REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 94 OF 2008

EASTERN PRODUCE KENYA LIMITED……………….........….PLAINTIFF

VERSUS

RONGAI WORKSHOP& TRANSPORTERS LIMITED.....1ST DEFENDANT

JUBILEE JUMBO HARDWARE LIMITED……………..…2ND DEFENDANT

JUDGMENT

1. By the plaint dated 27th May, 2008 the plaintiff filed a special damages claim seeking compensation for the loss it occurred when its cargo was stolen while in transit at the hands of the 2nd defendant. It sought Kshs. 3,244,479.90/= together with interest at 14% from 5th December, 2004 up to date of payment in full plus the costs of the suit.

2. The plaintiff's case as per testimonies of PW1 and PW2 was undisputed. The plaintiff is a company which engages in the business of growing and transporting tea. By an agreement dated 1st January, 2003, it contracted the 1st defendant to transport its tea from its various factories within Nandi Hills to its warehouses in Mombasa. The 1st defendant in turn sub-contracted the 2nd defendant to perform its obligations under the contract to transport the plaintiff's goods whenever called upon to do so. The substance of their agreements is captured in the letters dated 3rd November, 2003 and 21st October, 2004.

3. On 5th December 2004 the 2nd defendant gave a consignment of goods to transport from Kapsumbeiwa to Mombasa. However the goods were stolen while in transit and did not reach their destination.

4. The plaintiff has now sued both defendants for compensation for its stolen goods valued at Kshs. 3,127,735.90/= and Kshs.97,944/= being loss adjusters fees. It sought to enforce clause 2 of the agreement between the defendants under which the 2nd defendant assumed full liability to the 1st Defendant for all the goods that were lost while in transit.

5. The plaintiff argued that the defendants as bailees and common carriers for reward, had a duty to deliver the consignment safely and securely failure to which amounted to breach of the contract.

6. PW2 the plaintiff's insurer's representative and Marine Surveyor Peter M. Kuria testified that the plaintiff had since been fully compensated for its loss and that it had brought the claim against the defendants in exercise of its subrogation rights.

7. The 1st defendant filed a defence dated 17th July, 2008. It admitted existence of the transportation contract, the sub-contract to the 2nd defendant and loss of the consignment while in the 2nd defendant's custody. It however denied the allegations of negligence made against it. Its case was that should it be found liable to the plaintiff to pay damages or compensation then the same should be paid by the 2nd defendant pursuant to their agreement dated 3rd November, 2003 which was extended on 22nd October, 2004. It filed a notice of claim against the 2nd defendant dated 12th September, 2008 notifying it that it would be seeking indemnity against any finding made by the court regarding its liability to the plaintiff. Further by an undated agreement made after the incident, the 2nd defendant agreed to fully indemnify the 1st defendant for any loss it incurred. The 1st defendant sought to enforce this agreement.

8. On its part, the 2nd defendant filed a statement of defence dated 10th July, 2008, that it did not have any contract with the plaintiff which would entitle it to make any claim directly against it. There was no consideration that passed between itself and the plaintiff so as to create any rights or impose any obligations against it. It further argued that the plaintiff was not privy to its contract with the 1st defendant. Accordingly it could not seek to enforce the terms of that agreement. The 2nd defendant maintained that it did not owe the plaintiff any duty of care. It therefore urged the court to dismiss the plaintiff's claim against it. The 2nd defendant however did not dispute that it was liable to indemnify the 1st defendant against any claim made against it by the plaintiff.

9. The parties filed written submissions in support of their cases. The plaintiff's brief submissions were that the defendants as common carriers were jointly and severally liable for the entire loss it incurred after the theft of its goods. The fact that the 2nd defendant did not have a direct contract with it did not exempt it from liability. It relied on the holding in **H.N. Kariithi v Vivek Investment Limited [2012] eKLR** and **Nairobi Court of Appeal, Civil Appeal No. 331 of 2001 East Africa Industries Ltd v B.R. Nyarangi** where it was held, *inter alia,* that a carrier is strictly liable for all loss or damage that occurs in the course of transit.

10. The 1st defendant's submissions were filed on 27th September, 2016. It addressed its submissions to the 2nd defendant's contention that it was not privy to the contract between the plaintiff and the 1st defendant and accordingly could not be found directly liable to the plaintiff. It urged the court to find that there was a collateral contract between the 2nd defendant and the plaintiff. It referred the court to the **Court of Appeal's decision in [2015] e KLR** where the court held that collateral contracts were an exemption to the doctrine of privity of contract so that by it a party to a main contract may sue a third party to a collateral contract. It submitted that the 2nd defendant was aware of the main contract between 1st defendant and the plaintiff and vice versa. In this case therefore the doctrine was applicable and the 2nd defendant should be held directly liable to the plaintiff for the entire consignment that was lost.

11. The 2nd defendant relied on its submissions dated 12th July, 2016. Also relying on the **Savings & Loan (K) Ltd v Kanyenje Karangaita Gakome & Another** case (supra) it reiterated its earlier averment that the plaintiff could not sustain any claim against it as it failed to prove by way of documentary evidence that there was privity of contract between them. It further submitted that there was no evidence of any consideration that moved between them. It was further submitted that the claim could not be sustained because the plaintiff notwithstanding having been fully compensated by its insurer, did not plead that the same was brought on behalf of its insurer. Therefore the claim should be dismissed because if allowed, it will result in double benefit. Counsel cited the decision in **Nakuru High Court Civil Appeal No. 190 of 2007 Zakayo Maina Waweru v Naku Modern Feeds Limited & Another.**

12. **Analysis of Evidence, Submissions and determination**

The 1st and 2nd defendants admitted that the plaintiff's consignment was stolen while in transit and that they are liable to compensate the plaintiff for the loss that it incurred. The value of the goods stolen and the particulars of special damages claimed by the plaintiff were not denied. The 2nd defendant further

agreed to indemnify the 1st defendant fully against any claim that the plaintiff might have against it following the loss. The indemnity agreement is captured in their contract and further in the undated consent between the 1st and 2nd defendants.

13. **The issues to be decided are whether the plaintiff could maintain an independent claim against the 2nd defendant which entitled the former to recoup its loss from the latter; and the extent of liability of the 2nd defendant if any.**

14. The 2nd defendant denied that it was directly liable to the plaintiff due to none privity of contract and asserted that the latter could not maintain an independent claim against it. This assertion was pertinent to the 2nd defendant because it determined the extent to which it was liable to the plaintiff and the amount of money that was recoverable from it. The contract between the 1st defendant and the plaintiff provided that in case of any loss incurred during transit, the 1st defendant would only be.

> ***"responsible for the first Kshs. 30,000/= (thirty thousand shillings) of any loss, damage, or contamination per vehicle transit."***

The agreement between 1st and 2nd defendants provided that:

> ***"In the event that the tea is damaged, lost, stolen, short-delivered or mis-delivered, you will be fully responsible for that damage, loss or theft,…"***

15. The plaintiff was therefore keen to attach direct liability to the 1st defendant because then according to its interpretation of clause above, it could recover the full value of the stolen goods from the 2nd defendant. However if the plaintiff's remedy only lie with the 1st defendant, then it could only recover a part of the value of the consignment because the 1st defendant's liability was qualified and limited. The 2nd defendant could only be compelled to indemnify the 1st defendant against the plaintiff's claim.

16. The answer to the above issue turned on whether there was privity of contract between the plaintiff and the 2nd defendant. Under this doctrine, the general rule is that a contract confers rights and imposes obligations only on the parties to it. The parties are those who freely negotiate and agree to the terms of their contract. Accordingly a contract cannot be enforced either by or against a third party. **(See William Muthee Muthami v Bank of Baroda [2014] e KLR)** and **Nairobi C.A. No.272 of 2006 Savings & Loan Kenya Ltd and Kanyenje Karangatia Gakombe (Supra).**

17. An exemption to the doctrine of privity is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. (See **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR** and **Chitty on Contracts; General Principles, Twenty - Sixth Edition at paragraph 1957**).

Where a contractor engages a sub-contractor, the contractor remains liable to the contractor for all aspects of the sub-contract. There is no direct contractual link between the main contractor and the sub-contractor by virtue of the main contract. In other words, the main contractor is not the agent of the employer and accordingly the employer's rights and obligations are in respect of the main contract only. The employer cannot sue the sub-contractor for defects in his work.

18. However the employer will have a right to maintain a claim directly against a sub-contractor where he demonstrates that there was an intention to contract that is *animo contrahendi* and contractual consideration was given. (See **Chitty on contacts supra at paragraphs 1324 and 1325). Halsbury's Laws of England, Fourth Edition**, at page 499 provides in this regard-

> ***"753. Collateral contracts. A contract between A and B may be accompanied by a collateral contract between B and C, whereby C makes a promise to B in return for B entering into the contract with A or doing some other act for the benefit of C. Before B can succeed in an action***

against C for breach of C's promise, B must prove the following: (1) that C made a promise to B animo contrahendi; and (2) in reliance on that promise, B entered into the contract with A or did the other requested act."

19. Intention to contract, a key ingredient in a collateral agreement constitutes an intention to create legal relations between the parties. The English Court in **Alicia Hosiery v Brown Shipley & Company [1969] 2 ALL ER 504** as held as follows-

"There can be no contract between two parties unless both intend either to enter into contractual relations or do to act towards one another that the law will imply such an intention. There must be an offer and acceptance leading to a bargain between the parties.."

20. In the above case, the owner of goods in a warehouse pledged them to a bank and later sold them. The bank gave the buyer a delivery order addressed to the warehouse, but the latter refused to deliver the goods to the buyer who claimed damages from the bank. It was held that there was a contract between the buyer and the seller, and one between the seller and the bank, but none between the buyer and the bank as no intention to enter into such contract had been shown.

21. From my examination of the contracts it emerges that there was no privity of contract between the plaintiff and the 2nd defendant. There was no evidence that the plaintiff was aware and conceded to the appointment of the 2nd defendant by the 1st defendant. The terms of the contract show that in fact the plaintiff did not intend that in case the 1st defendant was unable to meet the demands of the plaintiff, it could engage a sub-contractor to discharge its obligations. Clause 2 of their contract provided:

"Notwithstanding anything to the contrary herein contained or implied the company shall without prejudice to the terms of this agreement have the right to use other transporters should the transporter at any time and for any reason fail to make available to the company the number of vehicles required by it for the purpose of transporting the company's tea. In this respect stock for two line factories should not exceed 30 tonnes and single line factories 15 tonnes. In the event of the charges of such transporters therefore being higher than those agreed with the Transporter hereunder the company shall recover the excess charges from the Transporter."

22. It was the plaintiffs (the company) that retained the right to sub contract in the event the 1st defendant was unable to transport the entire cargo of the plaintiff, and would in the circumstances be liable to offset any additional charges incurred by the plaintiff as a result. The 2nd defendant was not appointed under the direction of the plaintiff and did not incur any liability from it. In addition, there was no promise from the 2nd defendant to the plaintiff which would lead to the implication that there was an intention to create legal relations with the 2nd defendant. There was any also no evidence from the contract to show that the parties intended that the 2nd defendant would be liable to the plaintiff directly. Accordingly I am unable to find that there was warrant of safety or security from the 2nd defendant to the plaintiff.

23. The plaintiff attempted to attach full liability for the lost goods against both the defendants, by alleging that they were common carriers and accordingly fully liable for the entire value of the lost goods. A common carrier is defined in the **Black's Law Dictionary, 8th Edition** as follows-

"Common carrier. A commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee. A common carrier is generally required by law to transport freight or passengers, without refusal, if the approved fare or charge is paid. Also termed public carrier."

24. The defendants herein were not acting public service vehicles which provided transport services for, usually, a predetermined fixed fee. Their engagement was under private contracts which detailed the scope of their duties, terms of engagements and compensation. The arguments by the plaintiff do not apply to this case. The scope of liability is that which is provided for in their seperate contracts.

25. Accordingly I find that the plaintiff cannot enforce clause 3 of the contract between 1st and the 2nd defendant dated 3rd November, 2003 because it was not privy to that contract. The plaintiff’s claim remains with the 1st defendant and it cannot plead directly against the 2nd defendant.

26. In turn the 1st defendant may claim against the 2nd defendant for the entire value of goods that were lost while in transit as per the notice of claim dated the 12th September 2008 and filed on the 16th September 2008. The proper construction of the above clause is that the 2nd defendant only assumed the liability of the 1st defendant to the plaintiff as it is only the 1st defendant who can seek for indemnity against it. In this case the loss incurred by the 1st defendant constitutes Kshs.30,000/= and the loss adjustor’s fees of Kshs.97,744/= as per clause 1(g) of the contract between the plaintiff and the 1st defendant and dated 1st January 2003.

27. Accordingly the plaintiff’s claim is allowed in the following terms:

> ***(a) Judgment is hereby entered in favour of the plaintiff against the 1st defendant in the sum of Kshs. 30,000/= being the amount payable for the stolen consignment by the plaintiff and Kshs. 97,744.00 being the loss adjustor’s fees, a total of Kshs.127,744/= with costs and interest at court rates from the 27th May 2008.***
>
> **(b)** ***The plaintiff’s claim against the 2nd defendant is hereby dismissed with costs;***
>
> ***(c) The 1st defendant’s claim of indemnity against the 2nd defendant is hereby allowed in its entirety with costs;***
>
> ***(d) The 2nd defendant shall fully indemnify the 1st defendant of the plaintiff’s claim against it for Kshs. 3,096.735 plus costs and interest at court rates from the date of notice of indemnity that is 12th September 2008.***

It is so ordered.

Dated, signed and delivered this 28th Day of February 2017.

J.N. MULWA

JUDGE