IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: OMOLO, ONYANGO OTIENO & NYAMU, JJA)

CIVIL APPEAL NO 104 OF 2006

BETWEEN

MITCHELL COTTS (K) LTD……..…..APPELLANT

AND

MUSA FREIGHTERS…….RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Sergon, J.) dated 22nd August, 2003

in

H.C.C.C. NO 315 of 1995
****

JUDGMENT OF THE COURT

This appeal arises from a judgment of the superior court (Sergon, J.) delivered on 22nd August 2003, in which the learned Judge gave judgment in favour of the respondent in the sum of Kshs.1,363,000 being the value of 47 tyres which the appellant in its defence admitted to have received from the respondent. On his part the respondent had alleged that 53 tyres which formed part of a larger consignment had been in the appellant's warehouse in the month of November 1993 but which the appellant had failed to release to the respondent as demanded by it. According to the evidence of the respondent's only witness, the respondent company received a consignment of 442 tyres size 900x20 with tubes and canvas and the consignment was stored in the warehouse of the appellant company which was in the business of warehousing at a fee. Subsequently, the tyres were released by installments to the respondent except 53 tyres, the subject matter of the claim.

The gist of the appellant's defence was that 47 and not 53 tyres out of the consignment, were not accounted for; that contrary to the respondent's assertion, the value of a single tyre was not Ksh 29,000, and finally that the loss was attributable to the negligence of a third party namely a security company which was guarding the warehouse and the appellant intended to join it in the proceedings at a later stage.

The grounds relied on in this appeal are:

1 The learned Judge erred in law and in fact in arriving at the value of a tyre without any or any sufficient proof.

2 That learned Judge erred in law and in fact in being guided by extraneous evidence or by determining this case against the weight of the evidence.

3 The learned Judge erred in law and in fact in failing to demand strict proof of the respondent's claim the same having been one for special damages.

4 That the learned Judge in (sic) law and infact (sic) in holding that the plaintiff's claim was for breach of contract when the said breach had not been pleaded, while the plaintiff's evidence was that he was claiming for the tort of negligence.

5 That the learned trial Judge erred in law and in fact in failing to hold that the plaint disclosed now reasonable cause of action as neither particulars of negligence nor breach of contact had been pleaded.

6 That the learned trial Judge erred in law and in fact in holding that the plaintiff had established that it suffered damage when the preponderance of evidence showed that the plaintiff neither owned the goods nor paid the owner for the loss, of goods, nor paid the purchase price of the goods (tyres).

7 That the learned trial Judge erred in law and in fact in holding that the plaintiff had strictly proved its claim for special damages when neither the bill of lading, import documents nor the loss assessors report were adduced in evidence.

8 That the learned trial judge erred in law and in fact in holding that the defendant ought to have pleaded, the issue of the plaintiff lacking the capacity to sue on behalf of the principal when the plaintiff did not disclose the fact in its plaint and in allowing the plaintiff to adduce evidence contrary to the pleadings as to the capacity in which it sued.

Mr. Jengo, learned counsel for the appellant highlighted the same grounds in his submission and further emphasized that because in the evidence the respondent had conceded that he was not the owner of the goods, no damage or loss could have, in the circumstances been occasioned to the respondent. He submitted that it is the owner of the goods who had incurred the loss and that loss could only be the purchase price of the goods as per the shipping documents or any other relevant documents such as invoices and receipts and since these were never produced, there was no proof of the claim up to the required standard. He further submitted that according to the evidence the claim was for special damages and the same was neither specifically pleaded nor strictly proved at the trial in the superior court and since the evidence tendered had revealed that the respondent's claim was in negligence and that no particulars of negligence had been given the claim was fatally defective. Mr Jengo relied on various authorities in support of his submission on special damages.

Mr. Oddiaga, learned counsel for the respondent submitted that the appeal was procedurally incompetent having been brought outside the extension of 21 days previously granted by court and consequently **rule 83** of the Court's rules gives the Court power to dismiss such an appeal; that it was not in dispute that the two parties were involved in a commercial relationship and that relationship placed the responsibility on the appellant as a warehousing agent to take care of the goods; that the appellant did admit that it could not account for a total of 47 tyres when it was asked to release them; that it was incorrect for the appellant to contend that the respondent had not pleaded special damages as this was apparent from the contents of paragraph 4 of the plaint, and that as regards proof of the loss the respondent had satisfied the court by way of oral evidence of Mr Mkala that the value of the goods was Kshs. 29,000 per tyre and evidence to this effect was orally given and accepted by the superior court and that in this regard the requirement of the strict proof of special damages did to take away the respondent's right to inform the Court what it believed to be the current value of the goods and consequently failure to produce documentary evidence or an expert's opinion on value was not fatal to the claim.

We have considered the matter. In the pleadings, there is no denial by the appellant of the relationship between it and the respondent.

Concerning the appellants contention that special damages were not pleaded we find no basis for this in the face of paragraph 4 of the plaint which averred:-

"The plaintiffs claim against the defendant is for the sum of Kshs 1,537,000 being value of 53 tyres at Kshs 29,000 each which goods were handed over to the defendants by plaintiff during and in the course of its business as warehouses in the month of November 1993."

In response to this assertion, the appellant in paragraph 4 of its amended defence conceded in these records:-
"The defendant avers that 47 and not 53 tyres had been handed over to it by the plaintiff at the period alleged and puts the plaintiff to strict proof".

Concerning the issue of proof of the value of the tyres the only witness called by the respondent testified as under in cross examination:
"These tyres are for our clients i.e. we are clearing and forwarding agents. Aladin was the importer. The price is quoted as Kshs.29,000. I have not produced import documents to establish the tyres were imported. I have no document to show that the value of the tyres was assessed at Kshs.29,000. A loss assessor gave us a receipt. However I have not produced the same. I (sic) not an expert in assessing loss. However I am able to calculate the loss. The evidence (sic) in the extent to damages is real".

In his judgment, the learned Judge's findings concerning the above evidence was as under:

"I have carefully considered the evidence of the plaintiffs evidence. The plaintiff has not established that there was a balance of 53 tyres uncollected from the defendant's warehouse. No evidence was presented to establish that. However, the plaintiff is entitled to what is conceded by the defendant at paragraph 4 of the amended defence dated 6th March, 1997".

And on the issue of price per tyre, the learned Judge delivered himself, thus:

"I have examined the demenour of the plaintiff's witness Mr. Bakari Mkala. He was firm under intense cross examination. I am convinced that though he did not produce any document to establish that each tyre cost Kshs.29,000 he was telling the truth. I believe that he actually checked with the prices at the market and that the prices were known to him before he came to court".

In the light of the above and in the circumstances we cannot fault the superior court which accepted the only evidence which was tendered to the Court on the issue, the appellant having failed to give any evidence on the value of the tyres it had conceded it could not deliver to the respondent when called upon to do so. In this country civil cases are decided on the basis of a balance of probabilities. In the circumstances, the respondent had obviously put something on their side of the scales whereas the appellant had failed to do so resulting in the balance tilting in favour of the respondent on the critical issue of the value of the uncollected tyres. The court did its best and it cannot be faulted. In addition, the loss was specially pleaded in paragraph 4 of the plaint. In view of the admission by the respondent, the critical issues for consideration were whether the special damages were pleaded and if so whether they were proved. In our view, the respondent has proved both issues and for this reason, our inclination is not to disturb the judgment of the superior court.

In addition, concerning the contention that the cause of action as per the evidence was negligence, particulars of which had not been rendered, our view is that the averments in paragraph four of the plaint clearly reveal that the two parties were in a contractual relationship of bailment or a contract for storage of goods, the consideration of which was not in dispute. With respect, the appellant having received consideration to store the tyres cannot now turn around and assert that the respondent could not recover damages for the loss of the tyres because the respondent (the other party to the contract) was allegedly not the owner of the tyres. For the purposes of recovery of damages, we think that neither the negligence of the appellant nor the act of a third party which caused the loss would negate recovery of proven damages

in the circumstances. Indeed, at this time and age a party cannot be denied relief because he has not specifically described the formal name for his cause of action. Forms of actions were buried many centuries ago and in our course we have overrun the age of the forms of action into modern formless days where we look at the substance and not the form. As the classic works of Maitland and Pollock would put it *"we cannot allow the forms of actions to rule us from their grave"!*

In our view, the respondent had a clear cause of action which in turn attracted the remedy given to it by the superior court which we hereby affirm.

Accordingly, the appeal is dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 4th day of March, 2011.

R. S. C. OMOLO
……
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
……
JUDGE OF APPEAL

J. G. NYAMU
…….
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR