded and that for the aforesaid reason it did not owe the Respondent the claimed amount of money. It is on the basis of that denial that the Appellant counterclaimed against the Respondent.
 4. In his testimony the Respondent (PW1) gave an account of the procedure he went through to the point he delivered the consignment. He stated that he delivered goods to Multiple ICD Ltd at Kampala. He gave evidence of waybills issued to motor vehicle registration no. KAM 280J and KAP 057K. He stated that the containers are normally sealed by customs officers and the seals are confirmed at the weighbridge by police officers. He testified that at the time of delivery of the goods the seals were intact and Multiple ICD Ltd neither complained about the seals nor that the goods were not intact. He further stated that his driver never informed him that goods were stolen. The Respondent contended that had the goods been tampered with, Multiple ICD would not have released his vehicle. He also disclosed that there was a delay of 2 days before documents could be released at the port and he demanded repayment. He stated that no questions had ever been raised about the loss until the time he demanded his payment. He admitted that the goods were never delivered in eight (8) days as agreed but contended that the lateness was occasioned by the delay in leaving the port. He however stated that the Appellant was not informed that there would be a delay.
 5. On the other hand Daniel Musyoka Kavoi (DW1) who is the Appellant's Logistics Manager testified that the Appellant was not informed of the delivery of the goods by Uganda Revenue Authority. That the Appellant's customer, Somochem (U) Ltd found out upon opening the cargo after it was released to it that some goods were missing. The said customer then declined to pay the Appellant the transport and clearance charges. He stated that the Appellant made investigations on the loss of the goods and it was revealed that the seals were not verified. He however stated that the seals were not verified because the customer had not paid duty. He admitted that the Respondent would not have known the contents of the goods. He stated that the Appellant asked for receipts to show the weight of the cargo but none was not provided. He stated that the Appellant sent an officer to check the contained hedges and the officer found that the same had been removed and re-welded and repainted. On cross-examination DW1 admitted that the seals were intact by the time the Respondent delivered the goods to Uganda Revenue Authority and that the Respondent did not abandon the goods. That the seals were intact meaning that the container had not been opened. He stated that the Appellant did not verify the goods before handing it over to the Respondent. He stated that the Appellant suspects that delay was the cause of the loss of goods. He admitted that the Appellant did not claim for any loss on account of the delay. He stated that no inspection was done to the goods upon arrival at the port of Mombasa. He further admitted that the contract between the parties did not require that the Respondent issue the Appellant with weigh bridge receipts. On re-examination, DW1 confirmed that the seals were intact at the time of delivery.
 6. This being a first appeal, I have warned myself that I am called upon to re-evaluate the facts afresh, re-assess this case and make my own independent conclusions. See **Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.**
 7. I have re-evaluated the evidence on record and considered the parties' submissions. The existence of the contract between the parties is not contended I shall therefore not delve into it. The issue left for consideration are whether or not the trial court had jurisdiction to deal with the suit and whether or not the Respondent delivered the goods as per the terms of the contract.
 8. The purport of Section 15 of the Civil Procedure Act is to ensure convenience of the parties and cost effectiveness. It is upon the party aggrieved by the geographical placement of a suit to

demonstrate the same before court. The difficulty in accessing justice at the court where the suit has been filed must also be demonstrated by such aggrieved party. To do so the aggrieved party ought to challenge jurisdiction by way of preliminary objection and by way of an application before hearing of the matter. See **Atta (Kenya) Limited** (supra). The Appellant did challenge the court's jurisdiction as required.

9. **Section 3(2) of the Magistrates Court Act, Cap 10 Laws of Kenya** which is a substantive Act that confers jurisdiction upon the magistrates' courts provides that the resident magistrate's court shall have jurisdiction throughout Kenya. Under **sub-section (1)** a resident magistrate's court is duly constituted when held by a Chief Magistrate. The trial court therefore falls within the category of the resident magistrate's court contemplated in section 3(2) of the Magistrates Court Act. It follows that the trial court's territorial jurisdiction was not subject to limits or restrictions on jurisdiction. I find fortification in the holding in **Mohamed Sitaban v. George Mwangi Karoki, Civil Appeal No. 13 of 2002** where it was stated as follows:-

“Section 3(2) of the Magistrates Court Act provides that a court of Resident Magistrate (which is defined to include a Senior Principle Magistrate's Court) has jurisdiction throughout Kenya. Such court is not subject of the local territorial jurisdiction contemplated by section 15 of the Civil Procedure Act, in my opinion, section 15 of the Civil Procedure Act applied only to courts lower than the Resident Magistrate Court. I am fortified in that view by the fact that the Magistrates Court Act, Cap 10 of the Laws of Kenya was enacted in 1967 long after the Civil Procedure Act. The Legislature was therefore aware of the provisions of section 15 of the Civil Procedure Act and the hallowed rule of statutory construction that where two provisions in different statutes conflict, the provisions in the latter statute is deemed to amend the earlier provision...”

The trial court's jurisdiction could therefore not been ousted.

10. Article 4 (b) required of the Respondent to deliver the goods promptly. Although the Respondent was required to deliver the goods promptly, he admitted that there was a delay in so doing because there was a two (2) days delay in issuance of documents at the port. The Appellant did not plead damages for the said delay and the claim theretofore fails. The loss has however been attributed to the said delay. The same Article of the agreement states that the Respondent shall be liable for loss and damage during the period that any such contents are in his possession. Considering this Article vis a vis the evidence on record, it came out clearly from DW1's testimony that at the time the container was delivered by the Respondent, the seals were intact and that the Appellant did not verify the container before delivering it to the Respondent. In view of the circumstances, I find that the Respondent met his part of the contract by ensuring that the container was delivered as given to him. I also find that the Appellant having not verified the goods before handing it over to the Respondent, he could not have been sure of its contents and the Respondent cannot be blamed for the Appellant's mistake. There was There was further no evidence placed before court by the Appellant that the containers had been tampered with as alleged nor was there an investigation report tabled before court to establish that there was such loss. The Respondent on the other hand established that he fulfilled his part of the contract and this was confirmed by DW1 who confirmed that the seals were intact at the time the Respondent delivered the goods. From the foregoing, I find that the Respondent established his case against the Appellant on a balance of probability.
11. On the issue of costs, a party who succeeds in a case is entitled to costs and interest at court rates. I find no fault on the trial magistrate's finding on costs.
12. In the circumstances, I find no merit in this appeal and I hereby dismiss it with costs to the Respondent.

Dated, Signed and Delivered in open court this 10th day of July, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent