



**Palm Oil Transportes Ltd v Kenfreight E.A. Ltd (Commercial Case E028 of 2020)  
[2022] KEHC 14327 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14327 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E028 OF 2020  
DAS MAJANJA, J  
OCTOBER 28, 2022**

**BETWEEN**

**PALM OIL TRANSPORTES LIMITED ..... PLAINTIFF**

**AND**

**KENFREIGHT E.A. LIMITED ..... DEFENDANT**

**RULING**

1. By the notice of motion dated April 12, 2022, the defendant seeks what is known as a Norwich Pharmacol order which is an order named after a decision of the House of Lords; *Norwich Pharmacol Co and others v Customs and Excise Commissioners* [1974] AC 133 where the court issued injunctive orders compelling an innocent third party who has been caught up in wrongdoing which is the subject of the claim to provide disclosure of information.
2. In the application, supported by the affidavit of its Assistant Claims Manager, Noah Obuya, sworn on March 25, 2022, the defendant seeks orders compelling the competent officer of Kenya Revenue Authority (“KRA”), Mombasa Kilindini Port Section, Mombasa to appear and produce before the court, electronic scans pertaining containers on specific dates detailed in the schedule A.
3. The defendant’s case is that under a road carriage agreement dated March 15, 2022 (“the RCA”), the plaintiff was to deliver robusta coffee (“the cargo”) from Uganda to the Port of Mombasa in Kenya. It accuses the plaintiff of failing to deliver the cargo safely and securely due to short landed cargo. While the plaintiff claimed payment for services rendered, the defendant claims that the plaintiff breached the RCA and caused it loss and damage by failing to notify it of the damage, loss and or theft of the cargo and also failing to indemnify it against loss, damage and liability.
4. When the plaintiff demanded payment for services, the defendant claimed that it was not aware of the damage, loss and theft of the cargo but following investigations, it discovered that its cargo was



lost between the Malaba Border Post and the Port of Mombasa attributed to the plaintiff's employees. According to investigations, some of the lorries carrying the cargo were underweight a fact that can be verified by documents from KRA in particular the image analysis report of each container before its loaded on to the sea vessel. The defendant has stated that it has requested for these reports but the same have not been provided. It urges that in order to properly ascertain the liability of loss incurred by the defendant, it is necessary for the court to issue orders of disclosure against KRA.

5. The plaintiff opposes the application through the replying affidavit of its director, Mehari Kefela, sworn on September 23, 2022. The plaintiff's case is that there is no legal basis for the application. It denies all the allegations against it that it breached its common law duty as a carrier and that it failed to deliver the cargo safely and securely due to short landed cargo.
6. The plaintiff avers that in so far as allegations of criminal conduct are made, the defendant has not made any report to the police thus casting doubt on the veracity of those allegations. It adds that its duty was to ensure the cargo was safely delivered and that it delivered all the cargo in containers sealed by the Government officials with all the seals intact. Further, that the cargo was received at the Kenya Ports Authority in good order with seals intact as evidenced by delivery notes whereupon its role ended.
7. The plaintiff submits that KRA is not a party to this suit and no orders can be made against it. In any event, it urges that the issues raised by the defendant concern dealings between the defendant and KRA to the exclusion to the plaintiff hence outside the purview of this suit. It adds that in any event, the defendant's case amounts to a fishing expedition made in order to build its case. The plaintiff further states that granting the orders would amount to denying KRA an opportunity to be heard and that the application cannot be saved even by application of article 159(2)(b) of the [Constitution](#) as it is fatally defective.
8. The defendant seeks discovery orders against a third party who is not party to the suit. Under section 22 of the [Civil Procedure Act](#) (chapter 21 of the laws of Kenya), the court has broad power to order discovery on the following terms:
  - "22. Power to order discovery and the like subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—
    - (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
    - (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
    - (c) order any fact to be proved by affidavit."
9. Ordinarily and as between the parties to the suit, the court expects full disclosure of all relevant material and documents to avoid surprise at the trial. The court has wide latitude to order discovery as long as the material sought is relevant to the dispute (see generally [Concord Insurance Co Ltd v NIC Bank Ltd](#) [2013] eKLR). In this case what is sought is discovery against a third party. In principle, section 22 of the [Civil Procedure Act](#) or the [Civil Procedure Rules](#) do not constrain the court's power to order discovery against a third party where the circumstances permit and where it is in the interests of justice



hence I do not think the fact that orders are sought against a third party is an impediment to the court issuing the order. This is the essence of the *Norwich Pharmacal Co Case (supra)* I have described in the opening paragraph. Subsequent cases have developed the general principles. In *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) the court outlined three conditions that must be satisfied. First, a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer. Second, there must be the need for an order to enable action to be brought against the ultimate wrongdoer and third, the person against whom the order is sought must be mixed up in so as to have facilitated the wrongdoing and be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued. Last, the power to grant such orders does not extend to mere witnesses.

10. At paragraph 13.3 of the amended defence, the defendant, “pleads set off with respect to United States dollars two hundred and forty-eight thousand seventy-six and thirty four cents (USD 248,076.34) being the monies owed by the plaintiff to the defendant in respect to the short delivery and the consequential financial losses it suffered.” This pleading provides the necessary foundation for an order of discovery and not only satisfies the relevance test but also the condition that there was some form of wrongdoing through the loss of cargo by the plaintiff. In order to establish its case for short delivery, the information from KRA would be necessary to establish whether the cargo was delivered in good order. I do not see any reason why the order should not be granted. KRA of course will be at liberty to apply for any other further relief if it so wishes. Once the information is available, the plaintiff would be in a position to interrogate or test it at the trial.
11. I therefore allow the application dated April 12, 2022 in terms of the draft annexed order subject to the following amendments:
  1. The proposed search must be carried out within 30 days from the date of service of the order (para 1).
  2. The applicant must pay the costs of Kenya Revenue Authority assessed at Kshs 80,000.00.
  3. Kenya Revenue Authority shall be at liberty to apply for further or other orders.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2022.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Ondati instructed by Ahmednasir, Abdikadir and Company Advocates for the Plaintiff

Mr Bryant instructed by Bryant and Associates Advocates for the Defendant.

