



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 251 OF 2012

BIG ROAD ENTERPRISES.....PLAINTIFF

VERSUS

DHL GLOBAL FORWARDING (K) LTD.....DEFENDANT

JUDGMENT

[1] The Plaintiff herein, **Bid Road Enterprises**, is a duly registered partnership that carries on business as long distance hauliers, heavy commercial transporters and commission agents within the region. It has its offices at Mombasa. It filed this suit on **2 May 2012** against the Defendant, **DHL Global Forwarding (K) Ltd**, for the sum of **Kshs. 9,962,026.26**, being the balance of the amount on account due from and owing and payable by the Defendant in respect of charges for the carriage and transportation of goods at its instance by the Plaintiff during the period **2011-2012**. The Plaintiff also prayed for interest on the sum aforesaid together with costs of the suit.

[2] The claim was resisted by the Defendant vide its Defence and Counterclaim which was filed herein on **29 June 2012**, on the grounds that, while it was conceded that the Plaintiff was engaged by the Defendant to provide it with transportation services from Mombasa to Nairobi, some of the goods it was transporting on behalf of the Defendant got stolen in transit in **July 2011**, worth **USD 138,798.24**, thereby causing the Defendant substantial loss and damage. Accordingly, the Defendant laid a Counterclaim for the aforesaid sum of **USD 138,798.24** together with interest and costs.

[3] In support of its case, the Plaintiff called four witnesses, namely the it's General Manager, **Ismail Abdukadir Hassan (PW1)**, the Plaintiff's Accounts Assistant, **Warda Khalid Soud (PW2)**, a former Branch Manager of the Defendant, **Geoffrey Muttimos Luyuku (PW3)** and the Plaintiff's Loading Clerk, **Mike Kioko (PW4)**. The Defendant, on its part, relied on the evidence of its Import and Export Coordinator, **Marcus Okola (DW1)**. All these witness relied on and adopted their respective witness statements and the Bundles of Documents filed herein with the pleadings.

[4] The evidence of **Ismail Abdkadir Hassan (PW1)** was that, as the General Manager of the Plaintiff, he was aware that the Defendant had contracted the services of the Plaintiff from the year **2007**, and that they enjoyed a cordial relationship until **August 2011**. He added that he used to deal directly with **Marcus Okola (DW1)** whenever the Plaintiff's services were required by the Defendant; and that the carriage contracts were all verbal. According to **PW1**, **Marcus Okola** would simply call him and allocate the Plaintiff specific containers for transportation. He would then make arrangements for the loading of the containers on their trucks and for their transportation and delivery to various parts of Kenya in

accordance with the instructions of the Defendant.

[5] It was further the evidence of **PW1** that on or about **3 July 2014**, he was called by **Marcus Okola** and allocated two containers for transportation by the Plaintiff to Nairobi. Thereupon, he made arrangements with the Plaintiff's Operations Manager for two trucks to be availed for the job, confident that once the containers were loaded on the trucks, the drivers would proceed on their way as usual. He added that later at about 7.00 p.m., one of the Plaintiff's employees, named **Mutinda**, called and informed him that one of the containers had not been sealed; and that he had informed the Defendant about it and was awaiting a response. It was the evidence of **PW1** that by about 8.30 p.m., **Mr. Okola** had not sent somebody to attend to the sealing of the container on behalf of the Defendant.

[6] It was further the evidence of **PW1** that in view of the foregoing situation, he personally called **DW1** to bring the concern to his personal attention; and that **DW1** informed him that there was nobody to send and further that they had run out of seals. It was thus the evidence of **PW1** that **DW1** gave him the go-ahead to release the driver to proceed to his destination without the seal; which was done. He added that the following day, the supervisor called the drivers of the trucks for an update as was the routine, but did not receive a response from the driver of **Motor Vehicle Registration Number KBC 360N**, which was the truck whose container was not sealed. The drivers of the other trucks were accordingly put on alert and instructed to be on the lookout for the missing truck; and that at about 11 a.m. the Supervisor informed him that the truck had been traced at Mlolongo, but that the driver was missing.

[7] **PW1** further testified that he proceeded to Nairobi and had the matter reported to **Mlolongo Police Station** for investigations, which culminated in the arrest and prosecution of the turn boy assigned to the truck at the material time. He added that the Plaintiff continued to render transport services to the Defendant thereafter for about one month and that by the time the contract was terminated, the Defendant owed the Plaintiff about **Kshs. 18,000,000**; but that they made payments in instalments for part of the amount and thereafter stopped, leaving a balance of **Kshs. 9,969,000.00** outstanding. According to **PW1**, when this balance was demanded from the Plaintiff, **DW1** sent him a contract which was backdated and required him to sign the same to enable the Defendant pay the outstanding sum; and that since the Defendant declined to pay up unless he signed the backdated contract, the Plaintiff had no option but to file the instant suit. He produced as exhibits herein the unsigned backdated contract, a Statement of Account dated **27 December 2011** and its supporting documents, as well as a demand letter written to the Defendant by the Plaintiff's Advocates. They were all marked **Plaintiff's Exhibit No. 1** herein.

[8] **Warda Khalid Soud (PW2)** is an employee of the Plaintiff, currently serving as an Accounts Assistant. She confirmed that the Plaintiff rendered road freight services to the Defendant as set out in the Statement of Account dated **27 December 2011** for which various invoices were raised between **21 March 2011** and **15 December 2011**. She testified that the sum of **Kshs. 9,962,029.26** is justly due and owing to the Plaintiff from the Defendant.

[9] **Geoffrey Muttimmos Luyuku (PW3)** on his part stated that, as a former Branch Manager for the Defendant, he was aware that the Defendant had contracted the Plaintiff to transport the containers that are the subject of this suit. He further testified that from his dealings with the Plaintiff, as the Defendant's Branch Manager, he could confirm that the terms of business were that:

[a] The Plaintiff was a common carrier;

[b] The Plaintiff did not accept any responsibility for any loss or damage for any goods carried by them under any circumstances or at all;

[c] The Plaintiff did not know the contents of any cargo that they transported unless the Defendant informed them of the same, which was not done as a matter of course;

[d] The Defendant was under a duty to provide police or adequate escort for all the high value or sensitive goods transported;

[e] The Plaintiff was under no obligation to insure the goods it carried or transported and at all times it was understood by the Defendant that the goods were carried at its own risk as a merchant.

[f] It was the sole responsibility of the Defendant to fully insure the goods transported by the Plaintiff;

[g] The Defendant did in fact insure the said cargo right from the port of shipment in the country of origin and that the goods were so insured at the time of the loss suffered by the Defendant.

[10] **PW3** added that, although it was the procedure that the Defendant would affix its seal on the containers, this specific container was never sealed by the Defendant even after the Plaintiff drew the Defendant's attention to the anomaly. He added that, in this instance, the description and/or content of the consignment were not disclosed to the Plaintiff as the Defendant would not normally disclose the nature and character of the contents, especially for sensitive or expensive items.

[11] The Plaintiff's last witness, **Mike Kioko (PW4)** testified that, in respect of the subject matter of this suit, he received a call by **PW1** with instructions to see to the collection of some two containers from the Mombasa Container Terminal. He promptly notified his supervisor, **Mr. Mutinda**, who allocated two trucks for the job, being **KBC 408** and **KBC 360N**. That once the two motor vehicles were allocated, he delegated the loading duty to a clerk by the name of **Bismarck**, who thereafter left the Plaintiff's yard at about 10.00 a.m. to undertake the task. He added that the loading was done by 3.00 p.m. and the trucks were released at about 5.00 p.m. for their respective destinations.

[12] According to **PW4**, the containers would be sealed before leaving the Container Terminal; and that in this instance, **Bismarck** called him and informed him that the container on **Motor Vehicle Registration no. KBC 360N** had not been sealed by the Defendant. It was the evidence of **PW4** that he immediately drew this to the attention of **Mutinda**, who was his supervisor, for appropriate action. He got to learn the following day that the driver of **KBC 360N** could not be traced.

[13] For the Defence, **Marcus Okola (DW1)** conceded that the Plaintiff had been providing transportation services to the Defendant; and that it was a term of engagement that the Plaintiff would deliver all the Defendant's goods in good condition and in accordance with the expected delivery timelines. It was further the evidence of **DW1** that the parties entered into an agreement in which the Plaintiff would transport the Defendant's goods at its own risk; and would be held responsible for the safety of the goods as well as any damage or loss arising due to negligence in the course of such transportation.

[14] With regard to the subject matter hereof, it was the evidence of **DW1** that in **August 2011**, the Plaintiff was required to transport the Defendant's goods worth **USD 138,798.24** from Mombasa to Nairobi on behalf of **IT4 Africa**; and that in the course thereof, the said goods were lost in transit while in the custody of the Plaintiff. He added that the Plaintiff's employees, being the prime suspects, were arrested and charged and that the criminal case against them is still pending hearing and final determination. According to **DW1**, the Plaintiff ought to be held liable in the circumstances for the loss suffered by the Defendant as a result of the alleged theft as set out in the Defendant' Counterclaim. He added that despite numerous request for reimbursement for the loss, the Plaintiff has neglected and/or refused to pay the Defendant for the loss incurred.

[15] Having considered the pleadings filed herein including the documents annexed thereto, and the evidence adduced in support thereof, including the submissions made herein by the parties' Counsel, there is no dispute that there was a relationship between the Plaintiff and the Defendant, whereby the Defendant would subcontract the Plaintiff to transport goods to various destinations as required. It is similarly not in dispute that the Defendant contracted the Plaintiff to transport goods on behalf of **IT4Africa** from the port of Mombasa to Nairobi in **August 2011**; or that the goods were transported by means of the Plaintiff's two trucks **Registration Numbers KBC 360N** and **KAX 973V**.

[16] There is further no dispute that whereas the driver **Motor Vehicle Registration Number KAX**

973V safely delivered his consignment, the goods that were transported in **Motor Vehicle Registration Number KBC 360N** did not reach their intended destination. There is no doubt that the goods got stolen in transit while in the custody of the Plaintiff's employees, who were subsequently arrested and charged with criminal offences relative to the lost goods. The Court was informed that their trial is underway and is yet to be concluded. Thus, whereas Counsel for the Plaintiff flagged up a total of 10 issues for determination herein, in my considered view, the issues can safely be reduced to the following:

[a] Whether the Plaintiff has demonstrated that the Defendant is indebted to it in the sum of Kshs. 9,962,026.26 as claimed;

[b] Whether the Plaintiff is liable, as a carrier, to the Defendant for the lost goods.

[17] From the evidence adduced herein, it is common ground that the contract between the Plaintiff and the Defendant was an oral one. Even though the Defendant contended that there was a written agreement, no such agreement was exhibited herein. What was exhibited was a document that was unsigned by the Plaintiff, and which **PW1** contended was availed after the fact, for signature by the Plaintiff in **December 2011** in order for the sum claimed herein to be paid by the Defendant. Additionally, the evidence by **PW1** and **PW2** was that instructions would be given by the Defendant whereupon the Plaintiff would provide the haulage services and then bill the Defendant. Hence, the Delivery Notes, Invoice and the Container Interchange documents would be all that was required for payment purposes. This evidence was augmented by the testimonies of **PW3**, who was the Branch Manager of the Defendant at the time, and **PW4**. It is instructive that there was evidence adduced by the Defendant in rebuttal.

[18] The Plaintiff further adduced evidence to show that by **27 December 2011**, the Defendant owed it **Kshs. 9,962,026.26** for services rendered up to end of **August 2011**. The Statement of Account at pages 5 and 6 of the Plaintiff's Bundle of Documents was supported by the Delivery Notes, Invoices and Equipment Interchange Reports at pages 7 to 268 of the Plaintiff's Bundle of Documents. Again the Plaintiff's evidence in this regard was not displaced. I note however that the documents relied on by the Plaintiff were challenged by the Defendant on the ground that the documents were not produced by the makers. The Defence also discredited the evidence of **PW2**, arguing that as an Accounts Assistant, she could not vouch for how basis of the invoices or how the sums thereon were arrived at.

[19] I however have no hesitation in rejecting the foregoing argument in view of the clear directions provided in the **Practice Directions Relating to Case Management in the Commercial and Admiralty Division of the High Court at Nairobi, Gazette Notice No. 5179 of 25 July 2014**. Those directions require that such objections be taken at the Case Management Conference stage for directions to be given accordingly. Item 13 of the Case Management Checklist is with specific reference to objections to admissibility of any statement or documents. There was no such indication by the Defendant either in the Case Management Questionnaire or Checklist; and as such no directions could be given in that regard. Accordingly, the Plaintiff would be in order for assuming that no issue as to admissibility of any of the documents in its Bundle would be taken thereafter; and I would entirely agree, as the Practice directions aforementioned are intended to facilitate the Overriding Objective of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**. In my considered view therefore the objection is misconceived; and it is my finding that the documents were properly introduced as exhibits by **PW1** who had custody thereof on behalf of the Plaintiff. It is noteworthy that even the Defendant has herein relied on documents similarly introduced, without calling the makers thereof. The old adage, "What is good for the goose is good for the gander" would aptly capture the situation of the parties herein with regard to their respective sets of documents.

[20] The Defendant further challenged the evidence adduced by the witnesses for the Plaintiff on the grounds that it was basically hearsay evidence. It was submitted that **PW1**, **PW2** and **PW4** relied on what one **Mr. Mutinda**, evidently a Supervisor in the Plaintiff's establishment, said or told them. The said **Mr. Mutinda** was not called as a witness herein. Accordingly on the basis of the cases of **Dominic Mutua Maweu vs. Occidental Insurance Co. Limited [2015] eKLR** and **Subramaniam vs. Public Prosecutor [1956] 1 WLR 965** the Court was urged to disregard the evidence adduced herein by the Plaintiff. However, it is clear that, other than **Mr. Mutinda** aforementioned, **PW1** testified that he personally took

up the pertinent issue of the sealing of the subject container with **DW1**, having received information from **Mr. Mutinda** of the anomaly. Similarly, both **PW3** and **PW4** gave first hand evidence as to what they did and heard; a fact confirmed by **DW1** whose evidence was that the phone call he received in connection with the subject matter was from **PW1** and not **Mr. Mutinda**.

[21] Accordingly, I find no merit in the Defence argument that the evidence of the Plaintiff comprises of inadmissible hearsay. The same goes for the argument that **PW3's** evidence was obtained under duress and therefore ought not to be believed, granted that he came to Court out of his own volition. Indeed, in his evidence, he was categorical that he had not been induced to testify herein on behalf of the Plaintiff. Thus I would reject the Defence submissions that the evidence of **PW3** be disregarded.

[22] Finally, the Defendant urged that the Plaintiff should not be believed for the reason that it is guilty of material non-disclosure and concealment of information. In this regard it was contended that, whereas **PW1** testified that the Schedule before the Court was a complete record of all the transactions as at the date of theft of the subject goods, he was unable to account for the payments made thereafter by the Defendant. It is however clear that, in his evidence, **PW1** acknowledged that sum payments were made, which sums were reduced from the amount that was owing from the Defendant, and was therefore not part of the sum claimed herein. Indeed, in his evidence, **PW1** was explicit that the Plaintiff continued to provide services to the Defendant even after the theft incident, which evidence was not refuted. Accordingly, upon a careful consideration of the evidence availed herein, I am satisfied that the Defendant is indeed indebted to the Plaintiff in the sum of **Kshs. 9,962,026.26** for haulage services rendered as claimed herein.

[23] On whether the Plaintiff is liable, as a carrier, to the Defendant for the lost goods, it was the argument of the Plaintiff that the Defendant was not entitled to make a claim for the goods, granted that it was not the owner thereof. The evidence adduced was to the effect that the goods belonged to **IT4Africa Kenya Limited**. However, that the goods were consigned to the Defendant as a bailee, for the purpose of ensuring delivery to the importers, is not in question. The Bill of Lading confirms that the goods were dispatched from **DHL Global Forwarding TAS AS**, Istanbul, Turkey to **Global Forwarding Kenya Ltd**. Indeed it was the Defendant who sub-contracted the Plaintiff to transport the goods safely to the importers. Consequently, the Defendant has a valid cause of action against the Plaintiff in respect of the goods, that were lost in transit while under their custody, in view of the doctrine of privity of contract. In **Aineah Liluyani Njirah vs. Agha Khan Health Services [2013] eKLR**, this point was made thus by the Court of Appeal:

"Privity of contract is a long-established part of the law of contract... the essence of the privity rule is that only the people who actually negotiated a contract (who are privity to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him."

[24] There is a second reason why the Defendant is entitled to lodge a Counterclaim herein. As a bailee, the Defendant was entitled to counterclaim for the stolen goods that it had entrusted to the custody and care of the Plaintiff. This was recognized in **Raoul Colinvaux's Carver's Carriage by Sea, Vol. 2 (London: Stephens 1971)** at pages 46-47 thus:

"When goods are delivered to a carrier without any specific contract being made, the right to sue for breach of duty on the carrier's part appears to be in the person to whom the goods at the time of the bailment, or who is to bear the risk of the transit. If the actual sender is acting on the owner's instructions, the latter is regarded as the contracting party, and he becomes entitled to sue for the goods, and is liable to pay the freight, and otherwise to perform the implied contract. But when a special contract is made with the carrier, its terms must be looked at, and if it appears that the shipper was himself the contracting party, he is the person able to sue and liable upon the contract, although he may have been acting for the benefit of another, and may have no interest in the goods."

[25] By parity of reasoning, the Defendant, as the bailee herein, who had a carriage contract with the

Plaintiff, would be in its place, in lodging the Counterclaim herein in respect of the loss of the goods that were the subject of the bailment. There being no evidence to show that the Defendant had received compensation for the goods from the consignor's insurers, I would find and hold that, in so far as the carriage contract between the Plaintiff and the Defendant goes, the Defendant has the right to sue for the lost goods.

[26] As has been pointed out hereinabove, the contract between the parties was a verbal one, and while the Plaintiff contended that it was their understanding that the goods were transported at "**Merchant's Risk**", the Defendant posited that it was a term of the agreement that the Plaintiff would be liable for any transitional loss. Neither party availed tangible proof in support of their respective positions. Accordingly, I would go by the undisputed fact that the Plaintiff was at all times dealing as a common carrier. In **Black's Law Dictionary, 8th Edition at page 226**, a common carrier is defined thus:

"A common carrier is a commercial enterprise that holds itself out to the public as offering 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 fee or charge is paid."

[27] In **P.N. Mashru Transporters Limited vs. Rayshian Apparels Limited [2016] eKLR**, the Court of Appeal expressed the view that a common carrier is liable for any loss occurring while goods are in transit and under his charge. The Court held that:

"A common carrier is one who is ready to carry for hire as a business and not as a causal occupation and one who holds himself out as being ready to carry goods for any person no matter who they are. Thus the liability of a common carrier begins once he has accepted the goods for carriage and once he assumes the goods for carriage, he assumes a duty, not only to carry safely, but also to deliver safely to the destination and his liability only ends upon delivery of the goods."

[28] In the foregoing premises, it is clear that having accepted the goods that are the subject of this suit, it became the Plaintiff's responsibility to ensure their safe custody and delivery. It is therefore immaterial that one of the Defendant's employees was arrested and charged in connection with the loss, or that the theft was perpetrated by the Plaintiff's employees. Indeed, in **Securicor (K) Limited vs Drapers and Another Civil Appeal No. 67 of 1985**, the Court of Appeal took the position that:

"When a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then, if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also, if the servant or agent himself steals them or makes away with them."

[29] That the container was not sealed is a factor that ought to have put the Plaintiff on alert and caused it to exercise extra vigilance as to the safety of the subject consignment. There is no evidence to show that it was obligatory for the Plaintiff to risk having the unsealed container transported that night. Accordingly, it is my finding that the Plaintiff would be liable to the Defendant for the loss of the goods, given the foregoing circumstances; and although it was the Plaintiff's case that the Defendant did not give particulars of breach of contract or negligence, it is clear that liability is hinged on the simple fact that the goods were entrusted to the Plaintiff as a common carrier for safe delivery and that they were not so delivered. The value of the goods is set out in the Commercial Invoice at page 5 of the Defendant's Bundle of Documents to be **USD 277,596.48** for 672 pieces of HP PCs, Monitors and Laptops. **DW1** explained that only half of the consignment was delivered, hence the claim by the Defendant for half of the value of the goods as confirmed by the Police Abstract at page 8 of the Defendant's Bundle of Documents. In the premises, I am satisfied that the Defendant's Counterclaim has been proved and would find the Plaintiff liable to the Defendant for the value of the stolen goods, being **USD 138,798.24** as prayed in the Counterclaim.

[30] In the result, I would enter Judgment for the Plaintiff in the sum of **Kshs. 9,962,026.26** as prayed for in the Plaint against the Defendant, together with interest thereon. Similarly, it is my finding that the Defendant's Counterclaim against the Plaintiff has merit and as such Judgment is hereby entered in favour of the Defendant in the sum of **USD 138,798.24** together with interest from which the Plaintiff would be entitled to a set off of the aforesaid sum of **Kshs. 9,962,026.26**. **As each party has succeeded against the other I would direct that each party bears own costs.**

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF APRIL, 2017

OLGA SEWE

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2017

RACHEL NG'ETICH

JUDGE