



Compact Freight System Limited v Multiserve Oasis Company Limited & another (Civil Appeal (Application) E001 of 2021) [2023] KECA 1220 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1220 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E001 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 6, 2023**

BETWEEN

COMPACT FREIGHT SYSTEM LIMITED APPLICANT

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

MULTISERVE OASIS COMPANY LIMITED 2ND RESPONDENT

(An application to set aside the judgment of this Court delivered on 2nd December 2022 and in the alternative, that the appellant be allowed to rely on additional evidence that was obtained after the matter was heard before the High Court and thereby use the same to hold that the judgment of this Court of 2nd December 2022 be set aside and the suit be heard afresh)

RULING

1. In its application before us dated 3rd March 2023, the applicant seeks two main prayers. One, that the judgment delivered by this Court in this matter on 2nd December 2022 be recalled, reviewed, and set aside and for the suit that was before the High Court from which the appeal arose, be heard afresh. Secondly, and in the alternative, the applicant prays that it be allowed to rely on additional evidence that was obtained after the matter was heard before the High Court and thereby use the same to hold that the judgment of this Court of 2nd December 2022 be set aside and the suit be heard afresh.
2. The background is fully set out in the judgment of this Court of 2nd December 2022 that is sought to be reviewed. The short of it is that the High Court in a judgment delivered on 28th February 2020 found the applicant/appellant, a Container Freight Station, licensed as such by Kenya Ports Authority, liable for loss of the 1st respondent's consignment of bales of imported assorted garments entrusted to it and awarded the 1st respondent USD 214,803 for the same. The applicant unsuccessfully challenged that judgment on appeal to this Court which upheld the judgment of the High Court.



3. The applicant is still dissatisfied, hence the present application. The grounds in support of the application are set out on the face of the application and in the supporting affidavit of Peter Ng'ang'a, the General Manager of the applicant. Learned Counsel for the applicant Mr. Gikandi Ngibuini in the applicant's written and oral submissions also addressed us at length.
4. The applicant has urged that this Court failed to re-evaluate the evidence before the trial court particularly in the face of the claim that the documents relied upon by the 1st respondent in support of its claim were tainted by fraud which was only discovered post trial; that this Court wrongly failed to deal with the matter of fraud on the basis that it was not pleaded before the High Court; that there is a fundamental error in the assumption made by this Court that all the bales of clothes imported by the 1st respondent were of the same value; that it was after determination of the matter by the High Court that the applicant came to the realization that the documents relied by the 1st respondent in support of its claim are forgeries.
5. It was urged that during the pendency of the appeal before this Court, the applicant filed an application in the appeal which was dated 27th January 2022 seeking leave to introduce the said additional evidence prior to the hearing of the appeal; and that the applicant however withdrew that application being of the view that "the issues intended to be covered through such additional evidence would have been presented through the main hearing of the appeal"
6. Mr. Gikandi submitted that the jurisdiction of this Court to review its decisions is established; that the Court has the jurisdiction to re-visit a matter to correct obvious errors or if, as here, there is fraud, and that the 1st respondent should not benefit from a fraudulent transaction.
7. It was submitted that it is trite that special damages must be proved; that in this case, there is an error on the face of the record, namely in the assumption that the bales of assorted clothes had the same value; that there is also evidence that the 1st respondent was not in existence when the transaction giving rise to the claim was made as it was registered after; that there are also questions around the claim that the 1st respondent made payments for the consignment as there is no evidence of the money trail.
8. On those grounds, we were urged to allow the application and set aside the judgment of this Court and order a fresh hearing before the High Court before a Judge other than P.J.O. Otieno, J.
9. Opposing the application, learned counsel for the 1st respondent Lakicha Hassan relied on the replying affidavit of Bashir Mohamed Nur, a director of the 1st respondent as well as the 1st respondent's written submissions which he orally highlighted. According to the 1st respondent, the application is an abuse of process of the court and an afterthought; that in the High Court the allegation of fraud, which is belatedly raised, was not raised either in the pleadings or by the applicant's witnesses; that the application is made in bad faith to frustrate the 1st respondent from realizing the fruits of its judgment; that allowing the application would set a dangerous precedent of opening doors to all and sundry who might want to challenge judgments on basis of afterthoughts; that the jurisdiction to review is not intended to provide an avenue for a party who is unhappy with a judgment to challenge it.
10. It was submitted that considering that the applicant filed and then withdraw an application to adduce additional evidence, the present application is misconceived and there is no sufficient ground to allow the review. That the issue of alleged fraud is a matter that arose in 2021 and could have been raised before the High Court; that the matter of incorporation and the issue of payments for the goods were already addressed.
11. Mrs. Akwana learned counsel for the 2nd respondent indicated that the 2nd respondent would not participate in the application as the matter is between the applicant and the 1st respondent.



12. We have considered the appeal and the submissions. We agree with counsel for the applicant that this Court has residual jurisdiction to review its own decisions as pronounced in the case of *Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others* [2016] eKLR where this Court expressed as follows:

“This is to say that this Court has already pronounced itself in the Benjoh case in a way that evinces a clear intention of departing from the precedent set out in the Rai case. We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation. Indeed, the Benjoh case addressed this point thus:-

“This Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.”

13. The question therefore is whether this case fits within those exceptional circumstances. In our view, the grounds on which the present application coalesce into two main complaints. Firstly, that there is error in upholding the award of special damages by the trial court of USD214,803 when the same was not strictly proved and in assuming that the value of the cargo contained in each bale was the same in all the bales. Secondly, that the applicant established after the trial before the High Court that 1st respondents claim is fraudulent and that this Court should “exercise its mind afresh...to the new and compelling evidence of fraud presented” and allow the matter to be reheard again so that the issues raised are fully and properly interrogated.
14. On the complaint relating to the upholding the award for special damages, reference was made to past decisions including *Hahn vs. Singh* [1985] KLR 716 and *Provincial Insurance Co. EA Ltd vs. Mordekai Mwangi Nandwa*, KSM CACA 179 of 1995 in support of the proposition that special damages must be specifically pleaded and proved, and that in the present case that was not done, as the award is based on an assumption as to the value of the lost cargo. This matter was specifically addressed by the High Court in its judgment from paragraph 53 of that judgment and by this Court on appeal in its judgment from paragraph 47 where the Court stated:

“The last issue is whether the amount awarded was proved. The complaint in the memorandum of appeal is that the trial court “arrived at the figure of \$ 214,803 as the value of the lost consignment” without “evidence to that effect” and that the “claim had not been particularly pleaded nor was it specially proved.”

15. This Court went on to consider the legal principles applicable to claims of special damages and the evidence before upholding the decision of the trial court in that regard. In effect, the applicant being dissatisfied with the outcome is seeking to re-litigate a matter on which the High Court and this Court has deliberated and determined. It is not in our view a proper ground based on which the principle of finality of litigation should be overridden.
16. On the question of fraud, the applicant states that this was discovered after the conclusion of the matter before the trial court, and that this Court “completely failed to deal with the issues of fraud...brought



out through the said appeal.” In his affidavit in support of the motion, the General Manager of the applicant, Peter Ng’ang’a deponed as follows:

“7. That while in the process of preparing the record of appeal herein the Appellant’s lawyers now on record discovered that the documents relied on by the 1st Respondent in the High Court, although they were admitted with the consent of the firm of Ndegwa Muthama & Katisya, the said documents were fraudulent and/or doctored documents.”

17. It is clear from the foregoing that the documents in question that are alleged to have been forgeries were produced and admitted by the trial court with the consent of the parties. Furthermore, the transactions giving rise to the claim go back to 2009 and the suit before the High Court was instituted as early as 2010 and the judgment of the High Court delivered on 28th February 2020. The General Manager has deponed in his affidavit that he filed a complaint “of the suspected forgery with the Criminal Investigation Department” on 21st January 2021. That is almost a year after the delivery of the judgment of the High Court. He goes on to say that in July 2021 (a year and half after delivery of judgment) the applicant instructed a document examiner, Emmanuel Kenga, to examine the suspect documents who in his report concluded that the documents were forged.
18. There was in our view more than ample opportunity during the pendency of the suit for the applicant to have engaged the forensic examiner to scrutinize those documents. It was not until after the delivery of the trial court judgment, and seemingly in reaction to it, that the applicant did so.
19. Moreover, it was open to the applicant, upon the so-called discovery, to apply to the High Court to review its judgment, but it did not do so.
20. Furthermore, and as the applicant has stated, during the pendency of the appeal before this Court, it filed and then withdraw an application for additional evidence.
21. The residual jurisdiction of this Court to review its judgment is not, with respect, intended to redress missteps by a party. We therefore agree with counsel for the 1st respondent that this is not a proper case for the exercise of that jurisdiction. Consequently, the application fails and is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

