



**Auto Express Limited v Multiple (ICD) Kenya Ltd & another (Civil Appeal E095 of 2023) [2024] KEHC 2076 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2076 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E095 OF 2023  
HK CHEMITEI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**AUTO EXPRESS LIMITED ..... APPELLANT**

**AND**

**MULTIPLE (ICD) KENYA LTD ..... 1<sup>ST</sup> RESPONDENT**

**MULTIPLE HAULIERS LTD ..... 2<sup>ND</sup> RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. M NABIBYA  
(PM) DATED 29TH MARCH 2023 IN MOMBASA CMCC E964 OF 2021)***

**JUDGMENT**

1. The appellant brought suit against the respondents for the loss of cargo consisting of 1x40ft container number MSKU164722-9 and 1x20ft number MRKU802764-0 loaded with 890pieces of Dunlop tyres whose value was kshs 7,041,033. It is worth noting that the appellant had contracted the respondents to ferry the same from the port to its premises.
2. The respondents on their part did not object to the said agreement or contract or the loss of the goods while on transit but laid blame on Crest Security company which it had contracted to secure the goods while on transit. As a matter of fact, they brought an application to enjoin the said company as a third party. The application was allowed.
3. The security company did not however enter any appearance despite being served and the trial court it its judgement exonerated the respondents and laid blame on the said third party.
4. The appellant being dissatisfied with the said judgement has filed this appeal raising seven grounds. The gravamen of the said grounds is to the effect that the trial court failed to take into consideration the totality of the evidence especially the element of privity of contract. It added that the appellant had discharged its burden of proof which the trial court however failed to take into consideration.



5. The court directed the parties to file written submissions. As at the time of writing this judgement it was only the appellants submissions that were on record. The court has perused the same together with the cited authorities.
6. Having perused the record and the evidence adduced it is easy for one to conclude the following. First of all, there was a contract between the appellant and Geminia Insurance company which had insured the goods. The said insurance company was obligated to indemnify the plaintiff which it appears it did by paying it for the loss it incurred.
7. The suit and by extension this appeal is by the said insurer under the doctrine of subrogation.
8. Secondly there was no doubt that the appellant imported the tyres and that the same were ferried by the respondents. The paper trail evidence on record is uncontroverted. The said goods disappeared and never reached its destination.
9. The reports on record including those from the expert loss assessors and the police occurrence book (OB)are not uncontroverted. The loss adjusters' or assessors reports were done by both parties.
10. Thirdly the value of the goods was not disputed by either of them. The shipping records are uncontroverted.
11. Fourthly there was an understanding between the respondents and Crest Security company to provide security for goods on transit. This had nothing to do with the appellant.
12. At which point the goods disappeared was really an issue between the respondents and the said security company. All that the appellant expected was to have its goods delivered in good and perfect conditions as per their understanding. The goods did not arrive.
13. Taking the totality of the above, i find that the trial court missed the mark when it shifted liability to a third party namely the security company which the appellant had nothing to do with. The appellant did not enter into any contract with it or at all.
14. The fact that it failed to enter appearance after being served did not water down the suit between the appellant and the respondents. It was for the respondents and it is still the case for them to pursue it.
15. It was the duty and responsibility of the respondents to ensure that they contracted a credible and reputable security company. The respondents in my view cannot escape responsibility and liability.
16. Consequently, and without going into the other grounds raised in the appeal which I consider peripheral this appeal is meritorious. The same is allowed, the trials court judgement is hereby set aside and order that:
  - (a) Judgement is hereby entered against the respondents and third party jointly and severally for the sum of kshs 7,041,033.00 together with interest from the date of filing of the suit at the lower court till payment in full.
  - (b) The appellant shall have the costs of this appeal as well as at the lower court.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**H K CHEMITEL.**

**JUDGE**

