



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 53 OF 2018**

**BLOOMING BLISS KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**1. OCEANFREIGHT (E.A.) LIMITED**

**2. MEDITERRANEAN SHIPPING COMPANY LTD.....DEFENDANT**

**R U L I N G**

1. On 31/8/2018, the 1<sup>st</sup> defendant by a Notice of Motion dated 24/8/2018 sought an order that its name be struck out of the suit on the grounds that it is an agent of a disclosed principle and the suit thus goes against the grain of the established principle of law that where the principle is disclosed, the agent is not to be sued.

2. The Application was supported by the Affidavit of the one Moses Mwaliko the Claims Manager of the 2<sup>nd</sup> defendant who asserts that the 1<sup>st</sup> defendant is a shipping agent for a disclosed shipping line and the relationship is disclosed in the exhibited Bill of Lading and Shipping Order.

3. The application was opposed by the plaintiff who filed a Replying Affidavit whose gist was that in international trade, goods are transported by a shipping line and handed over to a shipping agent who takes responsibility of the goods upon discharge.

4. In my view the application asks the court to determine whether an agent in the carriage by sea transaction can be sued. The starting point is that to the general rule against suing agent for a disclosed principle has established and known exception. The exceptions are that the rule is side stepped where; there is a definite contract between the shipper and the agent and where the damage or injury is occasioned by negligence of impropriety by the agent

5. There are other considerations appurtenant to the general rule and I do find the words of the author of Halbury's Laws of England to be of help. He writes in 4<sup>th</sup> Edition paragraph 25:-

**“Where a contract is made by an agent on behalf of a foreign principal there is no presumption that the agent necessarily incurs personal liability and has no authority to establish privity of contract between the principal and third party. Where the intention of the parties is not clear or the terms of the contract are in dispute, the fact that the principal is a foreigner is a factor to be taken into account in determining whether in the circumstances the contract is enforceable by or against the foreign principal or whether the agent is personally liable” At paragraph 827 it is stated:- “Where the other contracting party whether in presence of the principal existence or not, obtains judgment against the agent or, though he knows at the time when the contract is made or discovers afterwards who the principal is, elects to look to the agent to the exclusion of the principal the principal is discharged from liability to the third party and his liability cannot be revived”**

6. In this matter the plaintiff pleads at paragraph 4 & 5 that it contracted the 1<sup>st</sup> defendant. To that plea there is no unequivocal denial but some ambivalent admission at paragraph 4. The exact dealing between the two must thus be left for determination by way of evidence and not by summary and draconian remedy of striking out.

7. The second consideration I have had in this regard is the fact that it is customary in carriage by sea contract that a carrier's liability ends upon discharge at the port of discharge. If that be the case then one wonders how the carriers' interests get captured and Protected Post-discharge. That to me is the purpose of a shipping agents.

8. It is now settled that striking out is a draconian remedy that must be resorted to in the clearest of the clear cases and not where better facts ought to be established by evidence.

9. I decline to exercise the remedy of striking out and do hold that the liability of the 1<sup>st</sup> defendant be determined upon evidence being led on the terms of carriage between the plaintiff and the defendants and the extent to which the 1<sup>st</sup> defendant was to participate in that arrangement.

10. The upshot is that I do find no merit in the application and direct that the same be dismissed with costs.

**Dated and delivered at Mombasa this 20th day of September 2019.**

**P.J.O. OTIENO**

**JUDGE**