



REPUBLIC OF KENYA



KENYA LAW
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Airband Cargo Forwarders Limited v Plumbing Systems Limited & another (Civil Appeal E306 of 2020) [2024] KEHC 2926 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2926 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E306 OF 2020
AN ONGERI, J
MARCH 22, 2024

BETWEEN

AIRBAND CARGO FORWARDERS LIMITED APPELLANT

AND

PLUMBING SYSTEMS LIMITED 1ST RESPONDENT

KENYA REVENUE AUTHORITY 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. L. L. Gicheha (CM)
in Milimani CMCC No. 3963 of 2015 delivered on 23/10/2020)*

JUDGMENT

1. The 1st respondent was the plaintiff in Milimani CMCC No. 3963 of 2015 where the 1st respondent was seeking the following from the appellant and the 2nd respondent who were the defendants;
 - i. USD 23,690
 - ii. Ksh.677,805
 - iii. Costs of the suit
2. The 1st respondents' evidence was that it contracted the appellant to transport the 1st respondent's tata lorry truck registration no. CE XXXX from Sudan to Nairobi.
3. The appellant failed to deliver the truck at Nairobi after taking possession of it at Juba.
4. The truck was stolen at Malaba border post while awaiting custom clearance. The appellant enjoined Kenya Revenue Authority (KRA) as a third party in trial court.



5. The 1st respondent discovered that the appellant had not taken an insurance cover and filed Milimani CCMCC No. 3963 seeking the value of the truck (USD 23,690) and kshs.677,805 in respect of the sum paid to the appellant for transporting the motor vehicle.
6. The appellant called a witness who said the motor vehicle was detained at Malaba custom yard where the registration certificate was demanded or a fine of ksh.10,000/=. The documents were sent but KRA refused to release the motor vehicle.
7. The appellant's driver discovered that the motor vehicle had disappeared on 20/8/2012 while in the custody of KRA (the 3rd party).
8. The trial court found that there was no evidence that the motor vehicle was in the custody of KRA when it went missing.
9. Further that the appellant did not insure the motor vehicle in transit.
10. The trial court absolved KRA and entered judgment in favour of the respondent against the appellant in the sum of ksh.2,077,995 plus costs and interest.
11. The appellant appealed to this court on the following grounds;
 - i. The learned magistrate erred in law and in fact by writing a judgment in the matter without seeing and hearing the testimony of the witnesses and without consent of the parties. The matter had proceeded before Hon. Gesora who heard all witnesses and took submissions and was the proper court to write the judgment.
 - ii. The learned magistrate erred in law and fact by failing to appreciate the issues in dispute and in evaluating the evidence on record resulting to a judgment whose findings were not supported by facts or law.
 - iii. The learned magistrate failed to appreciate the relationship between the defendant (now appellant) and the plaintiff was one of agency and the plaintiff did not make any payments towards the contract price.
 - iv. The learned magistrate finding that the defendant "...failed to take comprehensive insurance despite being paid to do so" is against the weight of evidence as from the evidence;
 - a. No money was paid by the plaintiff to the defendant
 - b. The defendant did not assume any liability to insure the vehicle.
 - c. The plaintiff represented that the vehicle was comprehensively insured and only raised the claim once its insurer declined to indemnify.
 - v. The learned magistrate erred in her failure to appreciate that the plaintiff loss was caused by the plaintiff's failure to take out insurance cover against loss in transit for the vehicle.
 - vi. The learned magistrate erred in finding that the third party was not to blame for the loss of Tata Truck No. CEXXXX when the evidence given by defendant's witnesses, Manuel Mutua was uncontroverted and more so where the third party tendered no evidence in rebuttal.



- vii. The learned magistrate erred in finding that the plaintiff was liable for the loss of the vehicle against the weight of the evidence.
 - viii. The learned magistrate finding that the defendant was paid kshs.677,805 by the plaintiff is against the weight of evidence as from the evidence
 - a. The plaintiff procured two bankers' cheques in favour of the third party which were paid to the third party as part of import duty.
 - b. No payment was ever made to the defendant.
 - ix. The learned magistrate erred in law and fact in her finding that the defendant is liable for the said ksh.677,805 while evidence on record was clear that the said money was paid by the plaintiff to the third party.
 - x. The learned magistrate failed to consider the defendant's evidence and submissions in their entirety thereby reaching an erroneous finding against the weight of evidence on record.
12. The parties filed written submissions as follows; the appellant submitted that as per the agreement concluded through various email correspondences between the parties, the 1st respondent was to pay the appellant Kshs. 91,200 towards border clearance, customs, fuel, insurance and road toll and Kshs 20,000 agency fee amounting to Kshs. 111,200 as opposed to Kshs. 677,805 as claimed by the 1st respondent.
 13. The appellant indicated that the sum of Kshs. 677,805 claimed by the 1st respondent was directly paid to the 2nd respondent towards taxes. The appellant did not receive the amount or convert the said funds as alleged by the 1st respondent. The 1st respondent drew cheques in favour of the 2nd respondent and payment receipts were issued thereafter. At the hearing the 1st respondent confirmed the same.
 14. The appellant submitted further that the 1st respondent intimated to the appellant that the vehicle was comprehensively insured in both South Sudan and Uganda. The appellant relied on the 1st respondent's assertions, took possession of the vehicle and proceeded to deliver it. It was the appellants argument that it was under no obligation to comprehensively insure the vehicle however a third party transit insurance was executed for the vehicle by the appellant as per the agreement.
 15. The appellant submitted that following the loss of the vehicle the 1st respondent confirmed to the appellant that the vehicle was comprehensively insured. The 1st respondent proceeded to make a claim to UAP insurance but was informed by the insurer that the insurance issued on the vehicle restricted its use to South Sudan and the COMESA insurance was only for third party liabilities. It was the appellant's contention therefore that the claim by the 1st respondent against the appellant was thus an afterthought after their insurer failed to honor its claim.
 16. The appellant argued that the proceedings before the trial court show that the appellant tendered evidence which proved that it left the vehicle in the custom yard, operated by the 2nd respondent. The said evidence was not controverted by the 2nd respondent.
 17. The 2nd respondent submitted that it was disingenuous for the appellant to argue that Mr. Manuel Mutua's evidence was not controverted yet Mr. Mutua was cross-examined on his evidence which yielded the fact that he had actually been arrested and charged for the theft of the alleged missing truck.



18. Mr. Manuel admitted that he had been charged alongside another employee of the defendant Mr. Peter Emoru and indicated that after the reporting about the missing truck he was arrested the following day.
19. The 2nd respondent submitted that the legal and evidentiary burden of proof fell squarely upon the appellant and that it did not adduce documentary evidence for the trial court to shift the same upon the 2nd respondent.
20. In addition, no document was adduced to imply KRA'S liability, the court also took note that the appellant's agents took two months to discover that the motor vehicle is missing. It was therefore the 2nd respondent's contention that a case against it was not established.
21. This being the first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court saw witnesses.
22. The issues for determination are as follows;
 - i. Whether the respondent proved its case against the appellant.
 - ii. Whether the 3rd party (now 2nd respondent) was responsible for disappearance of the 1st respondent's truck registration no. CEXXXX.
 - iii. Whether the appeal should be allowed.
23. On the issue as to whether the 1st respondent proved its case, there was no dispute that the motor vehicle was handed over to DW 1 at Juba for delivery to Nairobi.
24. The said motor vehicle was never delivered to the agreed destination and the appellant did not adduce documentary evidence that the motor vehicle was handed over to the custody of the 3rd party (now the 2nd respondent) when it went missing.
25. DW1 admitted in cross-examination that he had been arrested and charged with the offence of theft of the truck alongside another employee of the appellant, one Mr. Peter Emoru after reporting the missing truck.
26. I find that the 1st respondent proved its case to the required standard in civil cases.
27. On the issue as to whether the 3rd party (KRA)(now the 2nd respondent) was to blame for the disappearance of the motor vehicle, I find that the appellant did not produce evidence that he had handed over the motor vehicle to the custody of the 3rd party(now 2nd respondent) when it disappeared.
28. I find that the trial court was right in absolving the 3rd party (now 2nd respondent) from liability.
29. The law requires that he who alleges is under a duty to prove the allegation. Section 107 (1) of the [Evidence Act](#) which provide as follows: -

“ 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.”
30. On the issue as to whether the appeal should be allowed, the answer is in the negative.
31. I find that the appeal lacks in merit and the same is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF MARCH, 2024.



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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

