IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MUSINGA, (P), MUMBI NGUGI & TUIYOTT, JJ.A.) CIVIL APPEAL NO. 138 OF 2019

BETWEEN

COMMCARRIER SATELLITE SERVICE LIMITED....1ST APPELLANT
AZHAR CHAUDRY ..... 2ND APPELLANT

AND

GLOBAL FREIGHT LOGISTICS LTD.....RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Olga Sewe, J**.) delivered on 5th October 2018*

in

Civil Case No. 86 of 2014)

****

JUDGMENT OF THE COURT

[1] This appeal arises from a judgment in respect of two consolidated suits namely; **CMCC 195 of 2011; *Global Freight Logistics Limited vs. Comm Carrier Satellite Service Limited and another*** and **HCCC 86 of 2014; *Comm Carrier Satellite Service Limited and another vs. Global Freight Logistics Limited***.

[2] So as to avoid confusion at trial, Global Freight Logistics Limited (Global) was the plaintiff, while CommCarrier Satellite

Service Limited (CommCarrier) and Azhar Chaudry were referred to as the defendants.

[3] Global and CommCarrier had a long business relationship, the former offering clearing services to the latter. On 4th August, 2009, Global presented CommCarrier with an invoice statement for Kshs.4,812,346.80 against which CommCarrier issued four promissory notes on 1st September, 2007. Two promissory notes were not paid, leaving a debt of Kshs.2,899,031.70.

[4] So as to make up for this balance, CommCarrier issued two replacement promissory notes and cheque numbers 57 and 58 for Kshs.1,449,515.75 each, the notes being due on 4th November, 2010 and 20th November, 2010 respectively. These were not honoured on their due date. CommCarrier issued a guarantee and indemnity, letter of mandate and a general lien over of its goods to back up payment of the outstanding sums. The claim by Global against the two was for payment of the sum of Kshs.2,990,371.70.

[5] CommCarrier Satellite Service Limited (CommCarrier) and Azhar Chaudry, now the appellants in this appeal, denied the claim and averred that on 27th July, 2010, through one of its officers, Arbi Mussani, Global approached the 2nd appellant

and

presented him with a statement showing that CommCarrier owed Global a sum of Ksh.2,800,531.70. Global implored the 2nd appellant for immediate payment as it needed the money urgently and asked that it be provided with either the money or promissory notes and post-dated cheques plus the 2nd appellant's guarantee. In return, Global would provide the appellants with the documentation in support of their claim and also release equipment belonging to CommCarrier worth USD 250,000.00 which it was holding.

[6] The appellants' defence was that it turned out that upon a reconciliation of accounts carried out by them, it was Global who owed CommCarrier Kshs.1,770,681.00.

[7] However, based on trust that had been built over time between the parties, the 2nd appellant agreed to commence the process of issuance of the promissory notes, cheques and guarantee, but the process not be completed until the Managing Director of CommCarrier countersigned both the promissory notes and the cheques as the 2nd appellant had no mandate to sign alone on behalf of CommCarrier.

[8] It was contended that in breach of trust accorded to him by the 2nd appellant, the officer of Global walked away with the

Promissory Notes, Cheques and Guarantee and presented them to the Bank. It was alleged that Global committed fraud by:

> ***"(a) Wrongfully and without authority taking possession of the Plaintiffs' documents – Promissory Notes, Cheques and Guarantee;***
>
> ***(b) Proceeding to present the Plaintiffs documents to the Defendant's bank while knowing that they had no authority towards the same;***
>
> ***(c) Misrepresenting to the Plaintiffs that they had provided services to the Plaintiffs' worth Kshs. 9,576,443.25 over several years while knowing quite well that this figure was vastly exaggerated as they had not; and***
>
> ***(d) Making the 2nd Plaintiff commence the making of Promissory Notes, Cheques and Guarantee in the favour of the Defendant on the promise of the Defendant providing the Plaintiffs with supporting documents and releasing the Plaintiffs' goods to them while knowing at all times that there existed no such documents and no intention on the part of the Defendant to release the 1st Plaintiff's goods wrongfully and unlawfully held by the Defendant."***

[9] The appellants sought the following orders against Global;

> ***"a) An order compelling the defendant to release the 1st plaintiff's assets and in the alternative judgment against the defendant for the sum of USD 250,000/=.***
>
> ***b) General damages for loss of use of the said equipment since June 2009***

c) General damages for misrepresentation, breach of trust and fraudulent acquisition of the plaintiff's documents

d) An order for accounts to be taken between the parties.

e) Costs and interest."

[10] Each side called one witness, Mr. Arbi Ali Mohamed Mussani for Global and Mr. Azhar Chaudry for the appellants. The trial judge held that Global was justified in filing suit for recovery of Kshs.2,990,371.70 on the strength of the dishonoured bills as of 15th February, 2011. The trial court further dismissed the claim for fraud as unproven and was unable to find evidence that supported the assertion that CommCarrier had overpaid Global by Kshs.1,770,681.00.

[11] In the impugned judgment the trial court concluded:

> ***"In the result, judgment is hereby entered for the Plaintiff Global Freight Logistics Ltd, against the two Defendants jointly and severally in the sum of Kshs.2,990,371.70, together with interest thereon at court rates, payable from 20 November 2010 until payment in full. The Defendants' counterclaim, as pleaded in the Plaintiff filed herein on 7 March 2014 fails and is hereby dismissed in its entirely with attendant costs to the Plaintiff. It is further ordered that upon satisfaction of the Judgment and resultant Decree herein, the 1st Defendant shall be at liberty to collect its goods from the Plaintiff."***

[12] At the hearing of the appeal, the appellants narrowed their grievances to three. It was argued that the learned judge had erred in law and fact in finding that:

> **"i) The appellants had admitted the debt.**
>
> **ii) The appellants had not proved an overpayment and the need for reconciliation of accounts.**
>
> **iii) Global became a holder in due course of the promissory notes and cheques."**

[13] The role of the Court in a first appeal such as this is to re-evaluate the evidence and to draw its own conclusion, having regard to the fact that, unlike the trial court, it did not see or hear the witnesses testify. See **Selle & Another vs. Associated Motor Boat Company Ltd. & Others [1968] EA 123** where it was stated:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally (****Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 EACA 210****).”***

[14] Before us at plenary hearing of the appeal were learned counsel Mr. Wakwaya for the appellants and learned counsel Mr. Ondieki for the respondent. Both rehashed the written submissions filed on behalf of their respective clients.

[15] It was argued for the appellants that the trial court wrongly concluded there was no contestation regarding the two replacement promissory notes maturing on 4th and 20th November, 2010, contending however that these notes were taken without authority. It was asserted that the court incorrectly found they had issued fresh replacement promissory notes and cheques for payment of the balance of the debt, and that the respondent had executed an indemnity and guarantee as well as a lien and set-off in favour of the respondent, when in fact, Global had unlawfully taken possession of these documents. The trial court was assailed for failing to acknowledge the resolution of 9th February, 2010 concerning the 1st appellant's mandate and making no mention of the

reconciliation of accounts, despite reconciliation documents and an email exchange being produced to show that the respondent had been overpaid.

[16] A central point to the appellants' case, both at trial and before us, was the need for reconciliation of accounts. They claimed to have made an overpayment of Kshs.1,770,681, arguing that reconciliation of accounts explicitly supported their claim of overpayment. It submitted that so as to counter their plea for taking of the accounts, Global relied on the statement of 4th August, 2009, arguing that by signing the statement, the appellants were admitting that a sum of Kshs.4,812,348.30 was due as at 4th August, 2009. Global pressed that on the basis of the supposed admission, the appellants issued two replacement promissory notes and the attendant cheques. The appellants argued that it is evident that there was a dispute as to the amounts owing and therefore the need for reconciliation of the accounts. They relied on rule 1 of Order 20 and rule 16 and 17 of Order 21 of the Civil Procedure Rules which allow a court, when a party prays for an account or the matter involves the taking of an account, to order for taking of accounts, especially when the defendant fails to appear, or if a preliminary

question has been tried, or if the books are in the defendant's custody, or where there is prima facie evidence of the truth of the matter. The appellants cited **Javaid Iqbal Khan & another v Iqbal Transporters Limited & another [2018] eKLR** and **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR)** to support the argument that the court was obligated to order a rendering of true, proper and accurate accounts to ascertain whether there was any amount owing to Global. The appellants contended that the trial court ignored and disregarded their evidence by, firstly, finding that the appellants had not provided a basis reconciliation of accounts, and secondly, finding that the appellants willingly gave out the bills, contrary to the appellants' position that Global unlawfully took the bills, having knowledge that they were not properly executed.

[17] The appellants asserted that the Global unlawfully and illegally took possession of the bills and the lien and guarantee and therefore not a holder in due course of the promissory notes. Global was accused of unlawfully taking

possession of the bills with the intent to discount them, despite the original promissory notes being issued in 2019 (perhaps 2009?) and

needed to be countersigned. The appellants pointed to an email of 28th October, 2010 informing Global that the bills were improperly signed and needed to be returned. They referred to section 29 of the Bills of Exchange Act, defining a holder in due course as one who takes a complete and regular bill for value and in good faith, without notice of defects (**Amratlal Stores Limited v Shah Hirji Manek Limited [2013] eKLR)**. Cited as well was section 91 of the Bills of Exchange Act defining good faith as an act done honestly, whether done negligently or not, and section 30 (2) of the same statute, which provides that a holder of a bill is a holder in due course. If, however, an action on a bill is affected by fraud, duress or force and fear, or illegality, the burden of proof is shifted, unless the holder proves that the value has, in good faith, been given for the bill.

[18] Finally, the appellants argued that the rule in Turquand (***Royal British Bank v Turquand (1856) 6 E&B 327***) is applicable in this case, contending that the 2nd appellant did not have the sole mandate to sign company documents. They presented a resolution dated 9th February 2010 which the trial court disregarded. They argued that Global was

aware of the mandate requirement for two signatories based on their active business

relationship and account statements, and even if they were not, *arguendo*, the appellants testified that as at the time of preparing the replacement bills, which were to be issued upon reconciliation of accounts, the respondent was made aware of the mandate requirement. Citing **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the appellants stated that the Turquand rule does not apply where an outsider knows of the internal non-compliance or knew facts that would lead a reasonable person to inquire further. They concluded that the respondent had knowledge that the bills were incomplete and irregular due to a lack of proper signatory, and their impecunious state led them to have the bills discounted even when they were not due. In conclusion, the appellants submitted that there was sufficient evidence for the court to find that Global illegally and unlawfully detained their goods.

[19] In response, it was submitted by Global that the trial judge properly applied the law to the evidence that was presented at trial and arrived at a sound judgment, granting both parties the right to be heard. It was asserted that the appellants had

expressly admitted being indebted to Global and had made every effort to pay the outstanding sum.

[20] Global contended that the pleadings and evidence confirmed their indebtedness to it. The purported change of the company's mandate was described as an afterthought, the appellants having previously executed various documents in their own hand with no additional step being required. Specifically referenced were the four bills that the appellants had issued, two of which were dishonoured and which led to the issuance of replacement bills signed in a proper manner.

[21] Having reflected on the grounds of appeal, the submissions before us, the case prosecuted and defended by the parties at trial, we see three intertwined issues as arising for our determination. Whether Global fraudulently obtained possession and custody of the disputed promissory notes, cheques and guarantee; whether Global proved the debt it claimed from the appellants; and whether the appellants made out a case for reconciliation of accounts.

[22] At the trial the appellants had pleaded that Global, through its officer, Arbi Mussani, had wrongfully and without authority

taken the controversial promissory notes, cheques and guarantee. Elaborating, Azhar Chaudry stated:

> ***"That a few minutes later Mr. Mussani left my office and I was involved with other business and it was not until later in the evening when I looked for the aforementioned documents and failed to get them that I learnt that he had gone with them. That I had failed to ensure that he never carried the same due to the trust I had on*** *(sic)* ***him."***

[23] The impression the appellants gave was that Mr. Mussani stole or sneaked out with those important documents. While there was evidence that the mandate for signing could have changed after 8th October, 2010 so as to require two signatories, there was no evidence that Mr. Azhar had advised Mr. Mussani of the need for a second signature.

[24] On 28th October, 2010, a Mr. Anjum sent an email to Mr. Mussani requiring him to return the notes and cheques for counter signature. In part he states:

> ***"It appears that you/Azhar made an agreement for him to sign some bills for the benefit of Guardian Bank, payable on 4th Nov 2010 and 20th Nov 2010. These are accompanied by cheques also signed solely by Azhar. The bank mandate of the company specifies two signatures. Azhar advised you of this, and you were to come back to me for signature."***

[25] Neither then, nor in communications that followed did the appellants suggest that Mr. Mussani had stolen or

otherwise

wrongfully taken the bills, cheques and guarantee. The appellants were alleging fraud on the part of Global. This allegation, as correctly observed by the trial court, required strict proof, higher than on a balance of probabilities, although not beyond reasonable doubt (see for example **Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR**). There was no evidence whatsoever that the instruments and security were stolen by Global. To the contrary, the evidence is that they were released by Azhar to Mussani on a mutual understanding between the two.

[26] A second aspect of the case that discounts the theory by the appellants was their inability to impeach the evidence by Global that the two impugned promissory notes were replacements of two promissory notes issued by CommCarrier to Global which had been dishonoured on 1st September, 2009. The two dishonoured notes were PMT LBD 003/2009 and PMT LBD 004/2009 for a total sum of Kshs.2,541,564. The replacement bills were for Kshs.2,899,031.70 to include charges and interest occasioned when the two were dishonoured.

[27] The debt had already been admitted by CommCarrier on 1st

September, 2009 when it issued four promissory notes for

payment of the debt. The debt included what Commcarrier now disputes. In the face of this, it is not plausible, as posited by CommCarrier, that the two promissory notes, cheques and guarantees issued on 27th July, 2010 were given on a tentative debt that needed to be confirmed through reconciliation.

[28] We can see a basis for the trial court drawing the following conclusions:

> ***"24. It is manifest therefore that most of the Issues as framed by the Plaintiff and in particular the Issues replicated at paragraphs [a] to [f] of paragraph 14 herein above, have been resolved by the parties, namely:***
>
> ***[a] That the 1st Defendant did issue four (4) Promissory Notes signed by the 2nd Defendant in favour of the Plaintiff.***
>
> ***[b] That two of the initial four Promissory Notes were dishonoured on presentation on their due dates.***
>
> ***[c] That the Defendants thereupon issued two fresh replacement Promissory Notes and cheques to secure the payment of the balance of the debt.***
>
> ***[d] That the two subsequent Promissory Notes issued by the Defendants in favour of the Plaintiff to repay the outstanding amount were similarly dishonoured.***
>
> ***[e] That, in addition to the two Promissory Notes and Cheques, the 1st Defendant also executed an Indemnity and Guarantee as well as a***

Lien and Set Off in favour of the Plaintiff to ensure payment of the outstanding debt."

[29] The appellants submitted that they have made an overpayment of Kshs.1,770,081 and have demonstrated the need for reconciliation of accounts. Yet it does seem that the timing of the request for reconciliation is curious. It is on a date after CommCarrier had issued the two replacement notes and cheques. At the time of issuing the four notes for payment of the entire debt, no need seems to have arisen for reconciliation. CommCarrier was simply setting up an excuse not to honour the replacement notes and the cheques. The plea for taking of accounts is not *bona fides*.

[30] It is true that appearing on pages 41 to 94 of the record of appeal are documents which CommCarrier seeks to rely on to prove an overpayment. The trouble is that, it has not been demonstrated how the supposed overpayment of Kshs.1,770,081 is derived from those documents, which include invoices and counter dispatch forms. Further, it is inconsistent that the appellants assert that they have proved a specific overpayment of Kshs.1,770,081, yet still insist on the taking of accounts. All they needed to do was to prove the overpayment.

[31] As would be clear now, this appeal has no merit. It is dismissed with costs.

Dated and delivered at Nairobi this 20th day of February 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.