



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 201 OF 2014

YOSIEF MAHARAL.....PLAINTIFF

VERSUS

SPEDAG INTERFREIGHT.....DEFENDANT

AND

ROAD FREIGHTERS LIMITED.....1ST THIRD PARTY

KHALID ABDI T/A SAMATAR TRANSPORTER...2ND THIRD PARTY

JUDGMENT

Background

1. Through a plaint dated 7th November, 2012, the plaintiff claims that he contracted the defendant as a clearing agent and to transport containers Nos. XINU 1456022 and TRLU 9621198 containing corrugated sheets and nails, to Juba, South Sudan upon arrival at the Port of Mombasa. The plaintiff further claims that the cargo arrived in Mombasa on 8th August, 2011 but was never delivered to its destination despite the plaintiff having paid for all the services. He claims the total sum of US Dollars 489,500 in special damages, as particularized in the plaint. The plaintiff also filed a reply to the defence on 20th February, 2013.

2. The defendant filed its statement of defence on 17th December, 2012. It avers that it was engaged as a clearing agent by the plaintiff as per the terms and conditions provided in its general conditions that guide and affect all business transactions undertaken or entered into by the defendant with third parties. The defendant further avers that the plaintiff engaged it as an intermediary or agent in the procurement of carriers and other material logistics but denied assuming responsibility of a carrier under Article 2.2 of its general conditions. It claims that it engaged Road Freighters Limited to undertake the transportation of the containers in issue from Mombasa to Juba, Southern Sudan, with the knowledge, approval and/or acquiescence of the plaintiff. The defendant denied the particulars of the claim and said that if at all it is liable, its liability was limited to US Dollars (USD) 10,000.

3. The defendant issued a Third Party Notice to Road Freight Containers which filed its statement of defence on 6th February, 2014. It denies that the defendant is entitled to an indemnity at all from it and claims that the defendant contracted the Third Party to transport cargo to Juba, South Sudan by road. Subsequently, the Third Party sub-contracted M/s Khalif Abdi Samatar Transporters to transport the goods with the express consent and approval of the defendant. The 1st Third Party avers that the two signed a Road Carriage Agreement with the defendant dated 24th January, 2012 and that the two containers in issue were transported on the sub-contractor's trucks. The 1st Third Party alleges that 2 of the plaintiff's agents accompanied the truck Drivers to Juba, South Sudan. It therefore avers that it was not responsible for the loss, short or non-delivery of the cargo and reserved the right to commence Third Party proceedings against M/s Khalif Abdi Samatar Transporters for indemnity against the plaintiff's and defendant's claim in this suit.

4. On 17th March, 2014, the 1st Third Party filed a Third Party Notice addressed to Khalif Abdi Samatar Transporters. On 5th June, 2014, the 2nd Third Party filed a statement of defence. It avers that the instructing client introduced Abdullahi and Aden as the owners or agents. The 2nd Third Party further avers that the 2 men accompanied the goods from the 2nd Third Party's premises to Juba and took possession of the same. It is further averred that the 2 men failed to sign the delivery note on arrival in Juba on the allegation that they had no stamp. The 2nd Third Party therefore claims that if any loss occurred, the 1st Third Party or plaintiff are to blame

The plaintiff's case

5. It was the plaintiff's evidence that he imported cargo comprising 7 containers of which 5 were delivered to Juba, South Sudan but 2 went missing. The cargo contained corrugated iron sheets and nails. The plaintiff produced a bill of lading dated 7th November 2011 which was plt. exhibit 1. The plaintiff testified that the cost of clearing, demurrage and transportation was USD 73,645.00 and he produced an invoice issued by the defendant as plt. exhibit 2. The plaintiff claimed that the entire sum was fully paid to the defendant as per the statement of

accounts he produced as plt. exhibit 3.

6. In cross-examination, the plaintiff stated that the defendant asked for a lump sum of USD 73,645.00 for him to pay, which had the elements of transport and customs at the Sudan border. He also stated that the defendant was tracking the containers and updating him from Mombasa and he was not certain how many containers left Mombasa since they left at different times.

7. The plaintiff in cross examination by Mr. Oduor stated that he was not aware of any agreement between the defendant and the 1st Third Party. He testified that he received 5 delivery notes for the 5 containers delivered and a sample of a delivery note was produced by the plaintiff as plt. exhibit 6. The plaintiff admitted having instructed Mr. Liban Farah who only dealt with the issue of the cargo at the initial stages but he took over from him. He denied knowing Mr. Abdullahi who was mentioned by the defendant and the two Third Parties.

8. The plaintiff denied ever interacting with Mr. George Adongo during the transaction with the defendant. He asserted that the defendant was to clear the cargo and transport it as per the invoice he produced as plt. exhibit 2. The plaintiff indicated that he was not aware of any agreement between the defendant and 1st Third Party since he paid money for transport to the defendant directly.

9. In cross-examination the plaintiff admitted that he did not produce the documentations to verify the claim for damages and he did not also produce the invoice for the two tonnes of nails worth in US Dollars. The plaintiff also indicated that he gave the defendant a commercial invoice and the cost for the whole cargo was USD 172,556.25. He admitted that he did not produce any document on shipping charges and that he did not know whether the defendant had trucks to transfer the cargo.

The defendant's case

10. The defence case was adduced through one Kennedy Ochieng a Customer Relations Executive. He testified that the plaintiff was introduced to the defendant through George Adongo a representative of the 1st Third Party. The defendant admitted having quoted for clearing and transportation but George Adongo said he would handle the transportation. The defendant referred the court to emails dated 4th and 6th October, 2011 where transport was not an item. According to DW1 the emails had been sent to Mr. Liban Farah and copied to Mr. George Adongo who handled the transportation and later sub-contracted Khalif Abdi of Samatar Transporters, the 2nd Third Party, to transport the goods.

11. On being referred to the invoice produced by the plaintiff as plt. exh. 2, DW1 indicated that it refers to all the charges ex CFR (cost and freight) which included charges for clearance, administration and logistics from Mombasa to Juba. DW1 further testified that the 1st Third Party undertook to provide transport. Mr. Liban Farah and George Adongo were in the said meeting. Mr. Abdullahi was to receive the cargo in Juba and coordinate with Barakat in offloading.

ANALYSIS AND DETERMINATION

12. The plaintiff, the defendant and the 1st Third Party filed their list of agreed issues which are as follows:-

- (i) What was the nature of the engagement between the plaintiff and the defendant as per the contract and the general conditions of Spedag Interfreight Group of companies?
- (ii) What was the extent of liability and indemnity as between the defendants and the Third Parties herein?
- (iii) Whether or not the plaintiff herein acted through an ostensible agent in the contract and/or transaction forming part of the claim before this Honourable court; and
- (iv) Whether or not the plaintiff's claim is payable and if so to what extent?

Issue No. 1 - Nature of engagement between the plaintiff and the defendant as per the contract and the general conditions of Spedag Interfreight Group of companies

13. The general conditions do not specifically refer to the nature of engagement between the plaintiff and the defendant as the conditions apply generally to the customers the defendant deals with. In clause 1 of the said conditions, one can however discern that the defendant offers the services of a freight forwarder, carrier, warehouse operator, ship agent, husbandry agent, ship broker, clearing agent as well as additional and ancillary services. In order for this court to actually determine the nature of the engagement between the plaintiff and the defendant, one must resort to the invoice issued to the plaintiff by the defendant.

14. The original invoice from the defendant to the plaintiff raised charges in the sum of USD 73,645.00 for ex CFR for 7 by 20 foot containers at USD 7,150 each from Mombasa up to Juba. It is therefore the finding of this court that the invoice from the defendant addressed to the plaintiff included transportation charges of his cargo all the way to Juba.

Extent of liability and indemnity as between the defendants and the Third Parties herein

15. The defendant through the evidence of DW1 established that the 1st Third Party is the one that was contracted to transport the plaintiff's goods to Juba. He indicated that one George Adongo an employee of the 1st Third Party went to their offices with one Liban and requested for cargo clearance services. The defendant quoted for clearance of the cargo and transportation but George Adongo said that their company would do the transportation. The emails dated 4th and 6th October, 2011 were copied to George Adongo among other persons, this evidently shows that the plaintiff was in the loop about the transportation of his containers to Juba. This is for the reason that the said emails were

copied to Liban Farah who represented the interests of the plaintiff at the meetings.

16. DW1's evidence further stated that the plaintiff attended the 4th meeting in which it was arranged that Adullahi would receive the cargo in Juba and coordinate with Barakat for offloading. The defendant was given truck numbers for loading of the 2 containers and they were loaded by the 1st Third Party. DW1's evidence was that Adullahi boarded one truck and that the goods were delivered to Tiba Freighters in Juba, South Sudan.

17. The above evidence brings out clearly that the role of the defendant ended at the point where the 2 containers in issue were loaded on to the trucks owned by the 1st Third Party. Counsel for the 1st Third Party submitted that its witness died and they had no one to call as a witness to the case. However no supporting document such as a death certificate was produced to support the said claim. In the event that this court finds that the plaintiff has proved its case, the 1st Third Party will be held 100% liable and will indemnify the plaintiff for the said loss. The court however has to consider other issues before coming to a conclusion on the party that is liable.

Issue No. 3 - Whether or not the plaintiff herein acted through an ostensible agent in the contract and/or transaction forming part of the claim before this Honourable court

18. The plaintiff through one Mr. Liban Farah kept on being updated in regard to the defendant's dealings with the 1st Third Party through their representative one George Adongo. Consequently, the plaintiff cannot claim that he was not aware of the existence of third party transporters. According to DW1, the plaintiff attended the 4th meeting in which he was informed of the registration numbers of the trucks that were to transport the goods to Juba. Previously, Liban had been representing him in the meetings held. George Adongo from the 1st Third Party had also attended the meetings. For the foregoing reason, it can be safely said that the Liban acted as an agent for the plaintiff. This fact is borne by the fact that he attended the meetings on behalf of the plaintiff. In addition, the emails of 4th and 6th October, 2011 were copied to him.

Issue No. 4 - Whether or not the plaintiff's claim is payable and if so to what extent?

19. The plaintiff in his evidence asserts he had a contract for clearing forwarding and transporting the consignment with the defendant. There was a principal/agent relationship. Accordingly, any contract of carriage made by the agent with the transporter was in law a contract between the plaintiff (consignee) and the transporter. The plaintiff is claiming the sum of USD 489,500 as per the plaint. The claim is particularized and is therefore a claim for special damages for breach of duty of care. It is trite law that for special damages to be awarded, they must be specifically pleaded and also strictly proved.

20. Black's law Dictionary 10th Edition at page 474 defines special damages as follows:-

"Special damages are damages in other words which can be ascertained; quantified and proved. The same must be ascertained from the pleadings and proved by supportive documentary evidence."

21. In **Maritim & Another –vs Anjere (1990-1994) EA 312** at 316, it was held as follows:-

"It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."

22. The plaintiff sent the defendant a demand letter dated 23rd April 2012 claiming a sum of USD 445,500.00, being the value of two containers XINU1456022 carrying 4000 corrugated sheets and TRLU9621198 carrying 3125 corrugated sheets and 2 tonnes of nails. In cross-examination of the plaintiff by Mr. Nyongesa for the defendant, the plaintiff stated that they had worked out the value of the iron sheets from the point of purchase, shipment, clearance from the port, demurrage and transport to arrive at the figure of USD 445,500.00. The plaintiff also admitted that he had not produced any document to prove the purchase price of the goods and freight charges. The defendant however produced a commercial invoice which the plaintiff had given them which indicates that the cost price of the consignment was USD 172,556.25.

23. The plaintiff did not demonstrate or even give a breakdown of how he arrived at the figure of USD 445,500.00, as the value of corrugated sheets and nails that were aboard the two trucks in issue, as he did not produce evidence to indicate how he arrived at the number of corrugated sheets that had been loaded in each container. Further, as was submitted by Counsel for the defendant, the plaintiff failed to explain how the value of the iron sheets and nails came to USD 445,000, yet the total value of all the items in the 7 containers was USD 172,556.25 as per the commercial invoice from the seller.

24. The plaintiff's Counsel in his written submissions is the one who took it upon himself to explain how the gross sum of USD 489,500 claimed in the plaint was arrived at. Submissions cannot fill the gaps in the evidence of the plaintiff. In **Daniel Toroitich Arap Moi and Another vs Mwango Stephen Muriithi and Another** [2004] eKLR, the Court of Appeal held thus:-

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented"

25. The plaintiff also lumped the total costs incurred for different services together instead of giving a breakdown of the different services rendered by the defendant, thus making it difficult to verify if the figures were correct. Evidence of freight charges was never furnished by the plaintiff and therefore the same was not proved as per the claim. In **Bonhan Carter vs Hyde Park Hotel Limited** [1948] 64 TLR 177,

Lord Goddard stated thus:-

"It trite law that the plaintiff must understand that if they bring actions for damages it is for them to prove damage, it is not enough to note down the particulars and so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."

26. In view of the foregoing, I find that the plaintiff has failed to strictly prove the sum claimed in the plaint of USD 489,500.00 being the purchase price of corrugated sheets, nails and costs, due to his failure to produce relevant documentary evidence in support of the same. The plaintiff has failed to prove his claim to the required standard of a balance of probabilities. I hereby dismiss this case with costs to the defendant and the 1st Third Party. Save for filing a statement of defence, the 2nd Third Party did not participate in the proceedings. I make no order as to costs for the 2nd Third Party.

DELIVERED, DATED and SIGNED at MOMBASA on this 15th day of March, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Birir for the plaintiff

Ms Owiti holding brief for Mr. Nyongesa for the defendant

No appearance for the 1st Third Party

Mr. Oliver Musundi - Court Assistant