



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Cargo Services Centre East Africa Bv v MFI Solutions Limited (Civil Appeal
641 of 2019) [2022] KEHC 3396 (KLR) (Civ) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 641 OF 2019

CW MEOLI, J

APRIL 28, 2022

BETWEEN

CARGO SERVICES CENTRE EAST AFRICA BV APPELLANT

AND

MFI SOLUTIONS LIMITED RESPONDENT

*((Being an appeal from the ruling of Hon. G.A Mmasi , SPM delivered
on 22nd October, 2019 in Nairobi Milimani CMCC No. 5760 of 2014))*

JUDGMENT

1. This appeal emanates from the ruling delivered on 22nd October, 2019 in Nairobi CMCC No. 5760 of 2019. On 29th September, 2014 MFI Solutions Limited, (hereafter the Respondent) filed suit against Cargo Services Centre East Africa BV (hereafter the Appellant) described as a bailee for reward, and seeking the sum of Kshs 1,371,604/- for the Appellant's breach of contract resulting in the loss of the Respondent's consignment while allegedly in the custody of the Appellant.
2. The Appellant filed a statement of defence on 8th August, 2016 essentially denying the averments in the plaint and liability and pleading negligence on the part of the Respondent. On 25th June, 2019 the Appellant proceeded to file a preliminary objection dated 24th June 2019 based on grounds among others that the plaint dated 29th September, 2014 was fatally and incurably defective; the plaint contravened Chapter 2 Article 11 and Chapter 3 Article 18 of the *Warsaw Convention* as read with Section 3 of the *Carriage by Air Act* and ; that the suit was an abuse of the process of the court. Parties canvassed the preliminary objection by way of written submissions and by its ruling delivered



on 22nd October, 2019 the trial court dismissed the Appellant's preliminary objection thus provoking the instant appeal which is based on the following grounds:

- “1. That the learned magistrate erred in law by finding that the plaint did not contravene Chapter 2 Article 11 and Chapter 3 Article 18 of the Warsaw Convention as read with Section 3 of the Carriage by Air Act.
 2. That the learned magistrate erred in law and fact by finding that the Respondent and the Appellant herein had a contract.
 3. That the learned magistrate erred in law by disregarding binding authorities of Kenyan courts.” (sic)
3. The appeal was canvassed by way of written submissions with the Appellant's counsel further highlighting the same. On the applicability of the Warsaw Convention, counsel cited Section 3 of the Carriage by Air Act and Article 18(2) of the Warsaw Convention and argued that the Appellant was not a party to the contract of carriage, namely, the Airway Bill No. 473-20109445 in respect of the subject consignment, and hence could not be liable to the Respondent for any loss. He cited the decisions in KLM Royal Dutch Airlines v Domitilla Icha Simiyu [2016] eKLR and Midlands Gem Limited & Another v Airspaces Forwarders Limited & Another [2016] eKLR. And placing reliance on among others, Express Transport Co. Ltd v BAT Tanzania Limited (1968) EA 443, Saudi Arabian Airlines v Kodak & Another [2018] eKLR, and Securicor Courier (K) Limited v Benson David Onyango & Another [2008] eKLR counsel contended that the Appellant is not a common carrier, and that the Respondent could not sustain a claim against it for damages in respect of the loss of the subject consignment. Besides, that based on Article 10 & 11 of the Warsaw Convention, the Airway Bill, the Arrival Advice and Delivery Note by SDV Transami there was no loss of the consignment as alleged by the Respondent. In conclusion counsel submitted that in view of the foregoing, the Appellant was not a proper defendant/party before the lower court, and the ruling of the lower court ought to be set aside.
 4. The Respondent defended the lower court's findings. Counsel for the Respondent conceded the applicability of the Warsaw Convention and the Carriage by Air Act, concerning goods in transit by an aircraft. He asserted however that the loss of the subject consignment occurred after it had landed, and while in the custody of the Appellant at its storage facility hence the inapplicability of the foregoing statutes. It was asserted that the Appellant is liable for the loss of the Respondent's cargo and the lower court did not err when it made a finding that it had jurisdiction to hear and determine the suit. Lastly, it was contended that there existed a contractual relationship between the parties herein, and the Appellant as a common carrier, was responsible for the safe custody and delivery of the Respondent's goods. Counsel placed reliance on HCCC No. 646 of 2000 Eveready Transport Company (K) Ltd v Proost Paper (E.A) Ltd and Express Transport Co. Ltd (Supra) in that regard.
 5. The court has perused the record of appeal as well as the original record and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278.



6. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”.

7. The lower court in dismissing the preliminary objection expressed itself in part as follows:

... “The main issues that emerges for determination in whether this court has jurisdiction to hear and determine this suit and whether the defendant was wrongly sued. It is my view that the presence of proper parties before the court is sine quo non exercise of jurisdiction of the court...

I wish to state the proper party is one who is recognized under the law as having the legal persona to sue and be sued, and one who is impleaded in a suit and not those sitting on the hedge waiting to be enjoined.

In essence the joining of a defendant to a suit is not limited to the said defendant being a party to a contract. The cause of action can arise from acts of transactions related to the said contract. Further the law is also clear that parties are bound by their pleadings. In this case, the defendant in paragraph 23 of its statement of defence dated 6th August, 2016 admits to the jurisdiction of this court handling this matter. Therefore, the defendant was not a wrong party to this suit...

The averments by the plaintiff and which have not been disputed by the defendant is that the plaintiff contracted the defendant in their capacity as common carrier or bailee for reward who received the consignment for the plaintiff and kept it in temporary storage pending customs clearance and delivery to the plaintiff. From the averments in the parties pleadings, there is the contract for bailment between the plaintiff and the defendant and there is another between the Plaintiff and the third party.

Therefore, there is liability to be determined between alleged third party and the defendant separately as the bailee is under an obligation to take all reasonable steps to ensure the bailor does not suffer loss of its goods. As was held in the case of *Coggs vs Bernard*, any man who undertakes to carry goods is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost or come to any damage.

I therefore find that the defendant’s preliminary objection dated 24th June 2019 is devoid of merits and is thus dismissed with costs to the plaintiff.” (sic).

8. The Appellant’s preliminary objection before the lower court was primarily anchored on the provisions of Chapter 2 (Article 11) and Chapter 3 (Article 18) of the *Warsaw Convention*, 1929 as read with Section 3 of the *Carriage by Air Act*. The Warsaw Convention as ratified by Kenya was amended in 1955 vide the Convention for the Unification of certain rules relating to International Carriage by Air, The *Hague Protocol* of 1955.
9. Chapter 2 Article 11 of the *Protocol*, 1955 provides that;

“(1) The air waybill is prima facie evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage.



- (2) The statements in the air waybill relating to the weight, dimensions and packing of the cargo, as well as those relating to, the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo.”

10. Chapter 3 Article 18 of the *Protocol*, 1955 provides that;

- “(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.
- (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.
- (3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.”

11. Section 3 of the *Carriage by Air Act* states;

“The provisions of the Convention shall, so far as they relate to the rights and liabilities of carriers, carriers servants and agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in Kenya in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.”

12. In the court’s view, this appeal turns on the question whether the preliminary objection by the Appellant raised a pure point of law. As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, Law J. A. stated:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but



unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

13. In the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

14. Applying the above tests to the preliminary objection raised by the Respondent, it is evident from the material canvassed in the lower court and on this appeal that the preliminary objection was primarily grounded on a set of contested facts, namely whether the Appellant was privy to the contract encapsulated in the subject Airway Bill or at all, hence a proper party to the suit, the time and place of the occurrence of the alleged loss of the consignment and, ultimately liability on the part of the Appellant. The trial court settled on two issues for its determination being whether it had jurisdiction to entertain the suit and or the applicability of the Warsaw Convention to the said proceedings.

15. As rightly noted by the lower court the question of jurisdiction was conceded to by the Appellant in its statement of defence at paragraph 23 where it was averred that “Paragraph 13 is admitted” in response to the Respondent’s submission to the jurisdiction of the lower court. In my considered view however, the fundamental issue before the trial Court related not so much to jurisdiction, or the applicability of the Warsaw Convention but to the question whether on the circumstances in which it was grounded, the preliminary objection was a true preliminary objection. The key matters canvassed in respect of the objection, namely whether the Appellant was the correct party to be sued and the application of the *Warsaw Convention* to the matter were contingent upon disputed matters of fact. Order 3 Rule 1 Of the *Civil Procedure Rules* provides that:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”.

16. And in attempting to demonstrate their position that they were not the correct party, the Appellants canvassed matters of fact as part of urging the preliminary objection. There were two contentious, but alternative factual scenarios raised in the pleadings and submissions of the parties. The first was whether the Appellants were party to the carriage contract by aircraft (or at all), and whether the consignment was lost during transit by aircraft, in which event the provisions of the *Warsaw Convention* were cited by the Appellant as a shield from liability. Article 1(1) of the Convention provides in part that the “Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward” and by Chapter 3 Article 18 of the *Hague Protocol* (supra) “the carrier is liable for loss and damage of goods during transit while in the carrier’s charge.”



17. Or, alternatively, whether the Respondent’s consignment having landed in Kenya and been received into the Appellant’s custody and storage, had disappeared therefrom. Chapter 3 Article 18(3) of the Protocol States:

“The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.”

18. The trial court correctly cited the provisions of Order 3 Rule 1 of the *Civil Procedure Rules* concerning joinder and found that the issue of the asserted contract of bailment between the Appellant and the Respondent would be determined in the suit. The Court stated that equally, issues arising from any contract between the Appellant and any third party would be separately determined. In its essence, the Appellant’s objection was in my considered view an invitation to the lower court to prematurely determine disputed facts and liability between the parties. Indeed, the Appellant had proceeded to further assert that based on the consignment weights as recorded in the Airwaybill, Arrival Advice and other related documents, no loss had indeed occurred. The invitation was properly declined.

19. It is apparent from the foregoing that the objection raised by the Appellants failed the settled definition of a preliminary objection and was properly dismissed. There is no merit in this appeal, and it is equally dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2022

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr Mbaabu

For the Respondent: MS Wambugu

C/A: Carol

