Afrofreight Forwarders Limited v Pil (K) Limited (Civil Appeal E008 of 2021) [2023] KECA 1510 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KECA 1510 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E008 OF 2021

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

DECEMBER 15, 2023

BETWEEN

AFROFREIGHT FORWARDERS LIMITED ..... APPELLANT

AND

PIL (K) LIMITED ..... RESPONDENT

(An appeal against the judgment and decree of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) delivered on 31st May 2019inHigh Court Civil Appeal No. 210 of 2017)

JUDGMENT

1. This is a second appeal. It arises from the judgment of the High Court at Mombasa (P.J.O. Otieno, J.) delivered on 31st May 2019. In that judgment, the High Court set aside a judgment of the magistrate's court in favour of the appellant and substituted therefore an order dismissing the appellant's suit. The object of the present appeal is to persuade us to reinstate the judgment of the trial court.

2. In its suit initially filed before the High Court at Mombasa and subsequently transferred to the Magistrates Court Mombasa, Afrofreight Forwarders Limited, the appellant claimed against Pil (K) Limited, the respondent, an amount of Kes.4,168,853.70 comprising of Railage services offered of, Kes.1,386,703.70 and refundable container deposit of Kes.2,782,150.00. The appellant pleaded in its plaint that the respondent had contracted it to facilitate railage to its inland container for which the appellant paid rail freight charges of the containers to Kenya Railways Corporation through its ledger accounts on behalf of the respondent.

3. The appellant pleaded further that it also paid to the respondent container deposits on behalf of various clients which was refundable upon the return of the empty containers to nominated depots. It was on that basis that the appellant averred in its plaint dated 24th August 2006 that as at 31st December 2003, the respondent was indebted to it for the said amount of Kes.4,168,853.70.

4. In its statement of defence, the respondent admitted that the appellant provided railage but denied the claim asserting that despite repeated demands, the appellant's "claim is exaggerated and has not been supported by any or any proper accounts and documentation"; and further that the respondent was transacting as agents of disclosed principals.

5. During the trial before the learned magistrate, the appellant called Moses Mwangi Mwaura (PW1) its administrative officer, and Simon Njoroge Ndungu (PW2), its operations officer as witnesses while the respondent called Jim Mwangi its Traffic Enforcement Manager as a witness. Based on the testimonies and documents presented, the learned trial magistrate was satisfied that the appellant had established its claim to the required standard and that the respondent did not disprove the appellant's claim. In its judgment delivered on 1st September 2017, the trial court accordingly granted judgment in favour of the appellant as prayed.

6. The respondent was dissatisfied with the judgment and appealed to the High Court on the ground that the trial magistrate erred in finding that the appellant had proved its claim and by disregarding the respondent's submissions.

7. In allowing the appeal the learned Judge found that, besides contending that the respondent was indebted to the appellant, the appellant's witnesses did not comment on the respondent's documents particularly the invoices and bank statements showing cheques paid to the appellant. The judge concluded that there was no dispute that there was privity between the parties but that the trial court failed in its mandate by failing to fully appraise the documents provided by the respondent. The judge expressed that the exhibits provided by the respondent appeared to have escaped the attention of the trial court.

8. The Judge concluded that on the evidence adduced, the appellant's claim was sufficiently and wholly displaced and that there was no basis for the trial court to enter judgment for the appellant as it did. Accordingly, and as already stated, the High Court set aside the trial court judgment and substituted the same with an order dismissing the appellant's suit.

9. Aggrieved, the appellant lodged the present appeal, which was scheduled for virtual hearing before us on 22nd May 2023. Although the firm of V.W. Maina & Company Advocates for the appellant were served with notice of hearing, there was no appearance for the appellant. The said advocates had however filed written submissions dated 4th October 2021 on behalf of the appellant which we have duly considered. Learned counsel for the respondent Mr. Waweru appeared for the respondent and relied entirely on written submissions filed on 17th May 2023.

10. Based on the memorandum of appeal as amplified in the written submissions, the main complaints are that the learned Judge of the High Court erred in setting aside the judgment of the trial court and in dismissing the suit when the parties had already filed a consent compromising the matter; that the Judge erred in concluding that the respondent had disproved the appellant's claim; and that the Judge erred in failing to appreciate that an award of interest under Section 26(1) of the *Civil Procedure Act* is at the discretion of the court.

11. As regards the complaint that the Judge erred in failing to appreciate that the matter was settled, the record of proceedings before the High Court shows that on 10th April 2018, when an application under certificate of urgency dated 9th February 2018 seeking orders of stay of execution of the judgment of the trial court came up, counsel for the parties appeared before the Judge. Counsel for the appellant, Mrs. Kyalo is recorded as having informed the court that "we have negotiated and have filed a consent

which we wish to be recorded in the court file." Mr. Kinuthia, counsel for the respondent is recorded as having stated that, "that is the position". The Judge then ordered:

> " 1. Let the DR have the consent contained in the letter dated 10th April 2018 endorsed in the court file as an order of the court.
>
> 2. Let the parties pursue the negotiations respecting the rate and quantum of interest payable and to conclude them within 21 days from today.
>
> 3. if there shall be no settlement on that aspect within the said period, let parties have the liberty to apply.
>
> 4. meanwhile let no adverse steps be taken nor seizure of any proclaimed goods be undertaken till 21st May 2018 when this matter will be mentioned to record further development.
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> 5. costs in the cause."

12. Subsequently on 21st May 2018, counsel for the parties appeared before the Judge and recorded a consent that there be a stay of proceedings pending the hearing and determination of the appeal; that the decretal sum be deposited in a joint interest bearing account in the name of the advocates within 10 days; that the record of appeal be filed within 45 days; that in default of compliance with the order on deposit the stay granted to automatically lapse.

13. On 12th July 2018, counsel for both parties consented to extension of time for filing the record of appeal. On 9th October 2018, the appeal was admitted for hearing before a single judge and directions given for filing and service of submissions on the appeal. On 15th May 2019 counsel for the parties appeared before the Judge and orally highlighted their written submissions. At that point a Miss. Mukoya in addition to stating that she was relying entirely on her written submissions stated that the appeal had been overtaken by events "because the claim was paid in full pursuant to the consent order of 2nd May 2018". Mr. Waweru contested that position. He stated that that claim "cannot be true as the decretal sum was more than 14,000,000 the bulk of which is in joint account. The appeal is very live." With that, the Judge reserved judgment which was ultimately delivered on 24th May 2019 in favour of the respondent.

14. Based on that procedural history, the consent to which the appellant refers appears to have been entered into to compromise and dispose of the application dated 9th April 2018 filed by the respondent under certificate of urgency. The application sought to stop execution of the judgment of the trial court in respect of which execution proceedings by attachment through proclamation of the respondent's immoveable property had already been done. If indeed the compromise related to the appeal, why would counsel for the parties thereafter have taken directions on filing of the record of appeal and submissions relating to that appeal? There is no material in the record that points to the appeal itself having been compromised. We do not think there is merit in this complaint.

15. With regard to the other grounds of appeal, we bear in mind that on a second appeal such as this, our mandate is limited under Section 72(1) of the *Civil Procedure Act* which provides that "except where otherwise expressly provided" in that 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 the grounds that the decision is contrary to law or to some usage having the force of law; that the decision failed to determine some material issue of law or usage having the force of law; or that a substantial error or defect in the procedure provided by that 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.

16. As this Court stated in *Agnes Kwamboka Ombuna vs Birisira Kerubo Ombuna [2014]* eKLR:

> " A plain reading of these provisions shows that a second appeal to this Court should be on a question of law and complaints regarding facts do not ordinarily fall for consideration. The provisions have received numerous judicial pronouncements of this Court in its decisions such as in the case of Naomi Kemunto v Total (K) Limited and Kisii Total Service Station (Kisumu Civil Appeal No. 211 of 2008) (UR). There, the court stated:
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> "This being a second appeal, we remind ourselves that Section 72 of the *Civil Procedure Act* applies and that only issues of law fall for consideration (See Kitivo - v – Kitivo (2008) KLR 119.)""

17. With that in mind, the other complaint by the appellant is that the Judge erred in his evaluation of the evidence and in his conclusion that the respondent disproved the appellant's claim.

18. In entering judgment for the appellant, the learned trial magistrate had expressed:

> " I have perused the documents availed. The core dispute is on the reconciliation of the account held by the plaintiff in respect of the services rendered. The plaintiff's witness availed before the court all the necessary documents. The defendant's witness was at the time not in the defendant's employment. He relied on documentation prepared by other person other than him. The defendant did not disapprove the plaintiffs claim. I am satisfied that the plaintiff has proved its claim against the defendant and i do hereby enter judgment to the plaintiff as prayed in the plaint."

19. Evidently, the basis on which the trial magistrate discredited the respondent's evidence was principally that the respondent's witness was not in employment at the material time. The trial court's decision was not based on its examination and evaluation of the documents tendered. In the circumstances, we agree entirely with the learned Judge that had the trial court examined the documents tendered by the respondent as opposed to dismissing them of hand because of the witness not having been in employment, he would have arrived at a different decision.

20. We are therefore in agreement with the learned Judge when he stated in his judgment that:

> "One of the issues raised was whether some cheques had been in fact issued and paid. A look at pages 124, 125 and 126 shows that there were in fact payments of Kshs. 794, 903 as well as Kshs.1,000,787 vide cheque nos. 9O7850 and 9O777 respectively. In fact I find the evidence by the DW1 at page 201 to have fully explained and rebutted the plaintiffs claim. In his evidence the witness said and explained in details how the railage charges were settled as much as how the container deposit was accounted for. That evidence was never challenged in cross examination. The trial court was thus mistaken for asserting that the defendant failed to disprove the plaintiff evidence."

21. Moreover, it was the appellant that pleaded in its plaint that the respondent was indebted to it for railage services offered and refundable container deposit in the amount of Kes.4,168,853.70. as at 31st December 2003. As already indicated, beyond admitting that the appellant provided railage to it, the respondent denied the appellant's claim and maintained that the claim was exaggerated and not

supported by any accounts and documentation. The burden of proof lay with the appellant to prove its claim. Section 107 of the *Evidence Act*, provides that:

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

22. As explained by this Court in *Mbuthia Macharia v Annah Mutua Ndwiga & another, Civil Appeal No. 297 of 2015 [2017]* eKLR, under Section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability and it is for that party to show that the facts which he alleges his case depends on exist. The Court in that case expressed:

> "This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
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> "The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
>
> 14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."(Emphasis added)
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> (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence"

23. In the present case, the evidentiary burden did not shift to the respondent, the appellant not having provided evidentiary basis for the respondent to rebut. Consequently, we discern no error of law on the part of the learned Judge and uphold his decision in that regard.

24. There were arguments regarding the rate of interest the trial court had awarded to the appellant. Considering however that the judgment of the trial court was set aside by the

    High Court whose decision we have upheld, the question of interest is moot.

25. The upshot is that the appeal fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

.....

P. NYAMWEYA

JUDGE OF APPEAL

.....

G.V. ODUNGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR