

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 18 (26 April 2023)
Civil Appeal SCA 30/2021
(Arising in CS 109/2020 SCSC 513)

In the matter Between

Kasi Trading
(rep. by Mr. S. Rajasundaram)

Appellant

And

United Africa Feeder Line (UAFL)
(unrepresented)

1st Respondent

Benelux Freight & Logistics LLC Dubai
(rep. by Mr. I.N Baset (as per filed written submissions))

2nd Respondent

CMA CGM Shipping Line

3rd Respondent

Societe Seychelloise Navigation

4th Respondent

(rep. by Ms. Edith Wong)
Seychelles Port Authority

5th Respondent

(rep. by Mr. Joel F. Camille)

Neutral Citation: *Kasi Trading v United Africa Feeder Line (UAFL) & Others* (Civil Appeal SCA 30/2021) [2023] SCCA 18 (Arising in CS 109/2020) SCSC 513 (26 April 2023)

Before: Dr. M. Twomey-Woods, Robinson, Andre JJA

Summary: Appeal against a decision of the Supreme Court – *Plea in limine litis* - Prescription – *ex-parte* hearings.

Heard: 13 April 2023

Delivered: 26 April 2023

ORDERS

The Court makes the following Orders:

- (i) The appeal succeeds on grounds 2 and 4.
- (ii) The impugned Ruling of the Supreme Court is set aside and the matter is remitted to the Supreme Court for rehearing.
- (ii) Costs awarded in favour of the Appellant as prayed for.

JUDGMENT

ANDRE, JA

INTRODUCTION

- [1] This is an appeal arising out of the notice of appeal filed on 3 September 2021 by Kasi Trading (appellant) against United Africa Feeder Line (UAFL) (1st respondent), Benelux Freight & Logistics LLC Dubai (2nd respondent), CMA CGM Shipping Line (3rd respondent), Societe Seychelloise Navigation (4th respondent); and Seychelles Port Authority (5th respondent), being dissatisfied with the decision of learned Judge M. Vidot given at the Supreme Court on the 30 July 2021 in Civil Side No. CS No. 109 of 2020 in which he dismissed the plaint of the appellant on the basis that the matter had been prescribed.
- [2] The appellant as per cited notice of appeal appeals against the whole of the said decision upon the grounds of appeal set out in paragraph 2 of the notice of appeal and to be considered in detail below. The appellant further seeks the relief set out in paragraph 3 of its notice of appeal namely, to set aside, reverse and suitably modify the impugned judgment; to remit the matter back to the Supreme Court of Seychelles with a further direction to hear the case on merits by proper oral evidence; any decision that may meet the justice of the case; and cost for the Appellant at the trial and in the Appellate court.

BACKGROUND

- [3] In the Court *a quo*, the Appellant averred that it suffered a loss of SCR 264,593.88 due to a fire accident at the Seychelles Port attributable to the hazardous goods and inflammable consignment in the container belonging to the 3rd and 4th Respondents (3rd and 4th defendants in the lower court). By virtue of being the statutory body in charge of all sea ports in Seychelles, the 5th Respondent (5th defendant in the lower court) was joined to the matter. This was on account of being in the physical custody of the container which burnt and caused the alleged damage. The 1st and 2nd Respondents were joined on account of being legal custodians of the container.

- [4] The 3rd, 4th, and 5th Respondents filed their defences and raised a point of law to the effect that the Appellant's cause of action was barred by prescription under Article 2271 of the Civil Code. The learned Judge agreed with the Respondents and proceeded to uphold the point of law in a Ruling which is now the subject of this present appeal (supra).
- [5] Dissatisfied with the findings of the learned Judge, the Appellant approaches this Court setting out five grounds of appeal which read as follows:

GROUND OF APPEAL

- [6] The Appellant raises three grounds of appeal which state verbatim as follows:

***Ground No. 1:** The learned Judge failed to note that this Appellant being the Plaintiff in the court below never agreed to decide the matter on plea in limine but decided on his own to decide the matter on plea in limine, without consensus of the Appellant, while he ought to have heard the case on merits by proper oral evidence.*

***Ground No. 2:** The learned Judge erred in his findings while arbitrarily dismissing the Plaint, in that he completely ignored the admission of the 4th Respondent, more particularly the e-mail dated 7th February 2017 of its liability to pay the Appellant (as so averred in paragraph 16 of the Plaint) but wrongly interpreted the e-mail dated 7th October 2013 of the 4th Respondent, thus failed to note the existence of interruption of the prescription in favour of the Appellant.*

***Ground No. 3:** The learned Judge's approach that the facts of interruption averment must leave no doubt in the mind of the reader is erroneous while the reading of an averment is a matter of evidentiary value and not arbitrary.*

***Ground No. 4:** the learned Judge grossly misconstrued the 4th Respondent's averment of its reply to the Appellant's claim letter and wrongly concluded the essence of such reply against this Appellant.*

***Ground No. 5:** The learned Judge grossly failed to note that the 1st and 2nd Respondent were set exparte in the Court below and also his ruling circumvents the dismissal of the Plaint solely on the transactions of the 3rd Respondent without proper application of the*

law in respect of the law in respect of other Respondents' transactions with the 3rd Respondent on one hand and with the Appellant on the other hand."

[7] Against the backdrop of the above set grounds, the Appellant prays that this Court awards the following:

- a) *That the impugned decision be set aside, reversed and suitably modified;*
- b) *To remit the matter back to the Supreme Court with further direction to hear the case on merits by proper evidence;*
- c) *Any decision that may meet the justice of this case; and,*
- d) *Costs for the Appellant at the trial and in in the Appellate Court.*

SUBMISSIONS OF PARTIES

APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

[8] The Appellant through its learned counsel Mr Rajasundaram filed heads of arguments on 21 February 2023 in accordance with the Rules of this Court. Counsel for the Appellants seeks leave of this Court to consolidate grounds 2 and 4 which he views as relating to the same matter. On a cursory reading of the grounds, I agree with learned counsel in this regard in that the two grounds relate to the email, which is purported to have been the one that interrupted the prescription.

GROUND 1:

[9] With regards to Ground 1, the Appellant argues that it did not agree that the *plea in limine litis* be heard in the manner it was. That the Court simply accepted the motion of the 3rd, 4th, and 5th Respondents for the determination of the issues on maintainability of the suit only on a *plea in limine litis*. The Appellant only came to know of the procedure of hearing the *plea in limine litis* when the court 'insisted' on the filing of written

submissions. That it is clear there are missing proceedings in this aspect where the Appellant is not shown having accepted to determine the maintainability of the suit only on a *plea in limine litis*. It is the further argument of the Appellant that the laws of Seychelles require that there should be a consensus amongst litigants to hear the points of law unless the court thinks otherwise.

GROUND 2 AND 4:

- [10] The Appellant challenges the learned Judge's findings on the e-mail exchanges between itself and the 4th Respondent. According to the Appellant, it is unclear whether the learned Judge does not recognise the mode of e-mail exchanges between the parties, whereas the laws of this jurisdiction recognise the e-mail as a valid and lawful correspondence.
- [11] The Appellant argues that the e-mail exchange between itself and the 4th Respondent contained an admission on part of the latter. Learned counsel refers to a series of e-mails as follows.
- [12] First, it is an e-mail dated 7 January 2016 where the 4th Respondent's shipping manager Richard Barreau said: "*This case is being dealt with by our claim dept. We expect to get a response anytime soon.*" Based on this e-mail, it is clear that the case was not closed as found by the learned judge. I note that this e-mail is on record on page 47 of the bundle.
- [13] Second, learned counsel further refers to an error on part of the learned Judge to refer to an e-mail dated 7 October 2017 and that there is no such email. Instead, there is an email dated 7 February 2017 from the 4th Respondent's shipping manager Richard Barreau who said: "*I am trying to search for a formal notice of claim from your side to us but could not find it. Can you check if you have [sent] us a claim?*" Based on this e-mail, it is clear that the 4th Respondent entertains the claim as a continuing one and this is tantamount to admission. I note that the e-mail referred to by learned Counsel is on page 46 of the bundle.

[14] Further to the above, another e-mail correspondence that learned counsel refers this Court to is dated 8 February 2017. This e-mail follows after receipt of the Appellant's claim. The email is from the 4th Respondent's shipping manager Richard Barreau who said: "*Dear Mr Kasi, Well received.*" I note that this e-mail is on page 45 of the bundle.

[15] Counsel of the Appellant argues that the learned Judge in accepting the disclaimer made at the foot of one of the 4th Respondent's e-mails must also accept the absence of the same disclaimer in all other e-mails that followed from the 4th Respondent. In such circumstances, whether "*the tone of email is just an acknowledgment or denial or admission of liability is a matter of oral evidence and cannot shut the door with the high degree of inconsistency.*" (page 5 of the Appellant's heads of argument refers).

GROUND 3:

[16] The main argument in respect of ground 3 is that a court of wisdom cannot simply agree with the reading of one particular side and conclude the matter while the other party who reads differently must be given a right to explain before the same court. That the e-mails relied on by the learned Judge to show that they do not establish liability are from various sets of e-mails between the Appellant and the 4th Respondent. As such, each sender and recipient of the e-mails must have been allowed to adduce evidence to support or reject as the same may be. That the learned Judge's opinion that the Respondents "are trying to close the case" was a rushed opinion which led to the learned Judge closing the case against the Appellant.

GROUND 5:

[17] In respect of ground 5, the Appellant argues that the 1st and 2nd Respondents remained set ex-parte in the suit as set by the court a quo. Counsel for the Appellant refers this Court to pages 86 and 89 of the bundle. Given that there was an ex parte claim against the 1st

and 2nd Respondents, there was a sizeable impact on the claim and the learned Judge failed to note that the said parties did not contest the claim.

[18] Another limb of argument submitted in support of ground 5 is that given the ex parte status of the suit against the 1st and 2nd Respondents, the learned Judge ought to have allowed examining the other Respondents too.

RESPONDENT'S SUBMISSIONS

THE 2ND RESPONDENT'S ARGUMENTS AGAINST THE APPEAL

[19] I note the 2nd Respondent's written submissions tendered on 12 April 2023. They submit, for the most part, on the merits of the case noting that because they are only responsible for the importation of the container and not allocating storage at the port. Given this, they cannot be considered liable for any damage.

[20] These go into the merits of the cause of action rather than the plea in limine litis which is the subject of this appeal. Therefore the submissions will not be considered at length in this appeal.

THE 3RD AND 4TH RESPONDENTS' ARGUMENTS AGAINST THE APPEAL

[21] In accordance with the Rules of this Court, the 3rd and 4th Respondents filed heads of arguments through their learned counsel Ms Edith Wong, on 3 March 2023.

GROUND 1:

[22] In respect of ground 1, learned counsel Ms Wong refers to Section 90 of the Seychelles Code of Civil Procedure which reads:

90. Points of law

Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, or by order of the court, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

[23] Learned counsel submits that the provisions of Section 90 of the Seychelles Code of Civil Procedure mean any party can raise a point of law and the same may be set down for a hearing and disposed of at any time before the trial.

[24] This Court has been referred to the proceedings in the court a quo, wherein the following occurred. On 12 May 2021, the case was called before the learned Judge. Learned counsel Mr Raja, Mr Camille, and Ms Wong were all present. Learned counsel Mr Camille raised moved the Court to hear the *plea in limine* first. There was no objection from any of the counsels present. Against this background, learned counsel Ms Wong submits that the learned Judge ordered the hearing of the points of law in line with Section 90 of the Seychelles Code of Civil Procedure.

[25] It is the further argument of the 3rd and 4th Respondents that the Appellant's counsel by virtue of not objecting to moving to hear the points of law first, cannot now state that he never accepted the procedure adopted by the court a quo. Further, the contention of learned counsel for the Appellant to the effect that proceedings are missing where he agreed to hear the *plea in limine litis* is something that ought to have been raised at an earlier stage than where he has now raised it.

[26] On consideration of the above, it is the position of the 3rd and 4th Respondents that a point of law was raised, an application was made by the 5th Respondent to hear the point of law first, and the learned Judge faced with no objections, ordered that the same be disposed of by way of submissions. That in the circumstances, learned counsel for the Appellant cannot now object before this Court after the case was closed in the court a quo.

GROUND 2:

[27] It is the position of the 3rd and 4th Respondents that while there was an error in respect of who sent the email as referred earlier by learned counsel for the Appellants – such was a

typographical error and not an error in understanding on part of the learned Judge. That it was clear to the learned Judge where the email came from. At the same it, it is clear that the typographical error in dates is one which did not affect the understanding of the learned Judge.

[28] Further, the 3rd and 4th Respondents contend that the email referred to by counsel for the Appellant as one which is tantamount to admission is being misunderstood. This is because in stating that they are accepting the claim, the 4th Respondents are in no way admitting to liability. Learned counsel states that ‘processing a matter’ is not equivalent to ‘acceptance’ but rather a stage necessary before a determination is made.

[29] In addition to the above, learned counsel for the 3rd and 4th Respondents argues that other exchanges of emails referenced by the learned counsel of the Appellant cannot be considered at this stage as they are not evidence before the Court. The e-mail relied on by the learned Judge was one that was pleaded in the Pleint by the Appellant. Any other e-mail that was not in evidence cannot be submitted now because that would be contrary to the fair hearing rights of the Respondents.

GROUND 3:

[30] Learned counsel for the 3rd and 4th Respondents argues that the statement of ‘no doubt in the mind of the reader’ as stated by the learned Judge is a principle of law in relation to interruption of prescription.

[31] In the lower court, the 3rd and 4th Respondents submitted that if the Appellant is attempting to show that prescription was interrupted, it needed to prove the interruption under Article 2248 of the Civil Code. Learned counsel refers to Encyclopedie Dalloz which explains what ‘acknowledgment’ means and reads as follows:

“La reconnaissance expresse n'est soumise à aucune forme special. Elle peut resulter d'écrites quelconques: les lettres missives, pourvu qu'elles ne laissent aucune doute sur l'intention de celui qui l'a écrite.”

[32] Based on the above, it is the position of the 3rd and 4th Respondents that the learned Judge correctly applied the law and required that no doubt be had in the meaning of the email relied on to prove interruption of prescription.

[33] Learned counsel for the 3rd and 4th Respondents notes the Appellant's position that the learned Judge must have invited the parties to explain what the parties understood e-mails to mean for him to interpret the e-mail purported to interrupt prescription. In response to this, learned Counsel for the 3rd and 4th Respondents argues that it is not a requirement for the parties to come to Court and state how they each understood the e-mail to entail. Rather, any objective party can interpret the email without requiring evidentiary proof of the same. That the interpretation of the e-mail must be an objective one and not the subjective one to be tendered by the parties and thus the learned judge was correct to have used the objective test.

GROUND 4:

[34] In respect of ground 4 which relates to an appreciation of e-mails as evidence, learned counsel argues that there was a due consideration of the same by the learned Judge. Counsel disagrees with the Appellant's position that the learned Judge held the opinion that e-mails could never interrupt a prescription.

GROUND 5:

[35] It is the position of the 3rd and 4th Respondents that once a matter has been dismissed for prescription against parties, the fact that there are other parties involved does not mean that those who remain must stay to be examined in relation to the matter. To submit otherwise would be contrary to logic as this would mean each time a case has multiple parties it would require all parties to remain even if there are no findings that can be made against them.

THE 5TH RESPONDENT'S RESPONSE TO THE APPEAL

[36] The 5th Respondent through its counsel also filed heads of arguments in accordance with the Rules of this Court. These were filed on 10 March 2023.

[37] The main argument posited against the appeal is that learned counsel for the Appellant did not object to moving to hear the points of law by way of submissions. Similarly, the learned Judge's finding on prescription cannot be faulted and is justifiable in law. Even where the learned Judge considered the exceptions set out in the law, the case of the Appellant failed to fall within the two exceptions provided for under Articles 2262 and 2265 of the Civil Code.

ANALYSIS OF THE GROUNDS OF APPEAL

GROUND 1:

[38] The procedure adopted by the court a quo was to hear and dispose of the points of law in accordance with Section 90 of the Seychelles Code of Civil Procedure and dismiss the action pursuant to Section 91.

[39] Section 90 reads as follows:

90. Points of law

Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, or by order of the court, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

[40] On a plain reading of Section 90, the following is clear to me. First, a party is entitled to raise a point of law through pleadings. Second, a point of law must be disposed of at trial. However, a point of law *can* also be disposed of before trial with the consent of parties or in the instance that the Court so orders.

[41] In the present case, the court a quo on the application of the 5th Respondent ordered that the *plea in limine litis* be heard and disposed of before the trial. Counsels for the 3rd, 4th and 5th Respondents refer this Court to proceedings in the court a quo on 12 March 2021 (appears on pages 88-90 of the bundle), and state that the Appellant did not object to the procedure adopted. I agree with learned counsels in this regard. The Appellant did not object and *ipso facto* agreed to the procedure adopted. Thus, the Appellant cannot approach this Court at this instance and make a representation as though the procedure adopted was imposed on the Appellant without it providing its consent.

[42] I, therefore, find no merit in ground 1 because the learned Judge proceeded in accordance with Section 90 of the Seychelles Code of Civil Procedure with the clear consent of all parties.

GROUND 2 AND 4:

[43] The essence of grounds 2 and 4 is that the learned Judge failed to have a full appreciation of the e-mails which, according to the Appellant, interrupted the prescription. Learned counsel for the parties have each submitted arguments towards their respective positions and each of them has been taken into account in the analysis to follow.

[44] It is trite law that a decision on a point of law decided before trial must be made *ex facie* the pleadings (see generally *Faure v Hoareau & Ors* (SCA 21 of 2013) [2015] SCCA 34 (28 August 2015) at paragraph [11]). On a closer reading of the learned Judge's decision, he relied on email exchanges that were not in evidence. The only reason why the emails were in the court's file for the trial Judge's sight is owing to the Practice Directions which were in operation at the time. A reliance on the emails brings us to the principle that a case cannot be dismissed *ex facie* the pleadings if the court seeks to rely on a document that is referred to in the pleadings but not yet admitted into evidence (see *Gem Management Ltd v Firefox Ltd and 21 others* (Mauritius) [2022] UKPC 17).

[45] Based on the above principles in *Faure* and *Gem Management Ltd*, the learned Judge could have not dismissed the matter *ex-facie* the pleadings. Further, the point of law on

prescription and interruption could only be determined at trial when the emails were admitted into evidence and were subject to cross-examination by the parties.

[46] I therefore partially agree with the Appellant in this regard that it should have been allowed to address the email and this could only occur when they had been admitted as evidence at trial.

[47] For the aforementioned reasons, grounds 2 and 4 partially succeed.

GROUND 3 AND 5

[48] Having found that the point of law could have not been decided ex-facie the pleadings, I consider grounds 3 and 5 to automatically fall away.

DECISION

[49] The appeal succeeds on grounds 2 and 4 as analysed.

ORDER

[50] In conclusion, this Court orders as follows:

- i. The appeal is allowed.
- ii. The impugned Ruling of the Supreme Court is set aside and the case is remitted to the Supreme Court for rehearing
- iii. Costs awarded in favour of the Appellant.

S. Andre, JA

I concur

Dr. M. Twomey-Woods JA

I concur

F. Robinson, JA

Signed, dated, and delivered at Ile du Port on 26th April 2023.