



REPUBLIC OF KENYA



KENYA LAW

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**Speedex Logistics Limited v Catalyst Chemicals Limited; Mearsk
Kenya Limited (Interested Party) (Civil Case E591 of 2021)
[2022] KEHC 16038 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E591 OF 2021
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

SPEEDEX LOGISTICS LIMITED APPLICANT

AND

CATALYST CHEMICALS LIMITED RESPONDENT

AND

MEARSK KENYA LIMITED INTERESTED PARTY

RULING

Background

1. On or about 27th June 2018, the Applicant herein, a forwarding and clearing agent, was contracted by the respondent to facilitate the clearance of the consignment under Bill of Lading No. 965026466, Container No. MSKU8423597 and PONU7594511 imported through the interested party, a shipping company.
2. It is alleged that the Respondent made the requisite payments and taxes but the Applicant was unable to clear the Respondent's said consignment as the Kenya Bureau of Standards (KEBS) had collected samples of the consignment for further lab testing to establish compliance. The Applicant alleged that it could therefore not clear the consignment until the Respondent resolved the issue of compliance raised by Kenya Bureau of Standards.
3. It is further alleged that the Respondent and Kenya Bureau of Standards resolved the issue of compliance on 29th November, 2018 after which CFS and customs were allowed the release of the consignment on 18th July, 2018 but that the respondent did not pay the demurrage costs and other



charges that had accrued. A stalemate ensued over the issue of payment of the accrued costs that resulted in the instant Originating Summons in which the applicant seeks orders to be discharged from the consignment on the basis that its role was limited to processing the importation documents in the customs system and assisting in clearing the goods on behalf of the respondent. It is the applicant's case that having discharged its duties, it ought to be discharged as its role did not extend to payment of the accrued demurrage.

4. The Respondent, on the other hand, filed the Application dated 4th October, 2021 seeking orders for the conversion of the Originating Summons (OS) to a Complaint and that Kenya Bureau of Standards be enjoined as a party to the proceedings so as to enable the Court determine the dispute between the parties.

Application

5. The respondent in the Originating Summons seeks the following orders in the application dated 4th October 2021: -
 - a. The Honourable Court be pleased to direct that the proceedings continue as if they had been brought by way of a complaint.
 - b. The Replying affidavit filed by the Respondent be converted into a defence/pleading with liberty to the Respondent to add to or amend the defence as may be necessary to counter claim, seek contribution and or indemnity against the Applicant or the intended third party as appropriate.
 - c. Having granted the above orders the Court considers the *ex-parte* Chamber Summons filed herewith pursuant to [Order 1 Rule 15](#).
 - d. The Honourable Court does grant leave to join the Kenya Bureau of Standards or any other necessary party to these proceedings.
 - e. The Costs of this Application be provided for.
6. The application is supported by the affidavit of Sreeram Narayanan and is premised on the grounds on its face.
7. The applicant opposed the application through the replying affidavit of its employee Mr. Adrian Mureithi who avers that the matter before Court is straight forward, as it is over the determination of the relationship between an agent and its master in as far as the subject consignment is concerned. He states that the application is a deliberate attempt to delay the determination of the dispute between the Respondent and its supplier as well as the Kenya Bureau of Standards, for which the Applicant is neither privy nor a party.
8. He contends that since it is not disputed that the respondent made all the requisite payments and taxes in respect of the consignment, the Applicant had discharged all its obligation in facilitating the payment of the requisite taxes in July, 2018. He maintains that compliance on product quality is the responsibility of the importer and that all relevant government agencies have since cleared the consignment.
9. The applicant states that the Respondent was aware that the consignment had already accrued huge demurrage costs, port charges, warehouse and various costs which needed to be paid before the consignment could be released.



10. Parties canvassed the application by way of written submissions. The main issue for determination is whether the respondent has made out a case for the conversion of the Originating Summons into a plaint.
11. While the applicant in the Originating Summons maintains that the matter is straightforward and should be determined right away on the basis of the affidavit, the respondent is of the contrary view and has filed the instant application seeking not only to convert the Originating Summons into a plaint but also to include the interested party into the case.
12. Order 37 Rule 19(1) provides as follows:-

“Where, on an Originating Summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add, or to apply for particulars of those affidavits.
13. A simple reading of the above provision reveals that it grants the court the discretion to continue suits initiated as Originating Summons as if they had begun as plaints. From the above provision, it is clear that the court may for any reason convert the proceedings to continue as if the cause had been begun by way of filing of a Plaint.
14. In the present case, I note that the contract in which the applicant agreed to clear the respondent’s goods involved third parties who, the respondent claims, may have caused the delay that resulted in the escalation of demurrage charges among other costs.
15. My finding is that apart from the claim, by the applicant, that the conversion of the Originating Summons into a plaint may have the effect of delaying the finalization of the dispute, the applicant has not stated what prejudice it would suffer if such conversion is done. My humble view is that the conversion of the case to a plaint and the joinder of the interested party will have the desirable effect of enabling the court to determine the dispute between the parties in a wholesome manner.
16. For the above reasons, I find that the application dated 4th October 2021 is merited and I therefore allow it as prayed with orders that costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Mwangi for applicant

Mr. Onyango for Ms Miringu for respondent

Court Assistant- Sylvia

