Agricom Holding Limited v Trucks Direct Limited (Civil Appeal 451 of 2018) [2024] KECA 157 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 157 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 451 OF 2018

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

FEBRUARY 23, 2024

BETWEEN

AGRICOM HOLDING LIMITED ..... APPELLANT

AND

TRUCKS DIRECT LIMITED ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Kiambu (Meoli, J.) delivered on 21st September 2018inCivil Appeal No. 98 of 2017.)

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court, (Meoli, J.) dated 21st September 2018 in Civil Appeal No. 98 of 2018 allowing the respondent's appeal against the judgment of the trial court in favor of the appellant in Thika CMCC No. 513 of 2015, delivered on 27th June 2017.

2. The brief background of the case is that the appellant was an appointed transporter of East Africa Breweries Limited (EABL) to transport alcohol beverages and empty crates to designated points. The appellant would subcontract the transportation of these products to various companies and in this case, it subcontracted the respondent on an agreed rate of Kshs.15.5/= per crate of alcohol beverage transported as contained in their contract.

3. The appellant averred that it had a contract with the respondent. That the terms of their contract were inter alia that the overall objective was to work together to reduce costs; ownership and title to goods to vest in EABL; risk to pass to contractor upon pick up; contractor to waive all liens that it may acquire by virtue of the contract, and to resolve dispute by good faith negotiations.

4. In December 2012, the appellant averred, it advanced Kshs.100,000/= to the respondent since the respondent had a cash shortfall and it was agreed that the amount was to be offset from future payments to the respondent. The respondent paid off the advanced sum but remained with a balance of Kshs.24,200/=.

5. That on 22nd December 2012, during one such contract, the respondent's driver Simon Mugo Murage occasioned the loss of 1120 crates of empty Everest bottles from the Thika Castle depot to NCD Ruaraka on truck registration number KBQ 488R ZC 6354. The said driver received on board his vehicle the 1120 crates of empty bottles but did not deliver them to NCD Ruaraka. As a result, the appellant averred, it was surcharged Kshs.851,200/= by EABL.

6. The appellant reported the matter to the police and also wrote a letter to the respondent requiring it to pay the surcharged amount which yielded no fruits, leading to the appellant filing a suit in the Chief Magistrates' Court at Thika to wit, Civil Case No. 513 of 2015.

7. In the plaint dated 23rd April 2015, the appellant claimed that the respondent was vicariously liable for the actions of its servant and prayed for judgment against it for: -

    a. A sum of Kshs.875,400/= surcharged from their account by EABL and Kshs.24,200/= monies left from the advanced amount.

    b. Costs of this suit.

    c. Interest on (a) and (b) above from date of filing suit at court rates.

8. The respondent entered appearance and filed its defence dated 19th June 2015. It denied the existence of any written contract between it and the appellant and stated that the appellant had hired its motor vehicle registration no. KBQ 488R ZC 6354 to transport 1120 empty beer bottles on 22nd December from Thika depot to NCD Ruaraka. That the said vehicle had been hired from around July 2012.

9. The respondent averred that the terms of the hire through practice provided that the appellant pays the respondent part payment of total hire cost up front and in this particular case, the appellant had paid the respondent Kshs.100,000/= up front.

10. The respondent further stated that under other terms of engagement and conventional practices, the appellant was supposed to insure all EABL goods on transit carried by all hired motor vehicles including the respondent's suit motor vehicle. That the respondent would deduct the agreed sum of Kshs.10,000/= as premium for such insurance from the hire proceeds due and owing to the respondent.

11. The respondent indicated that at the time of the alleged incident, the suit motor vehicle was in the care and control of the driver, Simon Mugo, who had failed to deliver the subject 1120 empty crates of beer bottles at the intended premises. Upon investigation, it was found that the driver did not deliver the empty crates but allegedly stole the same without the knowledge, consent and/or collusion of the respondent. That the theft was reported to Kasarani police station, where investigations commenced.

12. In conclusion, the respondent maintained that the appellant hired the respondent's motor vehicle. It denied any form of vicarious liability for the criminal acts and omission of its driver. The respondent added that the appellant owed itself a duty of care to insure the goods in transit aboard the suit motor vehicle like it had done for all other goods carried by other motor vehicles. Further, the respondent denied the claim of the sum of Kshs.851,200/=.

13. At the hearing before the magistrates' court, the appellant called one witness Mr. James Ngari Mathu, its Logistic Director. His statement was more or less a reiteration of the appellant's claim. The gist of his testimony was that the appellant had insurance; however, the insurance did not cover an instance where an employee who is not directly under its employment is involved in the loss of goods. That the appellant had no direct control over the drivers of the respondent, and was not liable for their actions. That it suffered loss because EABL surcharged it the full value of 1120 crates that went missing. It was

Mr. Ngari's testimony that the appellant was seeking a refund of loss of Kshs.851,200/= it suffered due to surcharge by EABL and the balance of Kshs.24,200/= owed to it by the respondent.

14. The respondent equally called one witness in support of its case, one Mr. Michael Muringe Kahianyu, its Managing Director. The gist of his testimony was that the appellant hired its truck and that the driver of the truck was its employee. It was his testimony that the respondent opted out of the contract because the terms were unfavorable and that the appellant delayed in paying the respondent. He further testified that around September 2013 the respondent received a demand letter for the lost crates. That the appellant was demanding Kshs.851,200/= for the lost empty crates and verbally told the respondent that it had been surcharged without issuing an assessment. The respondent maintained that it did not owe the appellant money and that it was not the duty of the respondent to insure the goods in transit. Mr. Muringe thus urged the court to dismiss the appellant's claim with costs.

15. The parties filed their respective written submissions. After hearing the parties and considering their respective rival written submissions, together with the relevant authorities relied upon by them, Hon. Murigi (CM) on 27th June 2017 delivered her judgment. The trial magistrate found that a contract existed between the appellant and the respondent. She found that the appellant used to insure the cargo being ferried by the respondent; that the appellant was surcharged Kshs.851,200/=; that the respondent was vicariously liable for the criminal acts of its driver; and, that there was an outstanding balance of Kshs.24,200/= owed to the appellant by the respondent which evidence was not rebutted by the respondent. Consequently, the trial magistrate found that the appellant had proven its case on a balance of probability and entered judgment for the appellant against the respondent as prayed for in the plaint.

16. Aggrieved and dissatisfied with the judgment of Hon. Murigi (CM), the respondent preferred an appeal to the High Court to wit, Civil Appeal No. 98 of 2017 against the whole judgment of the Magistrates Court. The respondent faulted the learned magistrate of six (6) grounds namely: -

    1. The learned magistrate erred in fact in holding that the appellant held an insurance cover for goods in transit.

    2. The learned magistrate erred in fact in failing to find that the appellant had not been surcharged Kshs.851,200/= by the insurance company.

    3. The learned magistrate erred in fact in finding that the appellant had paid the insurance company Kshs.851,200/=

    4. The learned magistrate erred in fact in finding that the insurance cover did not cover loss of goods in transit as a result of criminal activities.

    5. That the learned magistrate erred in fact in finding the respondent responsible for the theft.

    6. The learned magistrate erred in law and in fact in finding the respondent vicariously liable for the criminal acts of the driver."

17. It thus prayed that its appeal be allowed with costs; that the judgment delivered on 27th June 2017 be set aside and the appellant's suit be dismissed with costs to the respondent; and in the alternative, the appeal be allowed and the honorable court make a finding as it may deem fit.

18. The appeal proceeded by way of written submissions. After considering the appeal, the learned High Court judge (Meoli, J.) delivered her judgment dated 21st September 2018. The learned judge identified only one issue for determination as sufficient to dispose of the appeal, which is whether the appellant suffered loss by way of a surcharge or debt on its account by EABL. She held among others, that the

appellant failed to prove its alleged damage or loss by failing to adduce evidence and that the same resolved the entire matter in the respondent's favour. In the result, the respondents appeal was allowed, the judgment of the court below set aside and substituted with an order dismissing the suit with costs.

19. Aggrieved and dissatisfied with the entire judgment of Meoli, J. the appellant preferred an appeal before this Court. The appellant faulted the learned judge on four (4) grounds namely: -

    1. "That the learned judge erred in law and fact in making contradictory findings.

    2. That the learned judge as a result erred in law and in fact in ignoring the respondent's uncontroverted evidence on record.

    3. Thatthe learned judge erred in law and in fact in ignoring the undisputed advanced sum of Kshs.24,000/=.

    4. Thatthe learned judge erred in law in failing to appreciate and apply the law on vicarious liability of employees in the course of their duties."

20. The appellant thus prays that the appeal be allowed and that the judgment delivered on 21st September 2018 be set aside and the finding of the subordinate court in Thika Chief Magistrate Case Number 513 of 2015 delivered on 27th June 2017 be upheld.

21. We heard the appeal through this Court's virtual platform on 24th October 2023, Mr. Wambugu learned counsel appeared for the appellant with no appearance for the respondent despite being served with a hearing notice. Mr. Wambugu stated that he would be relying entirely on the appellants written submissions. We note that although the respondent was not in attendance at the hearing, its written submissions are on record.

22. In the written submissions dated 13th September 2019, the appellant on the first ground of appeal submitted that the learned judge stated correctly that the issue of surcharge was an important one, but that she made a contradiction when she acknowledged that the lost cargo did not belong to the appellant. Yet she still said it was not enough to prove loss of goods and that personal surcharge had to be proved.

23. On the second ground, the appellant submitted that the email dated 6th March 2014 from the appellant requested the respondent to give a proposal on how to offset the debt, and the email by the respondent thereto clearly stated that he needed time to organize. The appellant urged that that the response was an admission of the debt. As regards insurance the High Court accepted the appellant's submission that the respondent had not pleaded it and urged it could not use it to escape liability.

24. On the third ground the appellant submitted that the learned judge erred in ignoring the undisputed advanced sum of Kshs.24,000/=. The appellant submitted that the claim for Kshs.875,400/= comprised the amount surcharged by EABL, of Kshs.851,400/= and Kshs.24,000/= being the sum advanced by the appellant to the respondent.

25. On the last ground, the appellant submitted that the High Court made a definite finding that the respondent was vicariously liable for the acts of the driver, which also amounted to criminality. That having made such a finding it was contradictory to find that there was absence of proof of the claim and to conclude by a finding that the respondent was not liable to the appellant.

26. The appellant submitted that its appeal has met the threshold in the celebrated case of Mbogo v Shah [1968] EA 93. The appellant contends that the learned judge misdirected herself, arrived at a contradictory finding, which has obviously led the appellant being occasioned grave injustice by suffering double jeopardy in that it was surcharged, filed a suit, and proved its case which was now

dismissed by the High Court. In the circumstances, it is contended that the findings of the High Court are amenable to being set aside, which the appellant invites this Court to do.

27. In rebuttal, the respondent filed its submissions dated 8th September 2023. Placing reliance on the case of Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR, the respondent submitted that it is trite law that on a second appeal, the court confines itself to matters of law only, unless it is shown that the courts below considered matters they ought not to have considered, or failed to consider matters they ought to have considered, or that looking at the entire decision, it is perverse.

28. In response to the first ground of appeal, the respondent maintains that the learned judge exercised her mandate judiciously in analyzing the pleadings and evidence presented hence the judgement of the 1st appellate court need not be disturbed. The respondent submitted that the learned judge asserted that indeed there was no dispute that the goods in question were lost however, the court noted that it was not clear whether the appellant held an insurance cover in relation to the goods as no documentation was presented in court on the same. In addition, the court noted that the appellant tendered no evidence in court to prove it was surcharged for the loss by EABL; and lastly, that the lost consignment was due to a criminal activity hence liability was solely on the driver of the vehicle that was transporting the goods.

29. On the second ground, the respondent submitted that the High Court noted and further elaborated that despite all the correspondences between the appellant and the respondent regarding the issue of surcharge and debt, no proof of surcharge was adduced in court. That its witness James Ngari at the de novo hearing made no reference of the surcharge, and there was therefore no evidence whatsoever of it having been surcharge by EABL.

30. On the third ground, the respondent maintained that the learned judge made a finding in favor of the respondent not only on the Kshs.24,000/= but on the whole of the sum claimed by the appellant in exercise of her judicial mandate.

31. Lastly, on the issue of vicarious liability, the respondent affirmed its averment at the High Court that it would be a fundamental error to mix up criminal justice principles to a purely civil matter. In addition, from the proceedings at the trial court and the High Court, and the evidence tendered therein, it was not clear whether the driver actually stole the consignment or facilitated its disappearance as alleged by the appellant. That up until the time of hearing, no one actually knew what happened to the driver or the goods on the material day and that without proof, this Court cannot make a pronouncement that the acts of the driver were criminal or that the respondent was liable.

32. In conclusion, the respondent urged that most of the grounds in the memorandum of the appeal were on matters of fact that could not be canvassed in a second appeal. Further, that the learned judge re-assessed, re-analyzed and reconsidered the record before her, evaluated the same before reversing the decision of the trial court; hence the sound judgment that does not invite this honorable court's intervention. The respondent submitted that this appeal does not raise any substantial question of law, lacks merit and forms a classical description of an abuse of due process and should be dismissed with costs.

33. This being a second appeal from the decision of the trial Court in Thika CMCC No. 98 of 2018, we are restricted to determining points of law and not of fact as set out in section 72(1) of the *Civil Procedure Act*. Section 72 of the *Civil Procedure Act* Chapter 21 Laws of Kenya – provides that: -

> "(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every

decree passed in appeal by the High Court, on any of the following grounds, namely-

a. the decision being contrary to law or to some usage having the force of law;

b. the decision having failed to determine some material issue of law or usage having the force of law;

c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

34. That section was explained by this Court (Waki, Karanja & Kiage JJ.A.) in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR as follows:

> "...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
>
> We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law."
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> (See also Pithon Waweru Maina v Thuka Mugiria [1983] eKLR, Kenya Breweries Limited v Godfrey Odoyo (supra) and Stanley N. Muriithi & Another v Benard Munene Ithiga [2016] eKLR.)

35. It is trite law that this Court on second appeal confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

36. In Mbogo & Another v Shah [1968] EA 93, the decision of the predecessor of this Court, per Sir Newbold, P. stated:

> "A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."

37. In Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR, it was emphasized that an appellate court should pay deference to decisions made in exercise of discretion. However, where there is a basis for upsetting such decisions, the Court should do so if the findings in question are based on no evidence, or on a misapprehension of the evidence; consideration of irrelevant matters or failure to consider what ought to have been considered. The court will interfere if it is shown that the court acted on wrong principles in reaching a particular finding of fact or conclusion of law or if the decision is generally perverse and unsupportable.

38. We have considered this appeal within the confines of our mandate as elucidated in the cases cited herein above. We have considered the pleadings, the evidence on record, the judgments of the courts

below, the grounds of appeal, the rival submissions of the parties, as well as the authorities each referred. Having considered these, we find that two issues are for determination.

i. Whether the learned Judge of the High Court erred in law in arriving at a finding that the appellant did not prove loss of Kshs.851,400/= whether through surcharge or otherwise.

ii. Whether the learned Judge erred in law in failing to make a finding on the sum of Kshs.24,000/= advanced to the respondent.

39. On the first issue of whether any loss was proved by the appellant, the basis of the appellant's claim for Kshs.851,400/= was the loss occasioned by the respondent driver when he failed to deliver 1120 empty crates of beer bottles belonging to EABL. That as a result, EABL surcharged the appellant for the loss in the said amount. There was no dispute between the parties that indeed the respondent's driver received the crates for delivery to NCD Ruaraka, and that the crates never arrived.

40. We have considered the arguments of counsel and the decision of the learned Judge. The bone of contention is whether the appellant brought proof that it suffered loss by way of a surcharge as it pleaded in the plaint.

41. It is critical to know what terms governed the relationship between the parties. We note from the appellant's plaint, paragraph 5 thereof, it pleaded that 'the relationship between the Plaintiff and the Defendant was governed by a written contract.' The respondent denied this under paragraph 3 of the defence where it pleaded; 'The Defendant denies a written contracted for transportation existed between the Plaintiff and the Defendant. And avers that the Plaintiff however did hire the Defendant's suit motor vehicle to transport alcoholic beverages.' The respondent pleaded further at paragraph 6 and 7 that the terms of hire was through practice that, terms of engagement and conventional practices.

42. The learned Judge after analyzing and evaluating the entire evidence came to the conclusion that no contract was adduced in evidence by the appellant. The learned trial Magistrate made mention of a contract, finding that indeed one existed between the parties and that it governed their relationship on the issue at hand. There was however no indication whether the same was in court as an exhibit. We examined the documents adduced in the case. We are satisfied that not even the appellant exhibited a contract at the trial. The finding of the learned Judge was correct that none was produced. The relationship between the appellant and the respondent was not governed by a written contract.

43. The learned Judge devotedly and painstakingly scrutinized the evidence of the appellant's witness as well as the documents adduced in support of its case in order to satisfy herself whether the appellant adduced evidence to prove loss of amounts pleaded in the plaint. The learned Judge observed thus regarding the appellant's case:

> " The trial court found, based on the statement of account in the Respondent's bundle of documents, that the Respondent was surcharged by EABL. This is what the Respondent had asserted all along through the various correspondences in the document bundle filed in court. And for their part, the Appellant demanded the proof of the surcharge.
>
> 15. What is interesting in my view is that the Respondent [the appellant before us] did not produce any of the documents filed in its bundle during the trial. At the denovo hearing of the matter, James Ngari Mathu (PW1) who described himself as the Logistics Director of the Respondent made no reference to the bundle of documents in his evidence in chief. Following his cross-examination, his counsel referred him to an alleged debit at pg. 34 and the security report at pg.35 of the Plaintiff bundle of documents. (The correct pages are 34 and 36

and 45) The Respondent's advocate submitting at the close of the trial that the Plaintiff's documents were undisputed. The documents were not produced, and it seems that the Appellant's counsel did not notice the anomaly."

44. The learned Judge observed regarding the respondent's evidence:

> "That notwithstanding, a good number of the emails exchanged by the parties were produced as exhibits by the Appellant's [read respondent's] witness Michael Muringe Kihianyu (DW1). The witness testified that the Respondent [read appellant] did not supply the Appellant with any evidence of the alleged surcharge by EABL and that they gave a verbal notification of the same. For what it may be worth, this court has looked at the documents relied on by the Respondent as evidence of the surcharge. The documents at page 34 and 36 must be read in the context of the other correspondence between the parties themselves and with third parties (presumably EABL staff) at pages 30 – 34..."

45. What followed was examination by the learned Judge, of a stack of emails and correspondences between the appellant and the respondent, as enumerated in her judgment. The subject matter of these correspondences was the respondent's demand to the appellant to show proof that "the invoice [of Kshs.851,200/= was settled by the appellant through surcharge." And after that arduous exercise, the learned Judge came to the conclusion:

> " This request [for proof of surcharge] is repeated in an e-mail by the Appellants sent earlier on 29th May 2014. One would have hoped that the Respondent would tender evidence of receipts or other documents from EABL and/or called EABL officials to confirm the surcharge. This however did not happen. Even though the Appellant had denied the claim in their defence. The question whether the Respondent was actually surcharged is an important one, because the lost cargo was not its property. Thus, it was not enough to establish the loss of the cargo, the Respondent had to prove the Respondent's personal loss through surcharge as a consequence of the cargo loss.
>
> 26. Reviewing the evidence on record, I have to agree with the Appellant that the Respondent's evidence does not establish a loss by itself of the sum of Kshs.851,200/= through surcharge."

47. In Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR, the Court of Appeal reiterated the fact that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit. Similarly, and in David Bagine vs. Martin Bundi (283 of 1996) [1997] eKLR, the Court of Appeal, referred to the judgment by Lord Goddard CJ in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177), and again observed that:

> " It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."

48. The appellant gave very clear evidence in support of its case, that it was surcharged by EABL, for the loss of the crates, occasioned by the respondent's driver. Being a special damages claim, just as the learned Judge observed, "One would have hoped that the Respondent would tender evidence of receipts

> or other documents from EABL and/or called EABL officials to confirm the surcharge. This however did not happen."

49. We have perused the judgments of the trial court and the learned Judge sitting as a first appellate court. As expected of a first appellate court, the learned Judge analyzed and evaluated the trial courts proceedings and evidence. The learned Judge took into consideration the evidence and the law, the principles relevant to the case. On the issue of loss, the learned Judge observed that the basis of the trial court's finding that surcharge was proved, was 'The trial court found, based on the statement of account in the Respondent's bundle of documents, that the Respondent was surcharged by EABL.' The learned Judge was right to find that the statement made by a party not called as a witness, without documents to prove actual payment or surcharge cannot suffice to prove loss.

50. The appellant claimed that the claim for Kshs.24,200/= was admitted by the respondent and that the learned Judge ignored that evidence. The respondent in its defence is awash with denial of that claim. Indeed, what the respondent pleaded contradicted the appellant's pleading in regard to the Kshs.100,000/= out of which the appellant claimed the Kshs.24,000/= arose. While the appellant stated that the amount was an advance payment to the respondent to meet operational shortfalls that was to be deducted form its dues; the respondent pleaded that it was their practice that the appellant paid the respondent half the cost of the total hire up front, and that the appellant paid the Kshs.100,000/= in that regard. We agree with the learned Judge that there was no admission of any debt by the respondent in pleadings and in evidence. If anything, the emails and correspondences prove that the respondent desired to see proof of surcharge before it could discuss its liability.

51. The appellant has challenged the judgment of the learned Judge as being contradictory. It put it thus:

> 'The learned judge stated correctly that the issue of surcharge was an important one, but that she made a contradiction when she acknowledged that the lost cargo did not belong to the appellant. Yet she still said it was not enough to prove loss of goods and that personal surcharge had to be proved. The learned judge misdirected herself, arrived at a contradictory finding, which has obviously led the appellant being occasioned grave injustice by suffering double jeopardy in that it was surcharged, filed a suit, and proved its case which was now dismissed by the High Court. In the circumstances, it is contended that the findings of the High Court are amenable to being set aside, which the appellant invites this Court to do."

52. The learned Judge did not contradict herself on the issue of proof of loss. The appellant's contention appears to suggest that the fact the cargo was lost, that was enough to prove loss. The learned Judge was right. Had the cargo been the property of the appellant, proof of loss of the cargo would have been sufficient to establish and prove loss. Now that the cargo belonged to another, what the appellant needed to do is adduce proof, evidentiary/documentary proof that it lost the equivalent of the sum claimed through surcharge on its account, as it had pleaded. That was not done.

53. The second issue we identified is whether the learned Judge erred in law in failing to make a finding on the sum of Kshs.24,000/= advanced to the respondent.

54. The learned judge identified only one issue for determination as sufficient to dispose of the appeal, which is whether the appellant suffered loss by way of a surcharge or debt on its account by EABL. The appellant pleaded the loss through surcharge and the loss through debt owed to it by the respondent

in one paragraph (13). It then demanded a composite total encompassing both. The learned Judge examined both losses in her judgment, but considered each item conclusively. The Judge cannot be faulted.

55. After a careful consideration of the appeal and of the judgment of the learned Judge sitting as a first appellate court we find: One, that the findings by the Judge were borne out of a careful consideration of the evidence, and is based no evidence adduced before the trial court. Two, we are satisfied that there was no misapprehension of the evidence. Three, we are satisfied that the learned Judge did not consider irrelevant matters, neither did the Judge fail to consider what ought to have been considered. The court was alive to the applicable law and correct principles in reaching its finding of fact we are satisfied that the learned Judge's conclusion was sound. We find no reason to disturb the judgment.

56. The result of this appeal is that the same has no merit and is dismissed in its entirety with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024

S. GATEMBU KAIRU, FCIArb.,

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

.....

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR