



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 51 OF 2017

FREDRICK NJORA MWANGI.....PLAINTIFF

VERSUS

WILHELMSSEN SHIPS SERVICES LIMITED.....1ST DEFENDANT

S.G.C SHIPPING SERVICES LLC.....2ND DEFENDANT

KENYA REVENUE AUTHORITY (CUSTOMS DEPARTMENT).....3RD DEFENDANT

JUDGMENT

The Suit

1. By way of an Amended Plaintiff dated 19th June 2017, the Plaintiff seeks the following orders:

- i. That the court declares that the Plaintiff is the beneficial owner of all that is contained in container number DFSU 7534892 (A40).**
- ii. The goods held by the 3rd Defendant be released to the Plaintiff forthwith, after payment of all relevant dues; as they are being held illegally.**
- iii. That the 1st and 2nd Defendants bear the costs of this suit.**
- iv. This court grants any other relief it deems fit and necessary.**

The Amended Plaintiff is supported by the verifying affidavit of **FREDRICK NJORA MWANGI** sworn on 19th June 2017.

2. The 1st Defendant is a limited liability company incorporated in Kenya and an agent of **EMIRATES SHIPPING LINE DMCEST**. The 2nd Defendant is a company registered in Dubai in the United Arab Emirates, while the 3rd Defendant is a state corporation under Cap 485, Laws of Kenya.

3. The Plaintiff alleges that on or about 23rd December 2016, he flew to Dubai and ordered goods which included beds, mattresses, TV sets, an engine, sewing machine and other assorted items for use in a hotel at Kajiado.

4. The Plaintiff claims that he paid the purchase price for all the items and while in Dubai he engaged one Hassan Mwadzaya to effect the export and that the said **HASSAN MWADZAYA** in turn engaged **EMIRATES SHIPPING LINE DMCEST** (whose agent in Kenya is the 1ST Defendant) to effect the export. The Plaintiff contends that he paid for the freight and other related expenses and proceeded to travel back to Kenya.

5. The Plaintiff alleges that the 2nd Defendant was at all material times an agent of the Plaintiff for the purpose of loading the suit property and/or instructing the shipping company the place of destination of the suit property.

6. The Plaintiff alleges that upon arrival of the suit goods in Kenya the 1ST Defendant refused to release the goods to him and demanded that he first produces an original bill of lading, which the Plaintiff claims is not within his possession.

7. The Plaintiff contends that as a result of the above he has incurred heavy losses as he was to use the suit goods in uplifting his business.

Response

8. The 1st and 3rd Defendants responded to the Plaintiff by way of Statements of Defence. The 2nd Defendant did not respond to the suit. The 1st Defendant filed its Statement of Defence on 17th July 2017 while the 3rd Defendant filed its Statement of Defence on 25th July 2017.

9. The 1st Defendant in defence states that it does not issue a bill of lading to anyone but simply handles shipping duties which include discharging and loading cargos aboard ships.

10. The 1st Defendant admits that the Plaintiff visited its office situated at Imara Plaza, 9th Floor, Mombasa with allegations that he had ordered for goods from Dubai and wanted to clear the same but contends that the Plaintiff's allegations could not be confirmed due to lack of an original bill of lading.

11. The 1st Defendant states that there is no cause of action that arises herein as there was no contract between the Plaintiff and the 1st Defendant.

12. The 3rd Defendant on the other hand states that on 25th February, 2017 vessel **MARIE DELMAS** docked in Mombasa carrying container No. **DFSU7534892** but no entry was made in the customs systems to enable the same to be cleared from the Customs Warehouse yard in Kilindini, Mombasa.

13. The 3rd Defendant states that the container manifest indicated the Bill of Lading as No. **EPIRAEESAD160270** but the bill of lading was never produced together with a duly completed form C17B to the 3rd Defendant to enable it release the goods.

14. The 3rd Defendant states that it is willing to release the consignment upon full payment of all custom and warehouse charges by the Plaintiff.

Hearing

15. The suit came up for hearing on 28th April 2017. Mr. Omangi appeared for the Plaintiff, Mr. Ngunjiri for the 1st Defendant while Mr. Siminyu appeared for the 3rd Defendant. There was no appearance for the 2nd Defendant.

16. PW1, the Plaintiff herein testified that he was a businessman with a hotel in Kajiado and that in December 2016 he travelled to Dubai and purchased various goods from different shops. PW1 testified that he was accompanied by his cousin, Nelson Irungu, who lives in Dubai.

17. The witness testified that after he was done purchasing the goods, his cousin took him to meet Mr. Suhai, the 2nd Defendant's manager who in turn asked a Mr. Hassan Mwadzaya to deal with his cargo for shipping.
18. PW 1 stated that he tasked the aforementioned person with collecting his goods from the various shops and bringing them to the 2nd Defendant for shipping to Mombasa. PW1 stated that he paid Kshs. 380, 330/= on 18th January 2017 and that his goods arrived on 20th February 2017.
19. PW1 testified that a Ms. Caroline Muia from the 1st Defendant called him and asked him to go and collect his goods. When he went there Ms. Caroline Muia gave him a copy of the bill of lading and asked him for the original bill of lading but he did not have as Mr. Hassan Mwadzaya had promised to send it to him.
20. PW 1 testified that in the copy of the bill of lading he is identified as the consignee of the goods but the 1st Defendant has refused to release the goods until he produces the original bill of lading. PW1 states that nobody else had claimed the suit goods thus this court should declare him the owner upon payment of taxes due.
21. PW1 testified that he served the 2nd Defendant with the suit documents herein but the 2nd Defendant has neither appeared before the court nor made any claim against him. PW1 also stated that he went all the way to Dubai to trace the bill of lading but he could not find Mr. Hassan Mwadzaya.
22. Upon cross-examination by Mr. Ngure, PW1 testified that he was introduced to Mr. Hassan Mwadzaya by the 2nd Defendant and that Mr. Hassan Mwadzaya was tasked with collecting the goods from the various shops. The witness testified that he paid Kshs. 380, 330/= to Mr. Hassan Mwadzaya which was payment for shipping of the goods. PW1 stated that Mr. Hassan Mwadzaya received the money but he does not know whether Mr. Hassan Mwadzaya gave the money to the shipping firm. The witness later found out that Mr. Hassan Mwadzaya was a conman. PW1 stated that when his goods arrived in Mombasa he went to collect them but he was required to produce an original bill of lading which he did not have as Mr. Hassan Mwadzaya had not posted it to him.
23. PW1 stated that he had brought an action against the 1st Defendant because they were the ones holding his good.
24. Upon cross examination by Mr. Siminyu, PW1 testified that he knew that in order to claim goods which have been shipped he required an original bill of lading which in this case he did not have. PW1 also stated that he had not claimed the goods from the 3rd Defendant because he did not have the bill of lading and that he had not filed any claims with the 3rd Defendant for the release of his goods.
25. On re-examination, PW1 stated that he had confirmed that the good had arrived in Mombasa and that nobody had made a claim for the goods.
26. DW1, Caroline Muia, testified that she was a shipping executive with the 1st Defendant and that sometime in April 2017, the Plaintiff went to their offices to search for his goods. DW1 stated that she asked him for the original bill of lading but he did not have it. DW1 stated that she printed a copy of the bill of lading from their system and gave the Plaintiff all the necessary assistance.
27. DW1 testified that she carried out her investigations and found that the bill of lading was issued to **DARSHAN KIRPA GENERAL TRADING LLC** and the Plaintiff had not paid some money hence the reason for withholding the original bill of lading. DW1 stated that the shipper was claiming 3,750 dollars from the Plaintiff. DW1 testified that the 1st Defendant was not holding the suit goods and that the 1st Defendant was paid freight charges and the 3rd Defendant was thus claiming demurrage on the container.
28. Upon cross-examination by Mr. Omangi, DW1 stated that the 2nd Defendant appeared to be an agent

for **DARSHAN KIRPA GENERAL TRADING LLC** and that it is **DARSHAN KIRPA GENERAL TRADING LLC** that informed her that the Plaintiff owed it 3,750 dollars.

29. DW1 further testified that the suit goods are stored at CFC extension of port and once the goods are released to the Plaintiff, the Plaintiff will pay the 1st Defendant demurrage charges and all other charges due to the 1st Defendant.

30. On cross-examination by Mr. Siminyu, DW1 testified that before the 1st Defendant releases any goods shipped it must be given an endorsed original bill of lading and the said document was not availed to the 1st Defendant. DW1 also stated that as of that time the owners of goods was **DARSHAN KIRPA GENERAL TRADING LLC** as it was holding the original bill of lading.

31. On re-examination, DW1 reiterated that the 1st Defendant has no claims for the goods but for the container and that the 1st Defendant was not an agent of **DARSHAN KIRPA GENERAL TRADING LLC**.

32. Mr. Siminyu, learned counsel for the 3rd Defendant did not call any witness to testify but rather relied on the witness statement of **COLLINS BOSIRE** filed on 26th July, 2017. As per the statement, on 25th February, 2017 vessel **MARIE DELMAS** docked in Mombasa carrying container No. **DFSU7534892** but no entry was made in the customs systems to enable the same to be cleared from the Customs Warehouse yard in Kilindini, Mombasa.

33. The witness stated that the container manifest indicated the Bill of Lading as No. **EPIRAEESAD160270** but the bill of lading was never produced together with a duly completed form C17B to the 3rd Defendant to enable it release the goods. Further, the witness stated that entry transaction indicated the consignor of the goods as **DARSHAN KIPRA GENERAL TRADING LLC** and the consignee as the Plaintiff.

34. Mr. Bosire stated that Section 42 of the East Africa Customs Management Act provides that goods can be disposed off after they have stayed more than the statutory time of 30 days and that it is pursuant to that the 3rd Defendant issued gazette notice No. 6758 that unless the suit goods are removed from the custody of Customs Warehouse Keeper, Kilindini within 30 days of the notice, they would be sold off in a public auction on 29th August, 2017. Mr. Collins Bosire stated that the said auction was stopped vide court order dated 17th July 2017.

35. Mr. Bosire stated that the 3rd Defendant is willing to clear the goods from its Customs Warehouse when the same are entered in its system with proper documentation or as the court may direct and upon full payment of the customs duty, warehouse charges and any other charges that are payable under the law.

Submissions

36. The Plaintiff filed his submissions on 14th August 2017. The 1st Defendant did the same on 14th August 2017, while the 3rd Defendant filed its submissions on 15th August 2017. The 2nd Defendant did not file any submissions.

37. Mr. Omani, learned Counsel for the Plaintiff submitted that the Plaintiff travelled to Dubai and bought an assortment of goods for his business and later he was called by one Caroline Muia, the agent of the 1st Defendant and told to produce the original bill of lading for the purposes of entry and processing of the container. Counsel submitted that the Plaintiff did not have the original bill of lading but a copy of the same showed that the Plaintiff is the consignee and no changes and/or amendments have been made to the said copy of the bill of lading.

38. Mr. Omangi submitted that the Plaintiff paid for the shipment of the goods through one Hassan Wanini Mwadzaya who was the agent of the 2nd Defendant and the goods would not have arrived at the port of Mombasa if they had not been paid for.

39. Mr. Omangi submitted that Caroline Muia, an agent of the 1st Defendant confirmed that all freight charges had been paid by the shipper and thus the 1st Defendant has no claim over the goods as its charges have been fully paid.

40. In relation to the allegation by the 1st Defendant that the original bill of lading was with **DARSHAN KIPRA GENERAL TRADING LLC** because the good had not been fully paid for, Mr. Omangi submitted that the Plaintiff while testifying under oath produced all the receipts for the goods and also that there was no claim from any party that the goods had not been paid for. Mr. Omangi submitted that since there was no claim challenging the Plaintiff's ownership to the goods this court should declare the Plaintiff as the beneficial owner of the goods. Counsel submitted that the Defendants are violating the Plaintiff's right to property thus this court by virtue of Article 23 can enforce this right. Counsel contended that when the 3rd Defendant gazetted the goods for destruction it is only the Plaintiff who protested further buttressing the Plaintiff's claim that he is the only person interested and/or has a claim on the goods. Mr. Omangi submitted the unavailability of the original bill of lading should be considered as a misplacement of the same as no counterclaim has been lodged nor any objection to the ownership of the goods. Counsel submitted that this court has the jurisdiction to hear this matter as Article 165 of the Constitution provides that the High Court shall have the jurisdiction to determine applications for redress of a denial, violation, infringement or threat to a right or fundamental freedom under the Bill of Rights.

41. Mr. Ngure, learned Counsel for the 1st Defendant submitted that the 1st Defendant is a shipping agent with its principals, EMIRATES SHIPPING LINE DMCEST in Dubai and that its principals received a request from the 2nd Defendant's principals, **DARSHAN KIPRA GENERAL TRADING LLC** to ship a one (1) 40 feet container to Mombasa and the consignment arrived in Kenya on 26th February 2017. Counsel submitted that upon arrival of the consignment, the 1st Defendant's employee, Caroline Muia, informed the Plaintiff and requested him to avail an original bill of lading in line with international maritime laws for purposes of entry and processing release of the container. Counsel submitted that the Plaintiff failed to produce the original bill of lading hence the goods could not be cleared and the goods are still at Regional Logistics CFC-Miritini under the custody of the 3rd Defendant.

42. Mr. Ngure submitted that the 1st Defendant's employee, Caroline Muia, went out of her way and contacted the shipper- **DARSHAN KIPRA GENERAL TRADING LLC** who confirmed existence of a trade dispute between itself and the Plaintiff claiming that the Plaintiff had not paid an amount of 3,750 dollars to enable the shipper release the original bill of lading.

43. Mr. Ngure submitted that the 1st Defendant is a stranger to the Plaintiff's claim as its operations were only to ship the container under the shipper's instructions which it did and its freight charges were paid thus the 1st Defendant has no control over the goods and will release the container once the original bill of lading is produced.

44. Mr. Siminyu, learned Counsel for the 3rd Defendant submitted that on 25th February, 2017 vessel **MARIE DELMAS** docked in Mombasa carrying container no. **DFSU7534892** but no entry was made in the customs systems to enable the same to be cleared from the Customs Warehouse yard in Mombasa. Counsel further contended that while the container manifest indicated the Bill of Lading as No. **EPIRAEESAD160270**, the bill of lading was never produced together with a duly completed form C17B to the 3rd Defendant to enable it release the goods from its warehouse.

45. Mr. Siminyu submitted that the 3rd Defendant relied on Section 34 of the East Africa Customs Management Act which provide the procedure for clearing goods. Counsel further stated that the suit goods have never been entered into the system more than five months after they were brought into the

country hence the decision by the 3rd Defendant to dispose them as they had stayed for more than 30 days statutory time provided by Section 42 of the East Africa Customs Management Act.

46. Mr. Siminyu submitted that pursuant to Section 42 of the East Africa Customs Management Act, it issued a gazette notice No. 6758 on 14th July, 2017 seeking to sell the goods by public auction on 29th August, 2017. However, Counsel stated that the auction was stopped by an order issued by this court on 17th July, 2017.

47. Mr. Siminyu submitted that the 3rd Defendant is willing to clear the goods from its Customs Warehouse when the same are entered in its system with proper documentation or as the court may direct and upon full payment of the customs duty, warehouse charges and any other charges that are payable under the law.

48. Mr. Siminyu submitted that the 3rd Defendant has no role to play with regard to the ownership of the goods and that the 2nd Defendant will be willing to comply with orders issued by this court with regards to the ownership of the goods.

Determination

49. I have carefully analyzed the Amended Complaint, the responses thereto and the rival submissions by the parties. The issues that arise for determination are:

a) Whether the Plaintiff is the beneficial owner of all that is contained in container no. DFSU 7538492 (A40).

b) Whether the goods held by the 3rd Defendant should be released to the Plaintiff forthwith after payment of all relevant dues.

50. On the first issue, whether the Plaintiff is the beneficial owner of all that is contained in container no. DFSU 7538492 (A40), the Plaintiff has stated that he went to Dubai on or about 23rd December, 2016 and bought goods to which he procured the services of the 2nd Defendant for the purposes of loading the suit goods and instructing the shipping company the place of destination of the suit goods. The Plaintiff further contended that he had paid the full purchase price, freight charges and all other related expenses before returning to Kenya. The suit goods were shipped by the principals of the 1st Defendant, **EMIRATES SHIPPING LINE DMCEST** on request from **DARSHAN KIRPA GENERAL TRADING LLC** acting through its agent, the 2nd Defendant.

51. It is not in issue whether the said suit goods arrived in Kenya. Indeed all the parties are agreeable that the suit goods arrived in Kenya on 26th February, 2017 aboard vessel- Marine Delmas Voyage 017065. Upon arrival, the Plaintiff proceeded to claim the goods but the 1st Defendant refused to release the goods until the Plaintiff produced the original bill of lading.

52. The 1st Defendant does not dispute the above assertions by the Plaintiff. However, the 1st Defendant contends that it requires the original bill of lading in order to prepare documentation for handing over to the Plaintiff's clearing and forwarding agents for facilitation of release of the Plaintiff's goods.

53. The 1st Defendant's witness, Caroline Muia (DW1), during examination in chief stated that through her own investigations she had found out that **DARSHAN KIRPA GENERAL TRADING LLC**, the principal of the 2nd Defendant, was withholding the original bill of lading as it was claiming some money from the Plaintiff, specifically 3,750 dollars.

54. The 3rd Defendant on the other hand lays no claim to the suit goods and states that it is ready to release the goods once the bill of lading is produced together with a processed form C17 and the

appropriate custom duty and warehouse charges are paid.

55. In the case of **PIL Kenya Limited versus Joseph Oppong [2009] eKLR**, Justice Bosire quoted the case of **Mason versus Lickbarrow 1BI.H. 359** where Loughborough C.J said:

“A bill of lading is the written evidence of a contract for the carriage and delivery of goods, sent by sea for certain FREIGHT. The contract, in legal language, is a contract of BAILMENT...in the usual form of the contract, the undertaking is to deliver to the order, or assigns, of the shipper... .. The indorsement of the bill of lading is simply a direction of the delivery of goods.”

56. According to Garner Black’s Law Dictionary, 10th Edition, a bill of lading is defined as:

“A document acknowledging the receipt of goods by a carrier or by the shipper’s agent and the contract for the transportation of those goods; a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods.”

The Dictionary further describes a bill of lading as:

“A bill of lading may be regarded in three several aspects (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 the carriage of the goods agreed upon between the shipper of the goods and the ship owner (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 the high seas.” *(Emphasis added)*

57. In this case, the bill of lading is like a document of title to the goods. The 1st Defendant’s witness, Caroline Muia affirmed this by stating that the 1st Defendant required the original bill of lading in order to determine ownership of the goods.

58. In the case of **Societe Miniere Delet versus Afrika Invest Limited & 2 others [2015] eKLR**, Justice Emukule relied on the description of a bill of lading offered in the Lexis Navigator Dictionary that states:

“A bill of lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of contract of carriage under which the goods have been delivered to and received by the ship.

The signed Bill of Lading is handed over to the shipper, who may either hold on to it or transfer it to a third person. During the voyage and transit, the Bill of Lading under the law merchant is considered the symbol of goods described in it, and the endorsement and delivery of the Bill of Lading operates as a symbolic delivery of the goods. This person may be named in the Bill of Lading as the person to whom the delivery of the goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of Lading, he is usually known as the holder or endorsee of the Bill of Lading.

The holder of the Bill of Lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus in the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner’s lien for freight. A Bill of Lading issued by the ship owner’s agent in the absence of any contract of carriage is a nullity.”

59. The Plaintiff attached a copy of the bill of lading to their list of documents, however, the same is not clear. The 1st Defendant and the 3rd Defendant herein have both admitted that in the bill of lading the Plaintiff is named as the consignee to whom the shipped goods were being delivered. Specifically, the 3rd Defendant's witness, Collins Bosire in his statement signed on 25th July, 2017 at paragraph 6 states that:

“The manifest entry transaction indicates that the consignor of the goods were Darshan Kirpa General Trading LLC and the consignee as Fredrick Njora Mwangi as the consignee which were manifested and tallied but no declaration or striking off has taken place.”

60. The Plaintiff claimed that he did not have the original bill of lading as the same was not sent to him by one Hassan Mwadzaya, whom the Plaintiff claims engaged the 1st Defendant's principal to ship the goods.

61. From the description of a bill of lading above, the person named as the consignee in the bill of lading is the person to whom the goods are to be delivered upon arrival at the destination. The bill of lading is also a contract of carriage in which the terms of carriage as between the shipper and the ship owner are provided.

62. In this case, the Plaintiff was named as the consignee in the bill of lading with the consignor being the principal of the 2nd Defendant. The original bill of lading is alleged to have been withheld **DARSHAN KIRPA GENERAL TRADING LLC**, the principal of the 2nd Defendant, as it was claiming some money from the Plaintiff. This allegation has not been substantiated by either of the parties.

63. However, if the allegation is true, this court is left to wonder why the said principal **DARSHAN KIRPA GENERAL TRADING LLC** by itself or through its agents, the 2nd Defendant, has not laid a claim to the goods or sought the alleged unpaid money from the Plaintiff.

64. The Plaintiff filed an affidavit of service sworn by Jonathan Omangi on 10th August 2017 who indicated that an Amended Plaintiff herein and a hearing notice had been sent to **DARSHAN KIRPA GENERAL TRADING LLC** via DHL Express. Similarly, another affidavit of service was sworn by Jonathan Omangi on 10th July 2017 stating that the amended plaintiff and summons to enter appearance had been sent to the 2nd Defendant via DHL Express. Neither the 2nd Defendant nor its principal **DARSHAN KIRPA GENERAL TRADING LLC** have contested the Plaintiff's claim to the goods.

65. This court cannot deny the Plaintiff his goods based on the original bill of lading being held by **DARSHAN KIRPA GENERAL TRADING LLC** which despite having the title document has not taken any action to claim the goods. The Plaintiff's claim to the goods held in container DFSU7534892 can therefore be said to be uncontested.

66. On the second issue, whether the goods held by the 3rd Defendant should be released to the plaintiff forthwith after payment of all relevant dues, this court, having found that there is no rivalry claim to that of the Plaintiff, sees no reason why the goods should not be released to the Plaintiff. However, the Plaintiff must pay all charges due to the 1st and 3rd Defendants before release of the goods. The 1st Defendant stated that its freight charges were paid but it is claiming demurrage charges on the container while the 3rd Defendant claims custom duty and warehouse charges from the Plaintiff. The Plaintiff is obligated to pay these charges.

67. For the going reasons, this court is satisfied that the Plaintiff has proved his case on a balance of probability. Judgment is therefore entered for the Plaintiff against the Defendants as follows:

a. The Plaintiff be and is hereby declared the beneficial owner of all that is contained in container number DFSU 7534892 (A40).

b. The Plaintiff do pay the 1st Defendant the demurrage charges owed to it.

c. That upon payment of charges in (b) above, the 1st Defendant do prepare requisite documentation to enable the 3rd Defendant release goods in container number DFSU 7534892 (A40) to the Plaintiff.

d. That the 3rd Defendant do release goods held in its warehouse in container number DFSU 7534892 (A40) to the Plaintiff upon payment by the Plaintiff of any custom duty, warehouse charges and any other charges or dues to the 3rd Defendant.

Dated, Signed and Delivered in Mombasa this 30th Day of October 2017.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Omangi for Plaintiff

Mr. Buti holding brief Ochieng for 2nd Defendant

No appearance for 3rd Defendant

Mr. Kaunda Court Assistant