IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J. MOHAMMED & KANTAI, JJ. A)

CIVIL APPEAL NO. 227 OF 2018

BETWEEN

VERT LIMITED.....APPELLANT

AND

DB SCHENKER LIMITED.....RESPONDENT

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Ngetich, J**) dated 30th April 2018 in HCCC No. 438 of 2015)*

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JUDGMENT OF THE COURT

Background

[1] This is an appeal from the decision of **Ngetich, J.** in the High Court at Nairobi filed by **DB Schenker Limited** (the respondent) against **Vert Limited** (the appellant).

[2] A brief background is that this appeal stems from a contract dated 9th June, 2011 between the appellant and the respondent. The appellant contracted the respondent to provide freight services for its fresh produce, including fresh fruits and vegetables, from Jomo Kenyatta International Airport in Nairobi, Kenya, to various destinations including London, United Kingdom. The relationship between the parties subsisted until 2015.

[3] On 14th September, 2015, the respondent filed **HCCC No. 438 of 2015**, the suit from which this appeal arises, against the appellant seeking the following prayers by way of a plaint dated 11th September, 2015:

a) **USD 74,286.46** as at 19th August, 2015 inclusive of interest of 2 % per month being the outstanding amount due and owing from the appellant to the respondent for services rendered;

b) Interest on the outstanding amount until payment in full; and

c) Costs of the suit.

[4] In response, the appellant filed a defence and counter-claim dated 9th October, 2015 which was subsequently amended on 30th May, 2017. In the amended defence and counter-claim, the appellant denied the respondent's claim. The appellant claimed that the respondent owed it **GBP 11,672 (USD 18,325.20)** for losses incurred following three successive offloads by British Airways in

May and June, 2012; that it had found numerous irregular and unilateral entries in the respondent's statement of accounts comprising billings for invoices already settled for alleged surcharges from the respective airline; and that following account reconciliation it was found that the respondent was indebted to the appellant prompting it to counterclaim

USD 1,780.60 plus interest thereon.

[5] Subsequently, on 15th June, 2017, the respondent filed a reply to defence and defence to counter-claim, (amended on 9th June, 2017) in which it denied the amended defence and counterclaim and averred that it had no duty to ensure that British Airways compensated the appellant for the alleged offloads.

[6] The learned Judge **(Ngetich, J.)** allowed the respondent's suit with costs and found that the appellant had not been double billed; and that the respondent is entitled to the amount claimed in the plaint. The learned Judge dismissed the appellant's counter-claim with costs to the respondent.

[7] Consequently, the learned Judge granted the following orders:-

> ***"1. The Defendant's counter-claim is dismissed with cost (sic) to the Plaintiff.***
>
> ***2. Judgment is hereby entered for the Plaintiff against the Defendant for USD 74,286.46.***
>
> ***3. Costs to be paid to the Plaintiff.***
>
> ***4. Interest on No.2 above at Court's rate from the time of filing this suit."***

[8] Aggrieved, the appellant brought this appeal on the grounds *inter alia* that the learned Judge erred in the following respects: failing to properly identify, synthesize and analyze the issues for determination; deciding the case on the basis of non-existent evidence of a Block Space Agreement entered into by the respondent; failing to consider that the appellant, being the Principal did not instruct the respondent, being the agent to enter into any Block Space Agreement(s), if at all any such an agreement existed; and failing to give premium to the place of an Airway Bill as a primary document in ascertaining any amounts due from an exporter such as the appellant.

[9] Further, that the learned Judge erred in finding that the appellant's counterclaim lay against the British Airline directly thereby failing to appreciate the role of the respondent and the privity of contract between the respondent and the Airline on the one hand and the privity of contract between the respondent and the appellant on the other; invoking and applying a *force majeure* clause which was not applicable, pleaded and/ or submitted on by either party thereby arriving at a wrong finding; failing to consider that the goods in respect of the counterclaim were never lifted but only loaded and offloaded meaning that the appellant's role as the agent was yet to come to an end; and relying on the respondent's allegation that it lodged a claim on behalf of the appellant against British Airline, despite there being no evidence in support of the allegation.

[10] The appellant prayed that the appeal be allowed; that the impugned judgment be set aside and be substituted with an order dismissing the respondent's claim with costs; and allowing the appellant's counter-claim as prayed.

Submissions by Counsel

[11] When the appeal came before us for hearing, learned counsel **Mr. Koech** and **Mr. Onsare** represented the appellant and the respondent respectively.

[12] Mr. Koech relied on the appellant's written submissions and bundle of authorities. He contended that the learned Judge made her decision based on the existence of a Block Space Agreement (BSA), between the respondent and the airline yet no BSA was produced by the respondent; that the learned Judge failed to give premium to the place of an air waybill as a primary document in ascertaining any amounts due from an exporter such as the appellant; that the learned Judge misdirected herself by erroneously invoking and applying force majeure clause which was not applicable and/or submitted upon by either parties thereby arriving at a wrong finding; and that by arriving at the decision to apply an inapplicable clause that was never pleaded, the learned Judge greatly prejudiced the appellant and drove her entirely from the judgment seat.

[13] Counsel further submitted that the learned Judge erred in finding that all the invoices in the respondent's list and bundle of documents were supplementary invoices despite the appellant tendering evidence to the contrary; that many of the invoices tendered were exact invoices and not supplementary invoices; that accordingly, the subsequent invoices were double invoices; that the respondent has never, at any point notified the appellant of the intention to raise supplementary invoices and the justification for the respondent raising the supplementary invoices; and that there was no evidence of a claim made by the respondent to British Airways to justify dismissal of the appellant's counterclaim. Counsel urged us to allow the appeal with costs.

[14] On his part, **Mr. Onsare** relied on the respondent's written submissions and bundle of authorities. Counsel contended that the learned Judge considered the evidence that was adduced by the parties and enumerated the issues for

determination; that the respondent's entire claim in the High Court was premised on the supplementary invoices which the appellant failed to settle whereas the appellant's counter-claim was premised on compensation for the shipment which was offloaded from British Airlines; and that in their Amended Defence, the appellant argued that the supplementary invoices had been settled and that the respondent had therefore double billed them. Counsel contended that the learned Judge articulated and determined all the issues in dispute.

[15] Counsel further submitted that the learned Judge did not err in basing her decision on a BSA; that the BSA's existence was proved by way of the testimony of the appellant's and respondent's witnesses; that there was ample evidence on record including email correspondences between the parties proving the existence of the BSA; that the main point of the agreement was the tonnage of produce per day; and that the appellant had contracted the respondent to book a minimum capacity of 3,000 Kg.

[16] It was counsel's further submission that there was an implied contract based on the conduct of the parties; that the respondent acted as an agent for the appellant by engaging the airline for purposes of reserving capacity for the appellant's produce; that the appellant contacted the respondent to ship produce on five (5) days of the week; and that in fulfillment of its obligations, the respondent had to block space with an airline to guarantee the appellant space on those particular days,

[17] Counsel further submitted that on some occasions, the appellant booked capacity but exported less; that the airline had the discretion to charge for the weight delivered or the weight booked; that the respondent was in instances where the airline charged for weight booked, forced to raise supplementary invoices with the appellant; and that supplementary invoices were issued only where there had been an overpayment or underpayment on an invoice for purposes of reconciliation.

[18] It was counsel's further submission that the learned Judge relied on the *force majeure* clause to refute the issue of the goods that were offloaded without compensation; and that the learned Judge found that the issue of compensation lay against British Airways and not on the respondent; that the respondent acts as an agent between the appellant and the airline; that the respondent's ordinary cause of business during the agency relationship terminates at the point where the goods are delivered to the airline and lifted; that the learned Judge did not therefore err in finding that the claim sought lay against the airline and not the respondent; that the respondent lodged a claim with British Airways on behalf of the appellant; and that the *force majeure* clause forms part of the contract and can be relied on as the terms of the contract are binding on the parties. Counsel urged us to dismiss the appeal with costs.

Determination

[19] We have considered the grounds of appeal, the submissions, the authorities cited and the law. This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowances for the fact that we have not seen or heard the witnesses. (See ***Selle vs. Associated Motor Boat Company Ltd [1968] EA 123, 126 paras H-1, Kenya Ports Authority V Kuston (Kenya) Ltd, [2009] 2EA 212 and P K Kenya Ltd V Oppong, [2009] KLR 442).***

[20] We have carefully evaluated the entire evidence on record. The point of dispute is whether the appellant was liable to pay the respondent USD 74,286.46 on account of services rendered. In this respect, the appellant's main contention was that there was no evidence of a BSA entered into between the parties.

[21] In this respect, the appellant's main contention was that there was no evidence of a BSA entered into between the parties and that it did not instruct the respondent to enter into a BSA. The respondent explained during the trial that the supplementary invoices were for charges it had incurred for cargo space which was unutilized as the appellant failed to avail the requisite quantity of goods. It was upon the respondent, in proof of its claim, to establish the specific transactions giving rise to its claim and that it actually booked air cargo space and paid for unutilized space.

[22] From the evidence on record, the respondent demonstrated that through a **'Hardblock Capacity Agreement'** dated 9th June, 2011, the appellant had contracted it to book a minimum capacity of 3,000kg and maximum capacity of 3,200kg until 31st September, 2011.

[23] Additionally, the respondent produced email correspondence evidencing that the appellant's employee, a **Ms Purity Mathenge** requested for BSA rate on 13th, 14th and 20th February, 2013. It is on record that on 23rd February, 2013, the appellant's director, **Ms Jane Maina (Ms Maina)**, through email sought cancellation of the BSA contract on EK with immediate effect. The respondent further contended that an email dated 17th October, 2011 sent by **Jacob Bwana** on behalf of the respondent to **Ms Maina,** of the appellant titled ***"BSA Re-adjustment"*** was evidence of the existence of BSA.

[24] The respondent called one witness, **Fred Gitonga (Mr. Gitonga)**, the Head of Airfreight who testified that the respondent would enter

into BSA's with the appellant; that in instances where the appellant would not avail the agreed weight of produce, the respondent would request the respective airline to allow them to ship what had been availed and that the airline could accept or reject their request; and that the respondent had remitted amounts for booked space which was unutilized when billed by the airline through the Cargo Accounts Settlements Systems (CASS system).

[25] From the record, the testimony of the respondent's witness, **Mr. Gitonga** and that of the appellant's witness, **Ms Ndegwa,** corroborated the existence of a BSA between the parties. It is notable that in **Ms Ndegwa's** testimony at the trial court, she did not dispute the BSA and stated as follows:

> ***"…Every Thursday we would give them projection of the shipment. They would book from the next week. On the morning of the date of shipment, we confirm the reality. We would also Block Space Agreement…BSA was based on seasonal pricing and availability of space."***

[26] Evidence of the existence of the BSA between the parties was proved by the production of *inter alia*, email communication dated 20th February, 2013 from an employee of the appellant, **Ms Purity Mathenge (Ms Mathenge)** to the respondent requesting for a BSA rate of 1200kg. Further, **Ms Mathenge** sent an email dated 13th February, 2013 to the appellant requesting for a BSA rated for actual kilograms delivered on the day in issue. **Ms Mathenge** further requested for a BSA rate for 1000Kg vide an email dated 14th February, 2013 to the respondent.

[27] It is further on record, that **Ms Ndegwa**, a Director of the appellant company vide an email dated 23rd February, 2013 to the respondent sought to cancel the BSA Contract on EK with immediate effect. Further, vide an email dated 17th October, 2011 which was sent by one **Jacob Bwana**, (the respondent's Product Manager – Airfreight) and responded to by **Ms Maina.** The subject of the said email reads "BSA Re-adjustment". The respondent contends that the reference of the email breathes life to the existence of a BSA and proves the existence.

[28] We find that the BSA was produced in evidence and that both parties acknowledged its existence. The learned Judge did not therefor err in finding that there was in existence a BSA between the parties.

[29] It was the appellant's contention that the agreement between the parties expired on 31st September, 2011, and that the impugned supplementary invoices were raised long after the said expiry date. It was not however disputed that the parties continued to engage long after the alleged expiry date. For this reason, the respondent contended that there existed an implied contract between the parties based on the conduct of the parties. The respondent relied on this Court's decision in ***Ali Mohamed v Kenya Shell & Company Limited [2017] eKLR,*** which relied on Bingham LJ in

> The Aramis [1989] 1 Lloyd's Rep 213:
>
> ***"As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case- and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between the parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."*** *[Emphasis supplied].*

[30] From the record, there were various emails exchanged between the parties in 2012 and 2013 indicating that they were still transacting business as per the contract.

[31] The appellant contended that the learned Judge erred by failing to give premium to the place of an air waybill as a primary document in ascertaining any amounts due from an exporter. The appellant disputed the validity of the supplementary invoices on grounds that it had already settled original invoices for the shipments. The appellant contended that the respondent did not produce air waybills to support the supplementary invoices, unlike the original invoices which tallied with the air waybills for the shipments.

[32] In response, the respondent's witness indicated that the block space agreements superseded the provisions of the air waybill. In their submissions, the respondent contended that the air waybill was purely an identification document that accompanies and enables the shipper to track the cargo; and that the air waybill did not factor in third party charges incurred such as handling agent charges for levying goods to the airline and bond fee which were reflected in the invoice.

[33] 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".

[34] ***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."

[35] As persuasion, **Ondeyo J.** in ***Ngunjiri v British Airways World Cargo [2003] eKLR, Civil Case No 60 of 2000*** found that the ***Warsaw Convention on International Carriage by Air*** is part of Kenyan law through the ***Carriage by Air Act, 1993***. The ***Carriage by Air Act No 2 of 1993***, provides that it is:-

"An Act of Parliament to give effect to the Convention concerning international carriage by air, known as, "the Warsaw Convention as amended by the Hague Protocol 1955" to enable the rules contained in that convention to be applied, with or without modifications, in other cases and, in particular, to non-international carriage by air, and for connected purposes."

[36] In light of the foregoing, it is clear that an air waybill is *prima facie* evidence of a contract of carriage by air.

[37] Having reconsidered and re-evaluated the evidence on record, we find that the respondent discharged its burden of proof in respect of its claim for ***USD 74,286.46*** against the appellant.

[38] In a civil claim, the burden of proof is on a balance of probabilities. ***Section 107 and 108 of the Evidence Act, Cap 80*** provides that:-

"107. (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.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

[39] In ***Palace Investments Limited v Geoffrey Kariuki Mwenda*** & ***another [2015] eKLR,*** this Court cited with approval the following statement by **Lord Denning J.**:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

[40] The second issue for our determination is whether the learned Judge erred in dismissing the appellant's counterclaim against the respondent for **USD 1,780.60** plus interest. The appellant's claim for **USD 18,235.20 (GBP 11,672)** was on the basis that the respondent failed to follow its instructions to make a claim against British Airways for losses it incurred for offloading of produce from British Airways flights between 31st May, 2012 and 2nd June, 2012.

[41] It is clear from the record that the appellant's goods worth **USD 18,235.20 (GBP 11,672)** were offloaded from **British Airways flight BA 064/01 June 2012.** From the email correspondence on record, on 1st June, 2012, the respondent's employee, **Gilbert Ngesa**, notified the appellant's director of the offloading of the goods.

[42] On 2nd June, 2012, the appellant's director, **Ms Maina** in response indicated that the goods could not be reloaded following a second

consecutive offload as the shelf life of the perishable goods had been compromised. She then instructed the respondent, as the appellant's representing agent, to lodge a claim with British Airways as the appellant's representing agent.

[43] The appellant's counterclaim was based on breach of duty by the respondent for failure to follow its instructions to claim against the airline. It was the respondent's contention that it had no control over any offloading that takes place before the goods arrive at their destination. It was the respondent's further contention that it lodged a claim with British Airways on behalf of the appellant but that the claim had not been settled by British Airways. The respondent produced an email from its employee to the appellant attaching the claim for the offloaded consignment.

[44] In absolving the respondent from liability to the appellant, the learned Judge observed in the impugned judgment that:-

> ***"On perusal of the contract between Plaintiff and Defendant I note that under Paragraph 7 as follows:-***
>
> ***"No party will be deemed to be in default or have any responsibility or liability whatsoever to any other party for any losses, delays failure to perform any obligation under this hard rock space resulting from events of force majeure."***
>
> (Emphasis supplied).

[45] It was the appellant's contention that the learned Judge erred in invoking the *force majeure* clause yet it was not pleaded or submitted on by the parties. Counsel for the respondent relied on this Court's decision in ***Kalpana H. Rawal v Judicial Service Commission & 3 Others [2016] eKLR*:**

> ***"The principles of law on unpleaded issues, as stated by the appellant, are correct and not in dispute. A court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court can validly determine the unpleaded issue."***

[46] We find that the learned Judge did not err in relying on the terms and conditions between the parties. The *force majeure* clause forms part of the contract between the parties which was the subject of the suit before the learned Judge and the subject of the instant appeal. Accordingly, the *force majeure* clause can be relied on as the terms of the contract are binding on the parties.

[47] The upshot is that we find that the appeal is devoid of merit and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR