



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL AND CIVIL DIVISION

CIVIL CASE NO. E036 OF 2021

GINEGAR PLASTIC PRODUCTS LTD.....PLAINTIFF

-VERSUS-

VICTREX LTD.....1ST DEFENDANT

MARTIN COURT (ALIAS).....2ND DEFENDANT

JUDGMENT

1. The plaintiff herein is a corporation carrying on business in Israel. On 9th April, 2021 it filed a plaint dated 25th March, 2021. It averred that sometime in June, 2020, it received an email requesting for a price quote for the supply of Shading Net from the 2nd defendant, a person whom the plaintiff believed to be a representative of Victrex PLC of Lancashire, United Kingdom, after he introduced himself as such.
2. The plaintiff further averred that it entered into further correspondence with the 2nd defendant by e-mail and that it believed that the request was from Victrex PLC of Lancashire, United Kingdom for the supply of the goods to the 2nd defendant in Uganda.
3. The plaintiff stated that it obtained a credit approval of 60 days from its finance insurance company in favour of Victrex PLC of Lancashire, United Kingdom. Pursuant to the said approval, the plaintiff agreed to ship 1800 rolls of Shade Net Black 60% to the 2nd defendant in Uganda, in 4 shipping containers for the sum of USD 137, 700. The delivery terms agreed upon were CFR Mombasa.
4. The plaintiff averred that on 10th July, 2020, the 2nd defendant via e-mail, requested for the release of documents related to the shipment including the commercial invoice, the packing list, the certificate of analysis, the certificate of origin, and the original copies of the bills of lading.
5. That the plaintiff released the consignment to Maersk Shipping Line for shipment to the defendants through the Port of Mombasa. It also released the original bills of lading numbers 204386048, 204673855, 205250282, and 205689617, among other documents of title for the consignment that had been requested for by the 2nd defendant.
6. The plaintiff further averred that after the lapse of 60 days, it tried to e-mail the defendants to follow up on the payment but received no feedback. It also tried to get in touch with the 2nd defendant through a phone number that he had used to get in touch with them, but it turned out that the number belonged to a third party who did not know the defendants.
7. The plaintiff stated in the plaint that by the time it took steps to stop the delivery of the consignment to the defendants, they had already cleared and collected the consignment that was covered under bill of lading numbers 204386048, 205250282, and 205689617 without paying for them. That it only managed to stop the delivery of the consignment which was covered under bill of lading number 204673855.
8. It is the plaintiff's case that it released the consignment which forms the subject of this suit for shipment to the 2nd defendant in the belief that payment was to be made by Victrex PLC of Lancashire, United Kingdom but it turned out to be false. The plaintiff stated that the defendants obtained the documents of title to the consignment of goods fraudulently, hence they had no right or title to it. It was also stated that the said consignment was still in the hands of Maersk Shipping Line in Mombasa and that it was necessary to stop the release of the consignment to the defendants.
9. The plaint in this suit was filed contemporaneously with a Notice of Motion application under certificate of urgency which sought *inter alia*, an order restraining Maersk Shipping Line as well as the Kenya Ports Authority whether by themselves, their employees, servants or agents from releasing the consignment covered under the bill of lading No. 204673855, to the defendants or their agents.

10. The said application was supported by the affidavit sworn on 25th March, 2021 by Fabio Kahn, the plaintiff's Chief Executive Officer. The said application was not opposed by the defendants, who did not file a replying affidavit. This court therefore confirmed the interim orders which had been issued against the defendants restraining them from taking possession of the subject consignment.

11. For the sake of expediency, Mr. Mugambi, Learned Counsel for the plaintiff urged this court to proceed on with the hearing of this case on the basis of the case stated and the evidence deposed to, in the affidavit of Fabio Kahn. The plaintiff's Counsel filed a list of authorities outlining recently decided cases in which fraudulent persons and entities had tried to defraud unsuspecting companies, by impersonating purchasers of various products. He relied on decisions in Mombasa High Court (Commercial & Admiralty Division) Case No. 70 of 2020, **Juncà Gelatines S.L v West Lake Chemicals East Africa** and **Rotem Kimyevi Maddeler Sanayi ve Ticaret AS v Sunland Chemicals Uganda Limited** [2019] eKLR.

12. He also relied on Nairobi High Court (Commercial & Admiralty Division) Case No. E551 of 2020 **SMS Kopuz Gida v Erycom Desire (Alias) & 8 Others**. In the said cases, similar tactics were used by fraudulent parties to order for goods which were shipped to the Port of Mombasa but were never paid for, requiring reshipment of the goods at the shippers' cost. The plaintiff's Counsel urged this court to order for the release of the consignment that is covered under the bill of lading number 204673855 to the plaintiff for re-shipment to Israel. He indicated that the defendant neither entered appearance nor filed a statement of defence to controvert the issues raised by the plaintiff. It was thus stated that the plaintiff had proved its case on a balance of probability.

ANALYSIS AND DETERMINATION

The issue for determination is if the plaintiff still has good title to the consignment of goods in issue, as against the defendant.

13. The plaintiff's Counsel urged this court to have due regard to the depositions in the affidavit sworn by the plaintiff's Chief Executive Officer on 25th March, 2021 and regard the same as the plaintiff's evidence in this case. He relied on the provisions of Order 19 Rule 1 of the Civil Procedure Rules, which state as hereunder-

“Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fides desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.” (emphasis added).

14. This court relies on the above provisions in the determination of this case by way of affidavit evidence as the defendant did not enter appearance or file a statement of defence. Further, the consignment of goods stacked in container No. MRKU600056-8 is accruing demurrage at the Port of Mombasa on a daily basis, which cost will befall the plaintiff. It is trite that courts are under an obligation to expeditiously deal with cases of this nature where goods have been ordered for through fraudulent means and costs have been incurred for shipment, which ultimately will be paid for by the plaintiff as the shipper of the goods. The plaintiff also stands to suffer loss from paying the costs of re-shipment.

15. The overriding objective of the Civil Procedure Act is provided under Section 1A of the Civil Procedure Act as:-

“(1) The overriding objective of this act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court.”

16. Section 1B of the Civil Procedure Act places an obligation on courts to purposively work towards achievement of the objective specified in [Section 1A](#) of the said Act. Section 1B of the Civil Procedure Act states that the Court-

“Shall handle all matters presented before it for the purpose of attaining the following aims –

(a) The just determination of the proceedings;

(b) The efficient disposal of the business of the Court;

(c) The efficient use of the available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) The use of suitable technology”. (emphasis added).

17. When dealing with a case whose circumstances are almost similar to this one, Judge J.A Makau in **Rotem Kimyevi Maddeler Sanayi ve Ticaret A.S v Sunland Chemicals Uganda Limited** (supra), proceeded to determine the said case based on affidavit evidence under the provisions of Order 19 Rule 1 of the Civil Procedure Rules.

18. This court is therefore not treading on uncharted waters by relying on the depositions in the affidavit of Fabio Kahn as the plaintiff's evidence in this case. The annexures thereto include a confirmation of order number SO20006944 dated 8th July, 2020 issued by the plaintiff and stamped on 9th July, 2020 with a stamp bearing the name of the 1st defendant and signed by the 2nd defendant. The goods were to be shipped by the plaintiff to the defendants herein. An export invoice number E1208000799 was issued on 7th September, 2020 by the plaintiff to Victrex PLC of Victrex Technology Centre, Hill House International, Thornton Cleveleys, Lancashire FY5 4QD, United Kingdom. A bill of lading number 204673855 was issued in the name of the 1st defendant. The said bill of lading was for container No. MRKU600056-8, which had a consignment of goods valued at USD 37,425.00.

19. In considering if the plaintiff still has good title to the consignment of goods after issuing a bill of lading in the name of the defendant, it is necessary to look into the value attached to the said document. **Lexis Navigator Dictionary** states as follows in regard to bills of lading-

“A Bill of lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of the contract of carriage under which the goods have been delivered to and received by the ship. The signed bill of lading is handed over to the shipper, who may either hold onto it or transfer it to a third person. During the voyage and transit, the bill of lading under the law merchant is considered the symbol of the goods described in it, and the endorsement and delivery of the bill of lading operates as a symbolic delivery of the goods. This person named in the Bill of lading as the person to whom the delivery of goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of lading, he is usually known as the holder or endorsee of the Bill of lading. The holder of the bill of lading is entitled against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner's lien for freight. A bill of lading issued by the ship owner's agent in the absence of any contract of carriage is a nullity.” (emphasis added).

20. In instances like the present one where the plaintiff has proved that the consignment of goods was obtained fraudulently, it is evident that the plaintiff through the bill of lading number 204673855 cannot pass good title to the defendant for the said consignment. I am in agreement with Mr. Mugambi that the plaintiff has established the existence of a dubious contract with the defendant which was initiated through fraudulent misrepresentation of facts. The confirmation order, invoice and the bill of lading attached to the affidavit of the plaintiff's deponent proves the plaintiff's case.

21. The 2nd defendant's failure to respond to e-mails after the consignment had been shipped and the discovery that the telephone number the 2nd defendant once used to contact the plaintiff did not belong to him proves that the defendant was a fraudster who set out to make a quick buck by obtaining goods fraudulently with no intention of making good the payment. Had the plaintiff not taken quick action, the said consignment of goods under bill of lading number 204673855 would have been cleared by the 2nd defendant at the Port of Mombasa, as the defendants had a 60 days' credit period before payment could be made. As stated by the plaintiff's deponent, the defendants herein managed to clear 3 containers with goods but container number MRKU600056-8 was salvaged in the nick of time.

22. Since the order for the consignment of goods was made fraudulently, the title in the goods did not pass to the defendants. It is my finding that the plaintiff has discharged its burden of proof on a balance of probability. I therefore hold that the title to the consignment of goods in container No. MRKU600056-8 under bill of lading number 204673855 remains with the plaintiff who is the rightful owner of the said goods.

23. I therefore enter Judgment in favour of the plaintiff as against the defendants in the following terms-

(i) It is hereby declared that the defendants have no right to the consignment of the subject bill of lading No. 204673855 and that the consignment is lawfully the property of the plaintiff;

(ii) An injunction is hereby issued to the plaintiff restraining the defendants and/or their agents from taking possession of the consignment the subject of the bill of lading No. 204673855;

(iii) The consignment in container number MRKU600056-8 that is the subject of the bill of lading No. 204673855 shall forthwith be released to the custody of the plaintiff for reshipment to a destination of its choice;

(iv) Costs of the suit are awarded to the plaintiff; and

(v) Interest on costs is also awarded to the plaintiff at court rates.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF APRIL, 2021. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Lelu for the plaintiff

No appearance for the defendants

Mr. Oliver Musundi – Court Assistant.