



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.
CIVIL CASE NO. 281 OF 2015

BETWEEN

CELINA TRADING LLC.....PLAINTIFF

AND

NGAO CREDIT LIMITED.....1ST DEFENDANT

SALOME WANGUI NJOROGE.....2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff, Celina Trading LLC (“Celina”) is a limited liability Company incorporated in the United Arab Emirates (UAE). It engages in the export and sale of second hand clothes and shoes. Its case is that it entered into a business arrangement with the 2nd defendant, Salome Wangu Njoroge (“Salome”) for importation and sale of used shoes and clothes in Kenya from Australia via Sharjah in the UAE.

2. According to the paragraph 7 of the plaint, the terms of their arrangement were that Celina would identify and collect used shoes and clothing (“the consignment”) whereupon Salome would make a deposit of 50% of the value of the consignment. Upon completion of order of any given consignment, Salome would pay to the Celina the balance of the purchase price being 50% of the invoice sum. Celina would then ship the consignment from USA to the port of Mombasa. Upon shipping the consignment, Celina would send the bill of lading to Salome by courier to enable her clear the consignment by paying custom duties, shipping and port clearance charges.

3. In order to facilitate the transactions, Celina stated that it extended credit to Salome on the understanding that the property in the consignment would only pass to Salome upon payment of the invoiced sum within the credit period. Based on the agreements, Celina shipped four container valued at USD 184,141.05 as follows:

- Container No. MRKU3685653 valued at USD 46,589.00 on 2nd February 2015
- Containers No. MRKU52777753 and TCNU8565694 valued at USD 53,721.75 and USD 38,279.30 respectively on 13th March 2015
- Containers No. MSKU8506412 valued at USD 45,560 on 9th April 2015

Celina claimed that Salome only settled USD 10,750.00 but defaulted in its obligation to settled the balance on USD 173,391.05.

1st Defendant’s Case

4. As the name suggests, the 1st defendant (“Ngao”) is a financial company involved in lending money. Celina claimed that on 13th April 2015, Salome and Ngao entered into an agreement in which Ngao advanced Kshs. 1 600 000/= to Salome to enable her clear the consignment in container MRKU5277753 and which Salome pledged as security for the loan. To perfect this arrangement, Salome gave Ngao the

following documents in respect to the Container; Bill of lading dated 15th March 2015, Fumigation and Disinfection Certificate dated 7th March 2015, Packing List/Commercial Invoice dated 7th March 2015. In order to clear the consignment, Ngao disbursed Kshs. 2,729,111.00 on behalf of Salome. When Salome defaulted in the repayment of loan, Ngao realized the security by selling the consignment and recovering its money. According to Celina, Ngao connived with Salome to fraudulently take the consignment and sell it when in fact the neither Ngao nor Salome had title to the consignment. Celina claimed US\$ 119,669.30 against Ngao.

2nd Defendant's Case

5. Ngao's defence is that it issued the loan to Salome in good faith. It contended that after scrutinizing all the documents including the original bill of lading, invoice, fumigation certificate which were forwarded it by Salome, it was satisfied the container MRKU5277753 belonged to her and was good security. On this basis it disbursed Kshs. 2,727,111.00 for clearing the consignment. Its case was that Celina did not have a cause of action against it as there was no privity of contract between it and Celina.

3rd Defendant's Case

6. In her defence, Salome denied the Celina's claim but put forth an alternative and affirmative defence. She admitted that she agreed with Celina that it would ship second hand clothes to be sold in Kenya. Following the agreement, two containers were duly shipped and that she paid Celina's local representative, a Mr Sultan, Kshs. 2,000,000.00 despite the fact that the goods shipped were not fit for purpose and were not accepted by the market. She stated that she paid customs duty amounting to Kshs. 1,400,000.00 for the two containers but contrary to the agreement between the parties, Celina shipped a third container with the knowledge that the goods in the previous containers were not fit for purpose and had not been sold. Salome also admitted that she obtained a loan from Ngao who facilitated clearance of the consignment. She further stated she was not involved in the fourth consignment which Celina brought. She therefore prayed for the suit to be dismissed.

Issues for determination

7. At the hearing, three witnesses testified. Sasha Nedelovski (PW 1) for Celina, Florence Wanjiru Ndungu (DW 1) for the Ngao and Salome (DW 2). Their testimony largely mirrored what the parties set out in the pleadings and what I have outlined above. The parties also filed written submissions which I shall refer to in the course of this judgment.

8. It is not in dispute that the Celina dispatched four consignments to Kenya on the terms agreed upon by the parties. The issue arising therefrom is whether Salome should pay for the value of the consignments. As between Celina and Ngao, the issue is in relation to container MRKU5277753 which Salome pledged as security for the loan to enable her clear the consignment at the port thus in order to resolve this matter, I frame the following issue for determination:

- a. Whether the 1st defendant colluded with the 2nd defendant to dispose of the consignment in container MRKU5277753 and if so, whether the 1st and 2nd defendants owe the plaintiff USD 53,721.75 being the value of the consignment in container MRKU5277753.
- b. Whether the 2nd defendant owes the plaintiff USD 173,391.05.

Whether the 1st defendant colluded with the 2nd defendant to dispose of the consignment

9. The first issue concerns the container MRKU2777753 pledged by Salome to Ngao and whose contents were subsequently sold by Ngao for sums advanced to Salome. The gravamen the plaintiff's case is that Ngao was negligent in failing to conduct due diligence on the ownership of consignment and that it colluded Salome to dispose of the consignment to the detriment of the plaintiff. The success of the plaintiff's case on this hinges on the nature of the bill of lading. Counsel for the plaintiff and 2nd defendant submitted extensively on the nature of a bill of lading and whether it confers ownership to the holder or consignee.

10. It is not in dispute that among the documents Salome presented to Ngao was the original bill of lading for container MRKU2777753. Ngao's case was that it was satisfied the Salome was the sole consignee and proceeded to take the consignment as a security for the loan advanced to Salome.

11. Counsel for Celina submitted that under the law of carriage of goods by sea, a bill of lading is only a contract of bailment and that the person named as consignee is an agent, company or person receiving the import consignment according to the *Merchant Shipping (Maritime Service Providers) Regulations, 2001*. Counsel cited several authorities among them *Societe Miniere Delet v Africa Invest Limited and 2 Others [2015] eKLR* and *Heifer Project International v Forest City Export Services Limited and Another [2017] eKLR* to support the proposition that a bill of lading was a contract of bailment and no more and in this instance Salome did not have title to the consignment and could not pledge it as security. Counsel further submitted for a Bill of Lading to be negotiable it must be "clean" and drawn "to Order" of the consignee. Counsel relied on the *British Freight Association, A Guide to Due Diligence on Release of Bills of Lading and Freight, 2018* where it states that:

A negotiable Bill of Lading is a document of title, which may be used to transfer ownership of the goods from one party to another. The original consignee, by endorsing (signing) the back of the bill, transfers title in the goods to another party (the new consignee). The new consignee may transfer title to another party and so on. For a bill of Lading to be negotiable it must be "Clean" and drawn "to Order" of the consignee.

12. Counsel for the plaintiff observed that since the bill of lading was not drawn to the order of Salome, it was not a negotiable instrument as such Salome could not pledge it as security consequently Ngao could accept it security and was liable to Celina for its disposal.

13. Counsel for the Ngao accepted that a bill of lading is a contract of bailment but went further to submit that it is was a document of title which Ngao was entitled to rely on while advancing the loan to Salome. In his view, the bill of lading forwarded to it by had Salome named as the sole consignee and it relied on this fact to conclude that she was held a good title to the consignment to the conclusion of everyone else.

14. The law concerning the nature and effect of a bill of lading is aptly summarized in **Black's Law Dictionary (10th Ed), p. 192** which cites with approval **William Anson, Principles of the Law of Contract, 380 (Arthur L. Corbin ed., 3d Am ed. 1991)** as follows:

A bill of lading may be regarded in three several respects. (1) It is a receipt given by the master of a ship acknowledging that the goods specified in the bill have been put on board; (2) it is the document [that] contains the terms of the contract for carriage of goods agreed upon between the shipper of the goods and the shipowner (whose agent the master of the ship is); and (3) it is a 'document of title' to the goods, of which it is the symbol. It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still on-board ship and upon high seas. [Emphasis mine]

15. The same position is position is taken in **T. E. Scrutton, Charterparties and Bills of Lading (17th ed.), Sweet and Maxwell, 1965** which states that a bill of lading is, "A document of title to goods which enables the consignee take delivery of goods at their destination or to dispose of them by endorsement and delivery of the bill of lading." While the bill of lading is first and foremost a contract of bailment, the possession of the original document by the duly named consignee as the person entitled to delivery of the goods coupled with the fact of possession is clear evidence that of title of the goods absent any other evidence to the contrary. The position that a bill of lading constitutes title to the goods was affirmed by the Court of Appeal in **PIL Kenya Limited v Joseph Oppong MSA CA Civil Appeal No. 102 of 2007 [2009]eKLR** where Nyamu JA., stated that, "A bill of lading in law is contract between a shipper and ship-owner. It constituted the title to the goods and shows where the property in the goods is at any time."

16. In light of the aforesaid statements representing the law, I find that the bill of lading which named Salome as the consignee was for all intents and purposes the document of ownership. The same document shows that the Celina was the consignee and it was not conditional in any manner as to whom the goods would be delivered. In the circumstances Ngao was entitled to rely on it as evidence of Salome's title. Further, I find that the issue of the bill of lading being negotiable does not arise as its terms were clear as to who the consignee was and that Salome having the original document in her possession and having taken delivery of the goods was entitled to pledge the consignment.

17. Counsel for the plaintiff further contended that Ngao knew of Celina's interest since one of the documents presented to it by Salome was the invoice which showed the terms of payment. Its case was that since 50% of the purchase price was yet to be paid then the property in goods had not passed hence Ngao ought not to have accepted the consignment as security without the consent of Celina. Thus, the plaintiff contended that Ngao ought to have exercised due diligence and by failing to do so, it was negligent and liable for damages.

18. Find the Ngao negligent in this circumstance depends on whether Ngao knew that property in the consignment had not passed. Whether the property in goods has passed is a question of fact and the **Sale of Goods Act (Chapter 33 of the Laws of Kenya)** ("the SGA") governs the manner in which transfer of property in property is determined. **Section 19** thereof states as follows;

19. Property in specific or ascertained goods passes when intended to pass

(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

19. When the contract of sale is not clear on when property will pass, **section 20** of the **SGA** provides rules for ascertaining the parties' intention. The subject of the agreement between the parties was for specific and ascertained goods hence **section 20(a)** was applicable and it provides as follows:

20. Rules for ascertaining intention as to time when property passes

Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—

a. where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;

b. -----

c. -----

d. -----

20. The plaintiff's case for negligence hinges on the fact that the invoice for the goods constituted notice that the property in the goods had not passed to Salome. The invoice relied on by Celina addressed to Salome is dated 7th March 2015 in reference to container no. MRKU5277753 and contains the following at the foot thereof, "Payment Terms: 50% Deposit and 50% Upon Completion of the Order"

21. In order to find the Ngao liable for negligence, it has to be established that the it had notice of any interest by Celina. In this case, the invoice only contained the terms of payment. It is not state that ownership would not pass until payment is made and under **section 20(a)** of the **SGA**, which I have quoted above, Ngao was entitled to assume that property had passed. Further, the terms of sale and when the property in the goods was pass was a matter between Celina and Salome and could not affect the purport and import of the bill of lading which, as I have held, was the document of title for the goods. Having looked at the invoice dated 7th March 2015, I find that it does not constitute notice of Celina's interest. In addition, having been presented with a clean bill of lading stating that Salome was consignee, Ngao was entitled to accept it as security for the loan hence I dismiss that claim that Ngao was negligent as alleged or at all in relation to the rights of Celina.

22. Celina also accused Ngao and Salome of defrauding it by disposing of the container MKRU52777753. It is trite law that a part alleging fraud must set out particulars thereof and prove the same to the required standard. At paragraph 19 of the plaint, the plaintiff set out the following particulars of negligence and connivance as follows:

- a. Failing, neglecting and or refusing to do due diligence on the consignment before accepting it as security for an advance to the 2nd defendant.
- b. Accepting the consignment from the 2nd defendant as a security for advance of Kshs. 1,600,000/- while knowing or having reason to believe that the 2nd defendant did not have title to the consignment.
- c. Charging usurious interest on the said advance with the intent to retain and dispose of the said consignment.

23. From the findings I have already made, particulars (a) and (b) must fail since Salome was the consignee and holder of the bill of lading and there was nothing in the documents alerting Ngao of the Celina's interest. Likewise, and as regards particular (c), Celina was not a party to the loan agreement between Salome and Ngao hence it cannot contest its terms. I find and hold that the claim for fraud and connivance fails and as a result the claim against Ngao is dismissed.

Whether the 2nd defendant is liable for USD 173,391.05

24. The substantial issue between the plaintiff and 2nd defendant is whether the 2nd defendant is liable for the four consignments set out at paragraph 3 above. Salome's contention and response to this claim is that the relationship between her and Celina was in the nature of a partnership. She testified that they agreed to sell the second hand clothes and share profits and losses together. She testified how the goods sent to her were not suitable for the market and did not move fast and as a result she did not make enough money to pay duties for the other containers and that is why she applied for a loan from Ngao to clear the consignment. She also testified that she paid Kshs. 2,000,000/- to a Mr Sultan, who was Celina's agent. She also recalled at some point, PW 1 and his associate came to the country and assisted in selling the merchandise. Thereafter they would meet at the end of the day, analyse the sale and keep the proceeds.

25. Salome further recalled that when she proceeded to pledge the consignment to Ngao following lack of income due to the low quality of goods, PW 1 reported to the matter to the police alleging that the Salome had stolen the container. Ultimately the police declined to prefer any charges as it was deemed to be a civil matter. Thereafter Salome terminated the relationship. She also testified that her goods which were at Gikomba Market were consumed by fire.

26. The question that I must resolve first is the nature of the relationship between the parties. In order to support its case Celina, produced each invoice and bill of lading for the four containers. Each invoice contained the terms of payment as follows, "*Payment Terms: 50% deposit and 50% on completion of order*" or "*1. 50% Advance Payment 2. Balance of 50% Upon Completion of the Order 3. At the time of Loading there might be a Variation of 5 to 8% of Proforma in Total.*" It was not disputed that the original bill of lading, invoice and fumigation certificate were sent to Salome in advance to enable her clear the respective consignments. At paragraph 17 of her statement of defence Salome admitted that she received the first three containers. She paid duty for the 2 containers and borrowed from Ngao to clear the third container. She told that court that the Celina took control of the fourth container with the intention of selling the goods themselves.

27. Counsel for the plaintiff submitted that the court was entitled to look at the evidence as a whole to determine whether the relationship was in the nature of a partnership. He relied on the decision of the Court of Appeal in **Jane Wanja Gachiengo v David Wanjohi Kamau and Another NKU CA Civil Appeal No. 98 of 2008 [2014] eKLR** where it held that:

In many cases, the agreement is oral. In verbal contract of partnership, a person has to prove the existence of it by proving material terms. This can be proved by their conduct, the mode they had dealt with each other and with other people.

28. At this stage I wish to point out that it is firmly established in our jurisprudence and practice that parties are bound by their pleadings and that evidence which deviates from or is at variance with the pleadings is to be rejected (see **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR**). I have looked at the 2nd defendant's defence and it does not allege that the parties entered into a partnership. In my view, the material part of the defence is at paragraph 17 in which Salome admits that agreement to ship second hand goods to the county but that the goods received were not fit for purpose. She does not plead a partnership nor the terms thereof.

29. Even if I were to accept that the partnership was pleaded, such a relationship is negated by several facts. First, that Celina sent the original bill of lading to Salome to clear the goods signifying the transfer of ownership. Second, the bill of lading was accompanied by an invoice confirming terms of payment. Third, Salome paid duty and cleared the containers. The bill of lading and invoice, establish the nature of the relationship between the parties. As to PW 1's participation in the sales, I find that that such participation did not negate the terms of the agreement but was intended to cement the business relationship to enable Celina continue to do business in Kenya.

30. I therefore reject Salome's claim that the relationship was in the nature of a partnership and find that the relationship was a simple

agreement for sale of goods whose terms were that Celina would ship the goods to Salome in Kenya from UAE. Salome would clear the goods at the port and pay the price on terms agreed. The terms of payment were based on the invoice forwarded to Salome. Salome did not object to or contest the bills of lading and invoices produced in support of each container as follows; Container No. MRKU3685653 valued at USD 46,589.00 but the invoice dated 31st January 2015 shows that USD 10,750 had been paid; Containers No. MRKU52777753 and TCNU8565694 valued at USD 53,721.75 and USD 38,279.30 respectively while Containers no. MSKU8506412 was valued at USD 45,560.

31. As regards payment of the Kshs. 2,000,000/- on account of the two containers, Salome testified that she paid Celina Kshs. 2,000,000/- cash through a Mr Sultan. When pressed in cross-examination, Salome stated that she paid Mr Sultan Kshs. 1,000,000/- in cash Kshs. 1,000,000/- to PW 1. She also admitted that the payment was not supported by any documentary evidence for example bank statements. In my view, this payment was not proved on the balance of probabilities. My view is fortified by the fact that this issue of Mr Sultan and any payment was not suggested to PW 1 in cross-examination. Further the pleading and evidence were contradictory. While the defence stated that she paid Kshs. 2,000,000/- to Mr Sultan in her witness statement, in her testimony she said it was Kshs. 1,000,000/-. This finding also negates the submission by counsel for the plaintiff that a deposit must have been paid for all the containers to be shipped and supports the plaintiff's position that it extended to Salome a credit period to enable her make payment.

32. There is evidence that at some point PW 1 and other associates of Celina were involved in selling some of the merchandise when the sales began to wane. Counsel for Salome submitted that plaintiff's representatives should not be allowed to delude the court that they did not keep a substantial part of the proceeds of sale. If this was the position, the 2nd defendant ought to have filed a set-off or counterclaim to state the exact sum she is entitled to as the amount of goods sold is in the nature of a special damage claim. Failure to specifically plead a set-off or counterclaim means this court cannot proceed on the road to determine what is due from the plaintiff or grant appropriate relief in that respect.

33. From the totality of the evidence, the first and second containers arrived in Kenya and the merchandise therein sold albeit with some difficulty due to what Salome termed as the low quality of the goods. The third container was the one subject of the contestation as it was pledged to Ngao and subsequently sold. Even though it was sold, the property therein had passed to Salome and she was liable for the value of its contents to Selina and was obliged to pay for it. According to the Salome's defence, the fourth container arrived and was received by the plaintiff. This aspect of the defence was not supported by Salome's testimony nor put to PW 1 in cross-examination. Lastly, Salome urged that her merchandise was destroyed by fire at Gikomba.

34. At the end of the day, the relationship between Celina and Salome was a contract based on sale of goods. Under the **sections 20 and 22 of Sale of Goods Act**, the property and risk in the goods had already passed to Salome once the consignment was in Kenya. The plaintiff was entitled to the value of those goods represented by the price. Any claim by the 2nd defendant, being in the nature of special damages, ought to have been pleaded as a counterclaim or set-off and if indeed the goods were not fit for purpose, the plaintiff had a right to reject them or seek relief in the form of the diminution in value of the goods represented by a specific sum to be pleaded and proved. In the event the goods were destroyed by fire, then Celina was not liable as the risk in the goods had already passed to her. In the circumstances, I find the 2nd defendant liable for the consignments.

35. For the reasons I have set out above, I enter judgment as follows:

a. USD 173,391.05 for the plaintiff against the 2nd defendant together with interest thereon at court rates from the date of filing suit until payment in full.

b. The plaintiff's suit against the 1st defendant is dismissed with the costs to be paid by the plaintiff.

c. The 2nd defendant shall bear the plaintiff's costs of the suit against it.

DATED and DELIVERED at NAIROBI this 29th day of NOVEMBER 2019.

D. S. MAJANJA

JUDGE

Mr Simiyu instructed by Musyoka Murambi and Associates for the plaintiff.

Mr Mulani instructed by MJD and Associates Advocates LLP for the 1st defendant.

Mr Otieno instructed by Arwa and Change LLP Advocates for the 2nd defendant.