IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, G.B.M. KARIUKI & MWILU, JJ.A.)

CIVIL APPEAL NO.3 OF 2008

BETWEEN

TADIS TRAVEL & TOURS LTD……..……...…..……. 1ST APPELLANT

ERITREAN AIRLINES LIMITED…….....…… 2ND APPELLANT

AND

ASTRAL AVIATION LIMITED…….…….....……. RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Azangalala, J.), dated 12th March, 2007

in

H.C.C.C. No.271 of 2004

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JUDGMENT OF THE COURT

[1] Tadis Travel & Tours Ltd and Eritrean Airlines Limited are the 1st and 2nd appellants respectively. They were the defendants in High Court Civil Suit No.271 of 2004 (Milimani) from which this appeal arises. The suit was filed by Astral Aviation Limited who is now the respondent in this appeal.

[2] As evident from an amended plaint dated 16th June, 2004 the respondent's claim against the appellants was for USD 125,178.86 plus general damages, costs of the suit and interest at court rates from 1st June, 2003 until payment in full.

[3] The appellants denied the respondent's claim contending that the respondent had no *locus standi* to lodge any claim against it as the appellants' liability, if any, was to the respondent's client and not to the respondent. By an amended defence and counterclaim, the appellants' counterclaimed from the respondent a sum of USD 295,087.60 as amount due to the appellants in respect of professional services

rendered, and or goods sold and delivered to the respondent, and or money had and received by the respondent for use by the appellants. Alternatively, the appellants claimed from the respondent a sum of USD 77,259.90 being the value of cheques that were countermanded by the respondent. In further alternative, the appellants claimed a sum of USD 75,000 being the value of air cargo space booked and confirmed by the respondent, but unutilized.

[4] The respondent filed a defence to the appellants' counterclaim in which it denied owing the appellants the sum of USD 295.087.60 or failing to utilize space valued at USD 75,000, but admitted withholding the sum of USD 77,259.90 as a set-off after the appellants breached the freight contract.

[5] In proof of its claim, the respondent called three witnesses. These were ***James Onyango Masese***, who was then the senior accountant of the company, ***Sanjeev Gadhia***, the commercial director of the company and ***Chief Inspector Wilson Bakari***, a CID officer in the Commercial and Crimes Unit. On their part, the appellants testified through ***Teweldenedhin Welde Slassie Gaebremedhin***, (Teweldenedhin) who was at the material time working with the 2nd appellant as the supervisor Cargo and rump services, and **Taddesech Yohannes,** (Taddesech) who was the managing director of the 1st appellant.

[6] In its judgment, the High Court (Azangalala, J. as he then was), dismissed the respondent's suit with costs and entered judgment for the appellants on the counterclaim for the sum of USD 77,259 together with interest at 12% per annum from 22nd March, 2005 until payment in full. Being dissatisfied by the dismissal of their claim for USD 220,087.60 the appellants lodged an appeal challenging that part of the judgment.

[7] The grounds of appeal raised by the appellants were that the learned judge erred in the following respects: concluding that the appellants' claim of USD 220,087.60 had not been proved beyond reasonable doubt when no proper defence was raised against the claim; failing to appreciate the meaning of a "a balance of probabilities"; not considering that the appellants' counterclaim was more probable than the respondent's defence; failing to enter judgment for the appellants for the amount supported by the evidence adduced; and treating the appellants' claim of USD 220,087.60 in an omnibus manner and as a single indivisible claim.

[8] During the hearing of the appeal, learned counsel Mr. Paul Mwangi appeared for the appellants, whilst learned counsel Mr. Gichuki Waigwa appeared for the respondent. Mr. Mwangi submitted that the learned judge erred in dismissing the appellants' claim for USD 220,087.60 as the appellants' claim was specifically pleaded in prayer (a) of the counterclaim in which the appellants sought judgment for USD 295,087.60; that this amount was in regard to the claim for USD 220,086,60 pleaded at paragraph 18 of the counterclaim, and USD 75,000 pleaded at paragraph 23 of the counterclaim; that appropriate evidence was adduced in proof of the appellants' claim through the testimony of defence witnesses Teweldenedhin and Taddesech that was supported by documentary evidence; and that this evidence was sufficient to discharge the required burden of proof. Counsel maintained that the evidence adduced confirmed that at the very least there was a sum of USD 199,564.81 that was due and owing from the respondent to the appellants, and this was the least that the court should have awarded. Counsel urged the court to re-evaluate the evidence and allow the appeal to the extent of setting aside the dismissal of the appellants' counterclaim in regard to the sum of USD 220,087.60.

[9] Relying on section 3(1) of the Evidence Act; **Re B (Children) FC [2008] UK HL 35** a decision of the House of Lords; and **F.H. v MacDougall [2008] 3.SCR.41 [2008] SCC 53** a decision of the Supreme Court of Canada, Mr. Mwangi submitted that had the learned judge properly weighed the evidence adduced she would have found that the appellants had proved their counterclaim on a balance of probability and thus discharged the burden of proof. Finally, counsel relied on **Wallersteiner v. Moir *(No.2) [1975] 1 All ER 849*** in urging the court to find that the interest awarded should have been compounded.

[10] Mr. Gichuki, counsel for the respondent urged the Court to confirm the decision of the High Court maintaining that the learned judge did not err in dismissing the appellant's claim for USD 220,087.60; that the figure of USD 220,087.60 was not particularized nor did the evidence show that any money was

received by the respondent, as all the Air Waybills that were produced in evidence were prepaid; that the figure of USD 290,969.49, was not related to the claim for USD 220,087.60. Mr. Gichuki therefore urged the Court to dismiss the appeal.

[11] The respondent has not filed any appeal or cross-appeal against the judgment of the High Court, and therefore this Court cannot revisit issues pertaining to the dismissal of the respondent's claim. That is to say that this appeal is only concerned with the judgment of the High Court in regard to the partial dismissal of the appellants' counterclaim. The substance of the appellants' counterclaim is to be found in paragraphs 17, 18, 20 and 21 of the counterclaim. In order to appreciate the appellants' counterclaim, we set out these salient paragraphs:

"17. The defendant reiterates the contents of defence hereinabove and by way of counterclaim states that (sic) all material times or during the currency of the Business relationships with the plaintiff, the plaintiff as an agent of the defendants used to receive various payments from various client (sic) on the (sic) behalf of the defendant which amount the plaintiff was bound to remit to the defendant upon receipt of the same.

18. The defendants state that on various dates during the currency of their relationship, the plaintiff received various sum totally of (sic) USD 220,087.60 from various clients which amount the plaintiff has failed to pay to the defendants despite demand being made.

19. Further the defendants states (sic) that on various date (sic) to wit: 6th June, 2003, 13th June, 2003, 16th June, 2003 and 18th June, 2003, the plaintiff issued the following cheques to the 1st defendant. …

Which cheques upon presentation to their banker were all returned with a remark "payment stopped by the Drawer".

20. The defendant further states that on various dates the plaintiff booked and confirmed various air cargo space which were unutilized after the plaintiff failed to make a representation. The total costs of the booked air cargo space which were unutilized is USD 75,000 which the defendants claims (sic) from the plaintiff.

21. From the foregoing, the defendants jointly and severally claims (sic) against the plaintiff a total sum of USD 295,087.60 being the amount due and owing to the defendants by the plaintiff in respect of professional services rendered, and/or good (sic) sold and delivered, and/or money had and received by the plaintiff for use by the defendants particulars whereof are well within the plaintiff's knowledge.

22. Alternatively the defendants jointly and severally claim against the plaintiff for the sum of USD 77,259.90 being the value of the cheque (sic) as pleaded in paragraph 19 hereof which were countermanded upon presentation."

[12] Simply put the above pleadings show that the appellants had two main claims. That is, a claim for USD 220,087.60 as payment received by the respondent from various clients for and on behalf of the appellants; and a claim for USD 75, 000 on account of costs incurred by the appellants for unutilized air cargo space booked by the respondent. The judgment prayed for was for the total sum of the two claims i.e. USD 295,087.60.

[13] In his judgment the learned judge found the two claims not proved but gave judgment for the alternative claim of USD 77,259.90 based on the dishonoured cheques. The learned judge stated in part as follows:

"I now turn to the counterclaim made to the defendant against the plaintiff. The defendant primarily prayed for USD 295,087.60 together with interest thereon at 30% per annum until payment in full. The foundation of the claim was pleaded in paragraph 18, 19 and 20 of the Amended Defence and Counterclaim. In paragraph 18, the defendants averred that on various dates during the currency of their relationship with the plaintiff the plaintiff received USD 220,087.60 from various clients which

amount the plaintiff failed to pay the defendant. …

…According to DW2, the total sum due to the 2nd defendant was USD 215,707.35. It is evident that there was no agreement even as between the defendant's witness on the amount due to the defendants from the plaintiff.

The discrepancies in the figures allegedly received by the plaintiff for and on behalf of the defendants and taking into account the fact that there seems not to have been any agreement on the rates applicable for the defendants' services, I find and hold that the claim for USD 220,087.60 alleged to have been received by the plaintiff from various clients was not proved on a balance of probabilities. In any event the same was not specifically pleaded as by law required.

With regard to the claim for USD 75,000 being costs of booked air cargo space which was not utilized, I am afraid that claim was not particularized and sufficient evidence was not adduced to establish the same. Matters were not helped when there was no agreement of the rates applied…."

[14] The main issue in this appeal is whether the appellant met the threshold of proving its claim on a balance of probability, by establishing that the respondent received the sum of USD 220,087.60 from clients for and on behalf of the appellant; and secondly, whether that the appellant incurred USD 75,000 for cargo space which the respondent had booked, but which was unutilized.

[15] It is trite law that in civil claims the burden of proof lies upon the party who asserts. This principle is codified in Sections 107 and 108 of the Evidence Act Cap 80 that state as follows:–

"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."

[16] Further from section 3(2) of the Evidence Act, it is clear that a fact is proved as follows:

"A fact is proved when, after considering the matter before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in circumstances of a particular case, to act upon the supposition that it exists."

[17] In ***Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR*** this Court applying the above principles quoted with approval Lord Dening in ***Miller v Minister of Pensions [1947] 2 All ER 372*** where Lord Dening in discussing the

burden of proof states: -

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. 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."

[18] Of relevance to this appeal is the general rule that the standard of proof required in civil claims is proof on a balance of probabilities or preponderance of probability. This means that the claimant must adduce evidence that leads the court to a conclusion that it is more probable than not, that the facts

happened as alleged by the claimant. Where there are two versions and there is a probability of both versions being true, or both being untrue then the burden of proof is not discharged.

[19] In an action anchored on a contractual relationship the burden of proving the existence of a contract, performance of conditions precedent, breach and damages, lies with the claimant, while the defendant has the onus of proving the facts pleaded in confession and avoidance, such as infancy, release, rescission, accord and satisfaction or fraud. (See ***Phipson on Evidence 6-08***).

[20] We note that although there was no formal contract between the appellant and the respondent, it was not disputed that the parties were engaged in a business relationship that involved the respondent sourcing clients who needed freight services, 1st appellant securing cargo space and 2nd appellant freighting, or arranging for the freighting of the goods. It is evident that the arrangement was such that that the clients paid the respondent who in turn paid the appellants for the services. Therefore in proof of their counterclaim, it was incumbent upon the appellants not only to establish the specific transactions giving rise to the monies claimed as received by the respondent for and on behalf of the appellants, but also establish that the specific amount received by the respondent was USD 220,087, and further establish that the respondent actually booked for air cargo space for which the 1st appellant paid USD 75,000 but that the space was unutilized.

[21] The evidence that was adduced by the appellants' witnesses Teweldenedhin and Taddesech was anchored on Air Waybills that were produced to confirm that the 1st appellant secured cargo space, and that 2nd appellant did freight or arrange for freighting of goods for clients sourced by the respondent. This fact was not in doubt. What required proof was that there was payment due and outstanding in regard to those Air Waybills. Teweldenedhin did not explain how the appellant's claim arose and what it was exactly claiming from each of the respondents.

[22] In his evidence Taddesech identified 6 Air Waybills in respect to which, according to him, a total amount of USD 60,821.4 was outstanding. These were Air Waybills numbers 593, 604, 630, 641, 615, and 722. A closer examination of these Air Waybills that were produced in evidence reveals that all have an endorsement "Charges prepaid." This contradicts the evidence of Taddesech as it implies that all the charges had been paid in advance. The attempt made by the witness to rely on handwritten alterations made on the Air Waybills was not of much help as the alterations were not countersigned and it is not clear at what point they were made and on whose authority. Further the witness made reference to Air Waybill Fee and Document handling charges as if they were separate or additional charges, but gave no explanation as to why these basic charges were not included in the charges indicated in the Air Waybills.

[23] We note that all the other Air waybills that were produced in evidence either bore the endorsement "charges prepaid" or 'freight prepaid'. The later endorsement implies that all the freight charges had been paid. Thus it was for the appellant to demonstrate that there were charges other than freight charges that had not been paid for and in respect to which the respondent had received money from the clients for and on behalf of the appellants.

[24] In his initial evidence in chief Taddesech referred to 35 Air Waybills. His evidence in part was as follows:

"Eritrean Airlines Ltd. started operations in Kenya on 23/4/2003.

The plaintiff approached us to carry cargo to different destinations. These are Air Waybills between us and the plaintiff. The rates used were different for each Bill. There were 35 Air Waybills on 23.4.2003. ……For each airway bill 15 dollars was charged for documentation. Sum paid is USD145160.55. Balance due is 220098.00 USD".

[25] Later in his evidence Taddesech states as follows:

"I have also summarized the account between W. S. Fish and Astral Aviation with the above

documents. The plaintiff was paid USD 290969.49. I produce the summary as D. Ex.60. I have also done a statement between the plaintiff and Eritrean Airlines. The total transactions is USD 353,342.24. They paid USD 145,170.20. Stopped cheques were for USD 77259.40. Total to Eritrean Airline is USD 215707.35"

[26] It is difficult to understand how the witness arrived at USD 215,707.35 because if the transactions were for USD 353,342.24 and USD 145,170.20 was paid the balance would be USD 208,172.04. Be that as it may, under cross examination, the witness insisted that the amount claimed of USD 215,707 was different from the counterclaim of USD 295,087 and that the difference was for lost business when booking was made but not utilized. Again if the amount claimed was USD 215,707 and the business lost from unutilized booking was USD 75,000 the total amount claimed would be USD 290,707.35, which is still different from what the appellant claimed in the counterclaim.

[27] The situation was further compounded by the submissions made before us by the appellant's counsel who submitted that the amount that remained unpaid is USD 199,574.81 and that judgment should be given for at least this amount.

[28] In his judgment the learned judge noting the discrepancies in figures stated as follows:

"The discrepancies in the figures allegedly received by the plaintiff for and on behalf of the defendants and taking into account the fact that there seems not to have been any agreement on the rates applicable for the defendants' services, I find and hold that the claim for USD 220,087.60 alleged to have been received by the plaintiff from various clients was not proved on a balance of probabilities. In any event the same was not specifically pleaded as by Law required."

[29] On our part in accordance with our obligation as a first appellate court, we have reconsidered and evaluated the evidence that was adduced before the learned Judge bearing in mind that we have not had the advantage of seeing the witnesses testify (see ***Selle v Associated Motor Boat Co. Ltd. [1968] EA 123***). As evident from the foregoing we have come to the conclusion that the learned judge cannot be faulted for finding that the appellant's main counter claim was not specifically proved. The evidence was contradictory and did not reveal whether the respondent owed the appellants any money, nor did the evidence reveal how much was owed if at all. Moreover the fact that the respondent issued cheques in favour of the appellants, and that the respondents subsequently countermanded these cheques supports the respondent's contention that the payments in regard to the Air Waybills were prepaid and this was why the respondents countermanded the cheques when a disagreement arose.

[30] As regards the issue of interest, this was not included in the 5 grounds of appeal raised by the appellants. Moreover, although in the counterclaim the appellants sought interest on the judgment sum at the rate of 30% per annum, no evidence was adduced to justify this rate of interest. In any case, award of interest is a matter of discretion and there is nothing before us to show that in awarding the interest at court rates the learned Judge exercised his discretion wrongly, capriciously or injudiciously, such as to justify our intervention.

[31] We find that the appellants failed to discharge the burden of proof with regard to the main counterclaim. The learned judge rightly gave judgment in favour of the appellants in regard to the alternative counterclaim for USD 77,259.90, as there was ample evidence in support of the same. In any case the respondent has not lodged any cross appeal against that part of the judgment.

In conclusion there is no substance in this appeal. It is accordingly dismissed with costs

Dated and Delivered at Nairobi this 25th day of September, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

……..…

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR