



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal 106 of 2006

GREAT LAKES TRANSPORT CO. (U) LTDAPPELLANT

AND

KENYA REVENUE AUTHORITYRESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at

Mombasa (Maraga, J.) dated 10th March, 2006

in

H.C.C.C. NO. 46 OF 2003)

JUDGMENT OF THE COURT

The record before us shows that the appellant ***Great Lakes Transport Co. (U) Ltd*** was as on 22nd July 1998 and prior thereto, the registered owner of Motor vehicle Registration No. KV 3028 and trailer No. HZ 5587G registered in Uganda but partly operating in Kenya pursuant to relevant permission given by the Kenya Government authorities. On or about 22nd July 1998, the respondent seized the motor vehicle and trailer allegedly pursuant to ***section 106*** of the Customs and Excise Act Cap 476 Laws of Kenya and refused to release them till an order of the court was issued by the Senior Resident Magistrate at Mombasa (B. Maloba) in a ruling dated and delivered on 18th October, 1999 in the Chief Magistrates Court Civil Case No. 4061 of 1999 filed by the appellant in which the release order was sought by way of Chamber Summons filed. That Civil Suit was, in H.C.C.C. Misc. Application No. 115 of 2003, transferred to the superior court as H.C. Civil Case No. 46 of 2003. On its transfer to the High Court the plaint hitherto filed in the subordinate court was amended and the amended plaint dated 11th March 2003 was filed on 12th March 2003. It sought judgment against the respondent for:-

“(a) A mandatory injunction to have the said motor vehicle registration number KV 3028D/HZ 5587C be released to the plaintiff.

(b) Payment of loss of income and special damages as prayed in No.7 above.

(c) Costs of this suit.”

Paragraph 7 of the amended plaint stated as follows:-

“(a) The motor vehicle was detained by the defendant’s agents and/or servants from July, 1998 to October, 1998 when the same was released back to the plaintiff i.e. a period of 15 months loss of use at US\$9,000 per week working out to US\$9,000 x 4 x 15 = US \$540,000.

(b) The plaintiff said truck and trailer were released back to him by the defendant with unroadworthy tyres and the plaintiff had to replace them with some new tyres and tubes at Kshs.910,000/=.”

We must add at this juncture that at paragraph 8 of the plaint, the appellant pleaded as follows:-

“8. The plaintiff further claims from the defendant general damages for loss of business for unlawful seizure and detention of motor vehicle registration number KV 3028D and trailer registration number HZ 558C.”

Although this plea for general damages was made in the body of the plaint at paragraph 8, it was not prayed for in the final prayers. The respondent filed statement of defence in the subordinate court on 5th October 1999. That defence, likewise, was amended on the matter being transferred to the superior court. The respondent in its amended defence denied liability and denied the claim for damages as well.

In response to paragraph 8 of the plaint, the respondent’s position was contained in paragraph 8A of the amended defence and was:-

8A The defendant denies paragraph 8 of the amended plaint and puts the plaintiff strict proof (sic).”

After the close of the pleadings and the disposal of several applications in the subordinate court and in the superior court, the matter was set down for hearing before Sergon J., who heard the evidence of the two witnesses called by the appellant namely Hemed Ahmad Abdalah (PW1), the Manager of the appellant company at the relevant time who stated that the appellant was a transport company and its vehicle was used for transportation of various goods before it was seized. He gave evidence on the loss suffered by the appellant. The other witness was Mohamed Iddi Juma (PW2), the proprietor of Ndambatezi Freighters Ltd, which had an agreement with the appellant for transportation of cargo between Mombasa and Kampala – return. He also heard evidence of one defence witness Latif Ali Hassan (DW1) who produced as exhibit, a notice of seizure No.0828 of 22nd 1998 confirming that the subject vehicle was indeed seized by the respondent. He also gave evidence on what the appellant was required to do in the circumstances after its vehicle had been seized and which it failed to do. After hearing these witnesses, Sergon J went on transfer and the file landed on Maraga J for further hearing. The learned Judge, after again disposing of some preliminary issues, heard evidence of two defence witnesses. Simon Charo Kahindi (DW2) stated that on the instructions of the Operations Officer in charge Mr. Jeremiah Mbai, he took the ignition keys of the vehicle and issued a deposit receipt for the vehicle. In short, he seized the vehicle and trailer. At the time he did so, the vehicle was conveying other goods, which were released and were transported on another lorry to Tanzania. He admitted that although he seized the vehicle pursuant to instructions from his superior officer, he never served the appellant with a charge sheet and he

did not know if anybody was charged with any offence relating to the seizure of the vehicle. The other defence witness was Jeremiah Kiburi Mbai (DW3 – wrongly referred to as DW4). He was a Revenue Officer with the respondent. He instructed Kahindi to seize the vehicle after he received information that there was a lorry which was being sought by the Deputy Commissioner for Customs Southern Region for entering the country uncustomed and that vehicle was the subject vehicle.

After hearing the evidence of the last two witnesses, and after considering the evidence of the appellant's witnesses and one defence witness who gave evidence before Serгон J. and after considering the written submissions of the counsel for both parties, the learned Judge, (Maraga J.), in a reserved judgment delivered on 10th March 2006, stated concerning the issue of liability as follows:-

“There is nothing on record to show that the plaintiff produced any document or made any representation to the defendant, leave alone knowing such document or presentation to be false. If the seizure notice had been issued under paragraph (c) of the section the burden of proof would of course have been on the plaintiff to show that the vehicle had not been imported into the country and if it was duty had been paid. In the circumstances I find that the defendant illegally seized and held the plaintiff's vehicle.” (Underlining supplied)

Having made that definite finding that the respondent was liable to the appellant for illegally seizing the appellant's vehicle and illegally holding the vehicle, the learned Judge went ahead to consider the damages to be awarded to the appellant. We pose here and state that having perused and fully considered the pleadings, the exhibits, the evidence and submissions that were before the superior court, afresh, as we are duty bound to do this being a first appeal and having considered the law applicable in such circumstances, we have no doubt whatsoever that the learned Judge clearly reached a right decision on the issue of liability and we find no reason to disturb that finding noting as we do that in any case, there was no cross appeal preferred. We agree with the learned Judge of the superior court that on the facts that were before the court, the case on liability was proved as against the respondent within the standard of balance of probability and we too find the respondent Kenya Revenue Authority was liable to the appellant for illegally seizing and holding its vehicle from 22nd July 1998 to 18th October 1999 when it released the same to the appellant and only after it was served with a court order for the release of the vehicle.

Having made that finding on the first limb of the case namely liability, the learned Judge then proceeded to consider whether or not any damages could be awarded to the appellant. He considered in detail, the two sets of special damages pleaded and prayed for in the plaint. These were, as we have stated the loss pleaded at paragraph 7 of the amended plaint namely loss of user of the vehicle at USD 9,000 per week for 15 months = USD 540,000 and Ksh.910,000 being the cost of tyres and tubes that were rendered unroadworthy due to overstay of the vehicle at the respondent's yard. He also considered whether or not the appellant took any steps to mitigate its losses. After all that consideration, the learned Judge concluded on that aspect of the case as follows:-

“If the plaintiff had proved his claim for loss of user I would have awarded it damages for a period of only six months. However, as I have already found it has not proved either of its claims for special damages and as there is no claim for general damages, I dismiss this suit in its entirety with costs to the defendant.”

That finding is the genesis of this appeal. The appellant felt aggrieved by that decision and hence this appeal based on eight grounds which, in a brief summary are, that the learned Judge upon his finding that the respondent was liable to the appellant for illegal seizure and detention of appellant's vehicle erred in holding that the appellant was not entitled to any kind of compensation from the respondent; that the learned Judge erred in failing to apply the principle that there is no wrong without a remedy; that the trial court having found as a proven fact that the appellant had proved claim of loss of the aforesaid motor vehicle at 9,000 Dollars per week erred in law in eventually holding that no damage of any kind was payable to the appellant; that the trial court should have appreciated that the appellant needed to be

awarded damages to put it in the same position as it would have been had the wrong not occurred; that the constitution and public policy demanded that justice be done but that was not done in this case; that the learned Judge erred in considering the matters of handwriting when such matters were not in issue before him and further he erred in deciding the matters without any evidence on the same; that the standard of proof placed on the appellant by the trial court was not known to the law and was extremely heavy and that the learned Judge erred in law in failing to hold that the respondent was liable to fully compensate the appellant for the entire period the subject vehicle was detained.

In his submissions in urging the appeal, Mr. Gikandi, the learned counsel for the appellant concentrated his arguments on ground 5 and 6 of his memorandum of appeal. He complained that the learned Judge, in holding that there was no pleading for general damages did not consider the pleading at paragraph 8 of the amended plaint which we have reproduced hereinabove. While conceding that there was no specific prayer for general damages, he however submitted that as the claim had been pleaded in the body of the plaint, it was left to the court to decide upon and it could not be ignored by the superior court. He further submitted that the claim for payment made for tyres should not have been refused as there was an invoice produced in support of the same and that should not have been treated as proforma invoice. He then took issue with the way the superior court treated the agreement between the appellant company and another company for transporting goods and submitted that the court erred in referring to that agreement as tailor made for the case as that agreement was not challenged by the respondent and as such there was no basis for that finding by the court. In doing so, Mr. Gikandi contended, the court turned itself into a handwriting expert on matters that were not challenged even after discovery was done as regards the documents exhibited which gave rise to the claim. He concluded his address by saying the learned Judge erred in failing to comment on interest which the appellant had claimed and in failing to frame issues which according to him led to the learned Judge dealing with issues not before him and hence erroneous conclusion which included ordering the appellant to pay costs to the respondent notwithstanding that it was the respondent which had wronged the appellant and which was liable to the appellant for illegally seizing and holding the subject vehicle. Mr. Ontweka, the learned counsel for the respondent was of a different view as one would expect. He submitted that as general damages were pleaded but not prayed for, the same could not in law be awarded. As to the documents relied on by the appellant in its case in the superior court, these were, in Mr. Ontweka's submissions, rightly rejected as there was no receipt to prove payment for tyres and the court could not rely on a mere invoice to prove special damage. Further the appellant failed to call the owner of the shop from where the tyres were allegedly bought to verify the same. There was thus no proof that the appellant actually paid for the alleged new tyres and the evidence of defence witness that no tyres were actually bought from the alleged dealer was rightly relied on by the learned Judge of the superior court. He argued that the claim of USD 54000 was rightly rejected as it had no basis. In conclusion, Mr. Ontweka submitted, with reference to the affidavit filed in the subordinate court and an agreement between Jimmy Munyao Mauta and another dated 3rd October 1997, that the appellant indeed did not mitigate its losses and delayed in taking necessary action to claim the subject vehicle.

As is clear from the judgment of the superior court part of which we have reproduced above, this is a rare case in which the superior court, having found that the respondent was liable to the appellant for illegal seizure and detention of the appellant's vehicle for 15 months, nonetheless did not award the appellant anything and, as if that was not enough, went ahead to order the offended appellant to pay costs of the suit.

The learned Judge did that on grounds, according to him, that the only two claims pleaded which were for special damages to wit a claim for loss of use of the motor vehicle pleaded at paragraph 7 (a) of the amended plaint and claimed at USD 9,000 per week for 15 months totaling to USD 540,000 and claim for refund of Ksh.910,000 used for buying tyres to replace the tyres that had become unroadworthy as a result of the length of detention time, were not proved to the court's satisfaction. He rejected some of the vital exhibits produced in support of those claims and found that general damages could not be awarded since they were not pleaded.

This is a first and last appeal. As we have stated above, in law we are required to revisit the case that was before the superior court afresh, analyse it, evaluate it and come to our own independent conclusion

but always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses and giving allowance for that – see case of ***Selle & Another vs. Associated Motor Boat Co. Ltd [1968] EA 123***. We have, on our own, considered the entire case and the law. As we have stated above, we agree with the learned Judge of the superior court on his finding on liability.

There is no appeal on the issue of liability and that is no longer our problem in this judgment. The issue before us is whether or not damages, special or general, should have been awarded to the offended appellant. In law, this Court will not disturb an award of damages by the superior court unless it is demonstrated that the learned Judge of the superior court proceeded on wrong principles or that he misapprehended the evidence in some material aspects thereby arriving at a figure inordinately high or low such as to represent an entirely erroneous estimate. In the case of ***Jivanji v. Sanyo Electrical Company Ltd (2003) KLR 425***, it was held by this Court inter alia,

“5. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate.

6. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect thereby arriving at a figure inordinately high or low.”

In short, before we interfere with the learned Judge’s refusal to award any

damages both special and general, we must be satisfied that he proceeded on wrong principles or that he misapprehended the evidence and in this case pleadings in some material respect and thereby arrived at an erroneous conclusion.

Having done so, we have no hesitation in finding that his rejection of the claim for Kshs. 910,000 in respect of cost of tyres to replace the allegedly unroadworthy tyres was sound in law. Although the claim was pleaded at paragraph 7 (b) of the amended plaint and prayed for in the prayers, the proof advanced in respect of it did not meet the required standard. There was no receipt produced to show that actual cash was paid, or any payment made for the alleged purchase of tyres. A mere invoice as the one produced in evidence was incapable of proving purchase. The claim could have been proved very easily by producing either a receipt from M/s General Tyre Sales Limited which was alleged to have supplied the alleged tyres or a witness from that company to confirm that indeed money changed hands when the alleged new tyres were acquired by and delivered to the appellant. Whereas we do not agree with the learned Judge in admitting and relying on the evidence of DW1 to the effect that the witness visited that company and was informed that the tyres were never bought, as such evidence is clearly inadmissible being hearsay evidence, nonetheless, there was no evidence that the appellant bought new tyres for the subject vehicle. Mr. Gikandi has endeavoured to show that an ***“invoice”*** is different from a ***“proforma invoice”*** and has made efforts to persuade us that an invoice should be treated as a ***“receipt”***. With respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word ***“PAID”*** on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of the goods wanted would be i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for support of goods has been made but payment is not yet made. In either case, neither of the two documents amounts to a receipt. We cannot fault the learned Judge in his rejection of that claim.

That brings us to the claim for loss of user. The learned Judge of the superior court accepted, upon

perusal of exhibits 5, 6 and 7 and evidence of PW1 that the appellant earned USD 9,000 per week under a contract to transport salt for New Sukisa Port B.P. 520 from Kampala in Uganda to Changugu in Rwanda and timber on return journeys. He however, rejected the claim on grounds that the contract ended on 29th May 1998, about two months before the vehicle was seized and was thus irrelevant to the matter that was before the court. As to the agreement in exhibit 8 which was dated 30th May 1998, for the transport of 45 tonnes of general cargo from Mombasa to Kampala return, the learned Judge rejected that claim on two grounds: firstly, that the agreement appeared to him to have been tailor-made for the case and that the rubber stamps of the contracting parties were made by the same person; in short they were forged. Secondly, that the agreement stated that the transportation was to commence on 19th June 1998 and there was no evidence that it did commence on that date and that in any event when the vehicle was seized, it was loaded with somebody else's goods destined for Moshi in Tanzania and so it was not on the relevant contract. For those reasons, the claim for USD 540,000 was rejected. We have, on our own, perused and considered the exhibits 5, 6, 7 and 8, together with the evidence on record. On the agreement in respect of transport of goods from Kampala in Uganda to Changugu in Rwanda, we are of the view that the learned Judge was plainly right in rejecting the claim based on it. The agreement, exhibit 5, stated at the last paragraph that the contract was to be effective from 1st April 1998. Hemed Ahmad Abdala (PW1) in his evidence in chief stated concerning that agreement as follows:-

“We did that work for about 2 months.”

That in effect meant that the work in respect of that agreement ended about June 1998 well before the subject vehicle was seized and detained. The bank statement produced in evidence shows it was completed on 29th May 1998 and that would appear to reflect the correct situation.

However, as to the agreement dated 30th May 1998 – exhibit 8, we find it difficult to appreciate the grounds for its rejection by the learned Judge. It appeared to him to have been tailor made for the case and he was not comfortable with the rubber stamps on it. In fact, he felt it was a forged document. As Mr. Gikandi rightly pointed out the document was among the plaintiff's list of documents filed on 23rd March 2005 long before the hearing of the suit commenced. It was listed as No. 3. Discoveries were done and that was why that list was filed. The respondent also filed its list of documents. There was no objection from the respondent that the document was tailor-made for the case or that its rubber stamps were forged. At the hearing PW8 produced it as an exhibit without any objection from the respondent and indeed the record shows that the witness was not cross examined on the agreement. The agreement was not challenged on the ground that it was tailor-made for the case nor on the ground that the rubber stamps for both parties appeared to have been made by one person. Mohamed Iddi Juma (PW2) gave evidence on the document and he was not challenged on the authenticity of the agreement. Thus, as to the agreement, both PW1 and PW2 who made it gave evidence and were not cross examined on the issue raised by the learned Judge in his judgment as a ground for rejecting it. We find no basis for the learned Judge introducing that extraneous aspect into his judgment and using the same to reject the agreement, exhibit 8. It is now settled law that, it is dangerous for a Court to canvass its own matters in its judgment and to rely on evidence not canvassed before it by the parties. His second ground for rejecting the agreement was that the transportation as per agreement was to commence on 19th June 1998, but there was no evidence it did. In our view, the respondent never stated in evidence that the agreement was stillborn. All that PW2 said was that he had business but the same did not take place because of the seizure of the vehicle.

The other ground relied on by the learned Judge in rejecting the agreement is that at the time the vehicle was seized it was loaded with goods belonging to another person. That, in our view is neither here nor there as it was upon the appellant to arrange and manage its work schedule and so long as he carried out his agreement it could not be stopped from doing other jobs. We see no proper grounds adduced by the learned Judge in his judgment for rejecting the agreement. However, that is not the end of it all. On our own perusal of the agreement – exhibit 8, we note that its commencement date was 19th June 1998. It stated at clause 1 as follows:-

“1. That the carrier not being a Commission Agent shall transport the goods described on the above consignment note from the place of loading Mombasa to the final destination Kampala at the agreed transport charges and shall deliver the said goods in good order and condition within seven days. Return trip (Mombasa- Kampala – Mombasa.)”

That in effect means this contract could only be effective up to 26th June 1998. The vehicle was seized on 22nd July 1998 well after the time the contract should have been performed. That was the only ground upon which this agreement could be held ineffective.

The upshot of all the above is that the appellant did not strictly prove special damages as relates to the prayers set out in the plaint. But, in our view that could not be end of the matter. The learned Judge, having found that the special damages were not proved, dismissed the case *“as there was no claim for general damages.”* This Court has, in several decisions made it clear that a court has no power to grant a relief a party has not specifically prayed for – see the case of ***Malindi Air Services and another vs. Halima A. Hassan, Civil Appeal No. 69 of 2000.*** However, in this case the position is to an extent different. General damages was pleaded at paragraph 8 of the amended plaint and specifically denied at paragraph 8A of the amended defence as we have indicated above. It was unfortunately not made one of the prayers, but clearly the appellant in raising evidence on its losses which were special damages was sending in effect one main message which was not disputed at any stage, that his vehicle was in active business. Indeed even at the time it was seized, it was carrying goods for transport to Tanzania. Simon Charo Kahindi (DW2) in his evidence in cross examination stated:-

“I agree that the owner must have suffered loss.”

It is not in doubt, in our view that the issue of general damages which was pleaded and denied, although not prayed for was a matter before the court and the court had to deal with it. Both agreements produced, together with evidence that the vehicle was in business even at the time it was seized, were all matters that demonstrated what Kahindi appreciated in his evidence that the owner did suffer loss for the fifteen months its vehicle was detained. One cannot deny that aspect. Unfortunately, the learned Judge of the superior court, in saying that no claim for damages was made did not at any stage direct his mind to the fact that this claim was pleaded though not prayed for. In our view, had he considered that it was pleaded and that there was evidence that the appellant had been deprived for its vehicle which was in active use for fifteen months., he would have considered the issue of general damages for it was a matter before him. In the case of ***Galaxy Paints Co. Ltd vs. Falcon Grounds Ltd (2000) 2 EA 385*** this Court stated:-

“It is trite law, and the provisions of Order X1V of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of Order XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court’s determination.”

In this case, as Mr. Gikandi rightly submitted, neither the parties nor the court framed issues before or after the trial. Nonetheless the issue as to claim for general damages was pleaded as stated above and the flow of evidence at the trial clearly established that that issue was left for determination. In the case of ***Odd Jobs vs. Muhia [1970] EA 476***, Law JA stated:-

“On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of the courts in India. In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision.”

In our view from the fact that general damages was pleaded in the body of the plaint and evidence led to

show that the appellant was actively using the subject vehicle it followed that it would suffer loss even if special damages were not properly proved.

Considering all the above and mindful of the legal position that the superior court ought to have considered that it was sitting both as a Court of law and a court of Equity, and noting that Equity would not allow a wrong to be suffered without a remedy, we hold that the appellant was entitled to an award of general damages.

We would in certain circumstances have referred this matter to the superior court for the assessment of the general damages. But in this case, noting that we are dealing with a matter in which the cause of action arose way back in 1998, it is a proper case for us to assess the award for general damages as we have the jurisdiction to do so. We agree that the appellant did almost nothing to mitigate the loss. It is correct as Mr. Ontweka rightly pointed out and the learned Judge accepted, that at one time, the appellant's agent went as far as denying ownership of the vehicle. We also note that the appellant made a move in September 1999 when it went to Chief Magistrate's Court seeking release of the vehicle. That was over one year after the vehicle was seized and detained. In those circumstances, we cannot fault the learned Judge when he stated that if the appellant had proved its case he would have awarded damages for a period of six months only. On our part, considering all the above, we are of the view that an award for Ksh.500,000 (Five hundred thousand) would meet the ends of justice. The learned Judge did not consider the claim for interest, perhaps because, he made no award to the appellant. We would order that the award shall carry interest at court rates from the date of the judgment in the superior court which was 10th March 2006. The appellant will have half the costs of the appeal and half the costs of the suit in the superior court.

In short, the decision of the superior court dismissing the case with costs is set aside. In its place, there shall be judgment for the appellant in the sum of Ksh.500,000/= with interest at court rates from 10th March 2006 to the date of full payment. The appellant shall have half the costs of this appeal and of the case in the superior court. The appeal succeeds to that extent.

Dated and delivered at Nairobi 13th day of November, 2009.

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR