DB Schenker Limited v Africa Apparels EPZ Limited (Commercial Case E205 of 2022) [2025] KEHC 13877 (KLR) (Commercial and Tax) (26 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13877 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E205 OF 2022

MN MWANGI, J

SEPTEMBER 26, 2025

BETWEEN

DB SCHENKER LIMITED ..... APPELLANT

AND

AFRICA APPARELS EPZ LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. E.M. Kagoni, Principal Magistrate, delivered on 22nd November 2022 in the Chief Magistrate's Civil Suit No. 4417 of 2018 at Milimani)

JUDGMENT

1. The plaintiff/appellant filed a suit against the defendant/respondent in the lower Court vide a plaint dated 26th March 2018, seeking judgment for special damages in the sum of USD 8,715.33 and Kshs.79,998.35, interest on the said sum and costs of the suit. The appellant's case was that it provided freight services to the respondent, a Kenyan clothing manufacturer, in 2015, for goods shipped from Europe and Asia to Jomo Kenyatta International Airport in Nairobi and Moi International Airport in Mombasa. The contention was that the respondent received the goods as agreed but failed, neglected, and/or refused to settle the agreed charges despite repeated reminders and demand notices.

2. The appellant contended that as at 13th October 2017, the respondent's outstanding debt to the appellant stood at USD 8,715.53 and Kshs. 79,998.35, accruing interest at the rate of 2% per month. The appellant stated that the respondent breached its contract with it by failing to pay the said sums, thereby causing the appellant to suffer losses. The appellant asserted that the respondent remains liable for the principal sum, interest, and recovery costs including legal fees.

3. In opposition to the appellant's suit, the respondent filed a defence dated 29th April 2019 where it denied all the averments contained in the appellant's plaint. The respondent admitted that it engaged the appellant for freight services in 2015, but denied owing any outstanding sums to the appellant,

maintaining that it fully settled all amounts due. The respondent asserted that it had no continuing obligation to the appellant and that the latter's claim was baseless, malicious, and an abuse of Court process. The respondent urged the Trial Court to dismiss the appellant's suit with costs.

4. On 22nd November 2022, the Trial Court entered Judgment for the respondent by dismissing the appellant's case and awarded costs of the suit to the respondent.

5. Aggrieved by the aforesaid Judgment, the appellant filed a Memorandum of Appeal dated 16th December 2022 raising the following ground of appeal -

    1. That the Learned Magistrate erred in law and fact by finding that the appellant lacked the requisite locus standi to institute suit against the respondent.

6. The appellant's prayer is for the instant Appeal to be allowed with costs, for this Court to set aside the Judgment of the Hon. Principal Magistrate delivered on 22nd November 2022 and to set down MCCC NO. 4417 of 2018 - DB Schenker Limited versus Africa Apparels EPZ Limited for hearing before any Magistrate other than Hon. E.M Kagoni.

7. The instant Appeal was canvassed by way of written submissions. The appellant's submissions were filed on 17th October 2023 by the law firm of Maina & Onsare Partners Advocates LLP, while the respondent's submissions were filed by the law firm of Eshiwani Ashubwe & Company Advocates LLP on 24th October 2024.

8. Ms Ngui, learned Counsel for the appellant relied on the case of Law Society of Kenya v Commissioner of Lands & others, Nakuru High Court Civil Case No.464 of 2000 and submitted that the doctrine of locus standi refers to the right to appear and be heard in Court, requiring a party to demonstrate sufficient interest in the matter. She contended that the Trial Court dismissed the appellant's suit on the ground that it lacked the requisite locus standi to file the suit in the lower Court, and held that the Airway Bill constituted a contract of carriage only between the shipper, carrier, and airline, with Schenker International (H.K.) Ltd identified as the carrier.

9. Ms Ngui relied on the Court of Appeal case of Vert Limited v DB Schenker Limited [2021] KECA 522 (KLR) and argued that the Trial Court's reasoning was flawed, since an Airway Bill merely evidences the contract of carriage between the shipper and the airline and does not bind the consignee. Further, that the respondent had engaged the appellant as its freight agent, a fact admitted in the defence. She stated that the appellant facilitated shipments through its Hong Kong office, prepared documentation, and invoiced the respondent directly, who made payments to the appellant and not Schenker International (H.K.) Ltd. She contended that any outstanding sums were due to the appellant. She stated that the appellant and Schenker International (H.K.) Ltd are separate entities under the DB Schenker group, but they collaborate operationally. At best, a tripartite or agency relationship can be implied.

10. Counsel cited the case of Kenindia Assurance Company Limited v New Nyanza Wholesalers Limited [2017] KEHC 2977 (KLR) and asserted that the Trial Court erred by relying on the Airway Bill to determine privity of contract and by introducing issues not pleaded, such as treating the appellant as a subsidiary of Schenker International (H.K.) Ltd without evidence. In addition, she stated that the respondent never raised locus standi as an objection as it admitted having engaged the appellant for freight services. She contended that the Trial Court should have allowed clarification from witnesses instead of dismissing the suit. Ms Ngui submitted that the appellant had the requisite locus standi to institute recovery proceedings being the party that was directly contracted by the respondent. She submitted that the matter in issue falls within the exceptions to the doctrine of privity of contract, particularly on agency.

11. Mr. Muimi, learned Counsel for the respondent relied on the Court of Appeal case of Alfred Njau & 5 others v City Council of Nairobi [1983] KECA 56 (KLR) and submitted that in determining whether the appellant had locus standi, the key question is whether it was a party to or had a vested legal interest in the subject matter. He stated that the appellant's claim and Appeal are founded on the Airway Bill dated 24th March 2015, which evidences a transaction of carriage by air. He submitted that such transactions are governed by the *Carriage by Air Act*, 1993 and the Warsaw Convention, and that Article 8 of the said Convention prescribes the mandatory particulars of an Air Consignment Note, including execution details, points of departure and destination, stopping places, and the names and addresses of the consignor, carrier, and consignee.

12. Counsel contended that under Article 11 of the Warsaw Convention, an Air Waybill is prima facie evidence of a contract of carriage, receipt of cargo and conditions of carriage. He cited the case of Ngunjiri v British Airways World Cargo [2003] KEHC 982 (KLR) and stated that the Airway Bill dated 24th March 2015 identifies C & T Label Company as the shipper, Africa Apparels EPZ Limited as the consignee and Schenker International (HK) Limited as the carrier. He submitted that the parties bound as per the Airway Bill dated 24th March 2015 are Africa Apparels EPZ Ltd and Schenker International (HK) Ltd, and not the appellant.

13. In submitting that under established principles, the appellant was not a party to the contract, hence it cannot be sue or be sued on it, Mr. Muimi referred to the decisions made in Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd [1915] AC 847 and Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] KECA 58 (KLR). He contended that the appellant, D.B Schenker Ltd, being a subsidiary of Schenker International (HK) Ltd, cannot sue on behalf of its parent company. He referred to the cases of OLX B.V v Radio Africa Limited [2017] KEHC 9957 (KLR) and Mosi v National Bank of Kenya Limited [2001] KEHC 842 (KLR), and asserted that subsidiary companies are distinct legal entities. He argued that no evidence was established to show that the appellant had authority to act on behalf of the parent company. He maintained the position that the appellant had no locus standi to institute the suit against the respondent.

Analysis And Determination.

14. This being a first Appeal, it is by way of re-trial and as the first appellate Court, I have a duty to re-evaluate, re-analyze and re-consider the evidence and draw my own conclusions, while bearing in mind that I did not see witnesses testifying and as such, I have to give due allowance for the said fact. That was the position held by the Court in the case of Peters v Sunday Post Limited [1985] EA 424, where the Court rendered itself as follows –

> It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

15. An Appellate Court will only interfere with the findings of a Trial Court if the same was founded on wrong principles of law or if the Court misapprehended the evidence tendered before him. To this end. I am bound by the Court of Appeal finding in the case of Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 931 where it was held that -

> Accordingly, on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere.

16. I have re-examined the Record of Appeal and given due consideration to the written submissions by Counsel for the parties. The issue that arises for determination is whether the appellant had the requisite locus standi to institute a suit against the respondent.

17. The appellant's case was that in 2015, it provided freight services to the respondent for goods shipped from Europe and Asia to Jomo Kenyatta International Airport in Nairobi and Moi International Airport in Mombasa. The appellant contended that although the respondent received the goods as agreed, it failed to settle the agreed charges despite repeated reminders and demand notices and as at 13th October 2017, the respondent's outstanding debt amounted to USD 8,715.53 and Kshs. 79,998.35, which continued to accrue interest at the rate of 2% per month.

18. To demonstrate the existence of a contract between itself and the respondent, the appellant relied on two Air Waybills. The Court of Appeal in addressing the importance and effect of Air Waybills in the case of Vert Limited v DB Schenker Limited (supra) stated as follows-

> An air waybill is a contract of carriage between an airline and a shipper. It also serves as a receipt of goods by an airline. In this regard, Article 11 of the Warsaw Convention on International Carriage by Air (the Warsaw Convention) provides that:-
>
> "1. the Airway Bill or the receipt of the cargo is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein".

Article 8 of the Warsaw Convention provides that:-

"The air waybill and the receipt for the cargo shall contain:-

a. An indication of the places of departure and destination.

b. If the places of departure and destination are within the territory of a single high contracting party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place, and

c. An indication of the weight of the consignment."

19. From the above decision, it is clear that under the Warsaw Convention on International Carriage by Air, an Air Waybill constitutes a contract of carriage between the carrier, airline and the consignee. In the case of Ngunjiri v British Airways World Cargo [2003] KEHC 982 (KLR) quoted with authority by the Court of Appeal in the case of Vert Limited v DB Schenker Limited (supra), the Court found that the Warsaw Convention on International Carriage by Air is part of Kenyan law through the *Carriage by Air Act*, 1993.

20. In light of the foregoing, this Court concurs with the Trial Court's finding that the parties named in the Air Waybill namely the shipper, the carrier/airline, and the consignee, are the ones bound by, and are privy to its terms. Upon perusal of the Air Waybills produced by the appellant, it is evident that it shows the shipper was C & T Label Company, the consignee was the respondent, and the carrier was Schenker International (H.K) Limited. It is not disputed that the appellant was not a party to the said Air Waybills.

21. As such, under the doctrine of privity of contract, the appellant cannot enforce rights under a contract to which it was not a party, unless it demonstrates that the Air Waybills were expressly made for its benefit. The doctrine of privity of contract was addressed by the Court of Appeal in the case of

Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] KECA 784 (KLR) as hereunder -

> In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principles thus:
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> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."
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> In this jurisdiction, that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation V Lendetia Ltd (1985), KLR 765 quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:
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> "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."
>
> Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter.
>
> While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In Darlington Bourough Council V Witshire Northen Ltd [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms.
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> The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

22. The appellant's Counsel submitted that the circumstances of this case fall within the exceptions to the doctrine of privity of contract, specifically under the agency relationship. She contended that an agency relationship can be inferred between the appellant and Schenker International (H.K) Limited, as its mandate required engaging the latter to execute its duties as a freight agent.

23. This Court however notes that apart from producing invoices, the appellant tendered no documents or evidence to establish the existence of an agency relationship between itself and Schenker International

(H.K) Limited. The appellant's witness testified that while the goods were delivered to the respondent, no delivery notes were available. He further confirmed that the record contains no document evidencing a contract between the respondent's agent and the appellant, nor any dispatch note indicating that the appellant dispatched goods to the respondent.

24. As the Trial Court correctly found, a subsidiary company is a distinct and separate legal entity from its holding company hence it cannot sue or be sued on its behalf. A similar position was taken by the Court in Mosi v National Bank of Kenya Limited (supra) that –

> The law is clear that a holding company is a distinct legal entity from its subsidiary and it cannot be sued for any breach of contract by its subsidiary.

25. Although the appellant claimed to be a subsidiary of Schenker International (H.K) Limited, and claimed to be entitled to institute proceedings against the respondent, it failed to demonstrate that Schenker International (H.K) Limited had authorized or granted it permission to do so on its behalf.

26. The appellant's argument that the issue of locus standi was neither raised by the respondent nor canvassed before the Trial Court holds no merit. This is because in determining whether the appellant's claim was sustainable, the Trial Court was bound to examine the alleged contract and its terms. In doing so, the said Court rightly identified and addressed the question of the appellant's locus standi to institute the suit against the respondent. It is therefore my finding that the Hon. Magistrate did not err in addressing the issue of locus standi.

27. In the end, this Court finds that the instant appeal is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

DELIVERED DATED, SIGNED AT NAIROBI ON THIS 26TH DAY OF SEPTEMBER 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Ngui for the appellant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.