



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 1 of 2011

GERARD BIZIMUNGU.....PLAINTIFF

VERSUS

S.D.V. TRANSAMI (K) LTD.....DEFENDANT

JUDGMENT

1. The Plaintiff is a Rwandan businessman operating a transit transportation service through Kenya. He is the owner of truck numbers RAA 926 F and RAB 831 H and trailer numbers RL 0627 and R. 0141. He alleges that by agreements entered into with the Defendant in 2008, the Defendant contracted his vehicles to transport goods for him from Mombasa by three trips as follows: To Bukavu on 1st July, 2008, 10 tonnes of malt, to Bukavu on 12th July, 2008, 55 tonnes of malt, and to Bralirwa Gisenyi 60 tonnes of malt.

2. In a suit filed on 17th January, 2011, the Plaintiff seeks payment of transport costs of US\$ 37,275 with interest at court rates from September, 2008 until payment in full. The first trip was invoiced at US\$13,500; the second at US \$12,375 and the third trip at US\$ 11:400. The Plaintiff asserts, for purposes of the suit, that the entire transaction was a contract of service.

3. In its Defence, the Defendant denies the existence of any contract between the parties; denies that it contracted the Plaintiff to transport the Defendant's goods as alleged and at the cost alleged. Initially, the Defendant asserted that the suit was defective and incompetent and it would raise a preliminary objection thereto, but did not follow up on the objection.

4. The parties agreed a joint list of issues which are as follows:

1. Whether there was a Road Carriage agreement
2. Whether the Plaintiff Transported the Consignments to Bukavu
3. Whether there was breach of the terms of the agreement; If so by whom.
4. Is the Defendant obliged to pay \$ 32,275 to Plaintiff?
5. Is the Plaintiff entitled to payment of \$ 32, 275

Who should bear the costs.

5. At the hearing the Plaintiff called three witnesses, namely: himself, Gerard Bizimungu (PW1); Jean

Damascene Habiyakare (PW2) who is the Plaintiff's son and the Deputy Manager of the Plaintiff's business known as Sofabigerwa Limited; and third, PW3 Iddi Kaka, one of the Plaintiff's two drivers. The Plaintiff's other driver, James Ngwabije, was unavailable to give evidence as he was said to have relocated to South Sudan. The Plaintiff's witnesses produced Exhibits 1, 2, 3a, 3b, 3c and 4.

6. The Defence case was made through its sole Witness Mehboob Virji, the Imports Transit Manager for S.D.V. Transami. He produced Defence Exhibits 1, 2, 3a, 3b, 3c, 4a, 4b, 4c, 4d, 4e, 4f and 5.

I will analyse the evidence as I deal with each of the issues.

Whether there was a Road Carriage Agreement

7. The genesis of the dispute is that the Plaintiff's drivers, Kaka Iddi and James Ngwabije had transported some goods to Mombasa from Rwanda. According to PW3, Kaka Iddi, the drivers sought to carry some goods back on their return trip. This was their customary practice. Kaka Iddi said they called their boss, the Plaintiff, to let him know that they had secured consignments of malt to transport to Bukavu and Gisenyi. The drivers then availed their lorries and trailers, which were loaded and Road Consignment sheets were issued.

8. Kaka Iddi said he telephoned the details of the consignment to his boss. He produced Exhibit 3(c) which are original Road Consignment Sheets Numbers AGEBUK 000406 and 407 dated 12th July, 2008. He said these were given to him by the Defendant's people when he was loading in Mombasa. He carried that consignment to Bukavu, and on reaching Bralima he gave the consignment sheet to the consignee at Bralima who stamped it on 14th August, 2008. It had also been stamped by **“S.D.V. Transami Katuwa office”** on 27th July, 2008 and **“SDV Agetpaf Bukavu on “14th August, 2008”**.

9. Plaintiff's Exhibit 3c appears to be similar to the first sheet of DExb 3b which bears the same RCN Number AGEBUK000406, and the details in both Exhibits are the same.

In PExb 3a RCN Number ACE BUK 000406 and 407, 45,150 Kgs and 9,850 Kgs malt respectively were loaded on vehicle RAA 926F and Trailer RL 0141 on 12th July, 2008. The vehicle and trailer belong to the Plaintiff as shown by PExhibits 2, the Logbooks: Identification Du Vehicle.” This was not disputed.

10. The documents at PExh 3c, shows the vehicle owner as Ssuna (Daudi) and the driver as Kaka (iddi). The instructions to the driver are as follows:

“Driver to report to SDV Malaba for onward clearance

Driver to report to SDV Kampala uganda before proceeding

Driver to report to SDV Congo Bukavu before delivery

....

Subcontractor to attach the original T812 endorsed at exit border to invoice in order to get paid”

Nowhere was it indicated in the said document who was the real owner of the vehicle. These are the Plaintiff's documents as relates to the road consignment.

11. The Defendant on their part produced two Road Carriage Agreements (hereafter “RCA”) as DExb 1 and DExb 2. The first, DExb 2, is dated 30th June, 2008 and, is indicated to be entered into between the Defendant (described as the '**Sender**') and Ssuna K. Dauda (described as '**the Carrier**') of P.O. Box 30519 Kampala. It is signed on behalf of the Defendant by F. Omar and on behalf of the carrier by Salma Yusuf. The Defendant gave evidence that they prepared the document and it is indicated as having been prepared and signed by Peter Otieno, Defendant's Transport Planner. Peter Otieno was not called to give

evidence.

12. The Second RCA (RCA 2) is DExb 2. It is dated 13th August, 2008 and is also indicated to be entered into between the Defendant as sender and Ssuna K. Dauda (the Carrier). It is signed on behalf of the Carrier by Yusuf Sinamengi, who describes himself as “**Directeur**.” It is prepared and signed by P. Otieno, who as earlier stated was not called to give evidence. Peter Otieno's signatures in DExhb 2 and DExb1 differs distinctly, a point I have noted but which was not raised during the hearing.

13. Both DExhb 1 and DExb 2 annexed the following: James Ngwabije's Driver's Licence; the vehicle Log book for Mercedes Benz RAB 831H and Trailer RL 0627. Both are indicated as belonging to Bizimungu Gerard, the Plaintiff. Comesa yellow Card Numbers 37751 and 37752 for vehicles RB831H and RL 0627 both showing the insured as Gerard Bizimungu, the Plaintiff of P.O. Box 178 Kigali as the insured, are also attached.

14. The third RCA (“**RCA 3**” is DExb 5 dated 14th July, 2008 and made between the Plaintiff and Ssuna Dauda. It is signed on behalf of the Defendant by F. Omar, and on behalf of the Carrier by Yusuf Sinamengi, describing himself as “**Manager**.” It is also prepared by Peter Otieno. The signatures of F. Omar in DExb1 and DExb 3 differ substantially. Annexed to RCA 3 was a copy of driving license for Iddi Kaka, and a photocopy of the Log book in the name of Ssuna K. Dauda for truck RAA 926F and trailer RL0141. The name of Ssuna K. Dauda that is indicated in this photocopy of the Logbook clearly appears to be typed in using a different font from the rest of the details incorporated therein. The Plaintiff produced the original logbooks for vehicles RAB 831H and RAA 926F, and for trailers RL0141 and RL0627 which were all registered in his name.

15. DExhibits, 1, 2 and 5 each contain 21 clauses. Clause 21 in both agreements shows the particulars of the consignment notes issued and the truck make and number. In both agreements only Truck Number RAB 831H and Trailer Number RL0627 appear to have been contracted.

Clause 5(a) in both RCA agreements provides as follows:

“The Carrier undertakes and expressly confirms that for the performance of this Agreement, it shall at all times:

(a) Offer the Sender vehicles for which it has a due legal title of ownership and shall ensure that the vehicles are maintained in roadworthy condition.”

16. The Road Consignment Notes relating to RCA 1(DExb 2) are indicated in clause 21 as 000396/000397/08 which relate to RCN computer printouts Exhibits DExb 3(a). The Road Consignment Notes Relating to RCA 2 (DExb 1) are 0001722/1723 which relate to Defendants RCN computer printout Exhibits DExb 3(c). As earlier pointed out the DExbs 1 and 2 are computer printouts of PExb 3(a) and 3(b), the only differences being that the Plaintiff's exhibits were the originals duly signed and stamped at various destinations.

17. The Road Consignment Note indicated at Clause 21 of DExb 3 (RCA 3) was Number 000406/08 which relate to computer printouts DExb 3b and the original copies duly signed and stamped at various destinations were produced by the Plaintiff as PExb 3c.

18 In all the Road Consignment Notes the Carrier is indicated as Ssuna Daudi, but the drivers are indicated as either Kaka or James depending on which vehicle appears on the Road Consignment Note.

19. In light of all the foregoing, I find that there was an **agreement for carriage of the goods** indicated by the Road Consignment Notes. The RCA agreement documents are indicated to be entered into by Ssuna K. Dauda, but none of his identification details were availed. Further, neither P. Otieno, the maker of the agreements nor F. Omar or any of the other witnesses to the documents or other signatories thereto were called to give evidence. In all cases the vehicles used were RAB 831 H and RAA 926F and the trailers were RL 0627 and RL0141. The original Logbooks produced as PExb 2 for all those vehicles

were all in the names of the Plaintiff.

20 Having carefully perused the Log book annexed to Dexb 5 showing the name of Ssuna K. Dauda, I am not persuaded that it is a true Logbook for vehicle RAA 926F and RL 0141 given the following: the font differences used in typing his name; and the fact that the address shown is Box 178 Kigali, and not Box 30519 Kampala as indicated in all three Road Consignment Agreements. That address appears in the original logbook as the Plaintiff's address.

21. Further, I note that clause 5 (a) in all agreements, RCA 1, 2, and 3 provides that the carrier, in this case Ssuna Dauda, was to confirm and provide vehicles for which he had a **"due legal title of ownership"**, However, he could not do this in the circumstances. As such it is clear that the Defendant was negligent in ascertaining compliance with the agreement as drafted by them.

22. The Defendant's case on this point was basically that an Applicant wishing to be a carrier is first vetted, and thereafter, issued with an account as a supplier of services. The Plaintiff had never applied, and was thus not a supplier. As such no contract could be entered into with him, and there being no privity of contract, the Defendant has no obligations to the Plaintiff.

23. However, the real problem with the contracts entered into by the Defendant with Ssuna Dauda is that he was not the owner of the vehicles, but misrepresented himself as such. There was failure by the Defendants to do following: to properly vet Ssuna Dauda; to insist on compliance with clause 5(a) of the contract; to check that the names and addresses on the logbooks tally with those of the asserted owner. All in all, these failures resulted in the Defendant placing himself at a risk as to the integrity of the contract that the Defendant entered into.

24. Was there, then a contract between the Plaintiff and the Defendant? To answer this, I turn to the pleadings to see what the Plaintiff has alleged. In Paragraph 3 of the plaint the Plaintiff asserts:

"Sometimes in the year 2008 or thereabouts there existed a transport agreement between the Plaintiff (as transporter) and the Defendant as customer." (underlining mine)

And in paragraph 4:

"That on diverse dates between 1st July, 2008 and 15th August, 2008 the Defendant contracted the Plaintiff to transport the Defendant's goods from Mombasa to Bralima, Bukavu at an agreed fee as follows..." (underlining mine)

The Plaintiff in his final submissions alleged that there was an agency agreement entered into by his drivers. Although nowhere in his pleadings does the Plaintiff plead agency or assert an agency arrangement, that alone cannot lead to a conclusion that there was no agency.

25. If the Plaintiff was a principal in the contract at all, he was either an undisclosed principal or unidentified principal.

In the first situation, existence of the principal is not made known to the other party at that time of contracting. This principal may intervene to sue and may be sued. Likewise, in the second situation where the agent clearly indicates that he acts for **"our principal"** or **'our clients'**, there may indeed be cases where the third party can be regarded as being willing to deal with the principal whoever he is. (See Bowstead on Agency paragraphs 9 - 012 and 9 - 016.

26. The following quote from **Bowstead** at paragraph 8-073 page 345 further explains the disclosed and undisclosed principals concepts.

"What is an undisclosed principal? A more difficult question is that of the nature of the authority which must be conferred. Here two views can be justified from the cases. One view is that for the doctrine to operate the principal must have authorised the agent to bring him into contractual privity

with the third party. If this view, which in some respects seems obvious, is correct, the application of the doctrine is confined to two types of case. The first occurs where the principal wishes to be a party to a contract, but wishes also to conceal that fact, perhaps because he does not wish it to be known that he has entered the market. The second is that where the agent does not disclose the existence of his principal, perhaps because he does not wish the third party on the next transaction to bypass him and go direct to the principal; and the principal either acquiesces in this or makes no inquiry as to the agent's practice.

The other view is that whatever the principal's intentions, he is affected by this doctrine whenever he uses the services of an intermediary who works on agency basis, viz, undertakes only to use his best endeavours, does not act as an independent merchant or supplier of services, but takes a commission on the transaction arranged, and so forth, even though the principal does not intend to be a party to any contracts made. This would bring within the scope of the doctrine situations where the principle uses the services of an intermediary (often called commissionaire) who deals with the outside world as principal, but as regards his own principal acts as agent—the indirect agency of the civil law. In such a case the entitlement and liability of the principal would be superimposed by the law irrespective of the intentions of parties, and contrary of course to the normal result in civil law countries recognising this notion.”

27. In this case PW3 Iddi Kaka 's evidence was that:

“Bizimungu is my boss.

At Mombasa I unloaded (tea) and started looking for cargo to carry. When I found Transami, I called my boss to let him know. I told him that one ton was US \$ 225. He told me to carry the cargo.”

In cross-examination he said:

“I am the one who got the cargo job. Each was \$ 255 per ton. When they were packing the cargo I was there. I cannot remember the date or month....

I did not sign PExb 3C anywhere.”

28. It is to be observed that the Plaintiff did not give evidence of having contacted the Defendant once the cargo job was allegedly obtained. In addition, the evidence of Iddi Kaka can only be taken as relevant to the Road Consignment Notes Numbers 000406 and 000407 (PExb 3c) for the loading done on 12th July, 2008. For the Road Consignments made on of 1st July 2008. (PExb 3(a), and 15th August, 2008 (PExb 3(b), James Ngwabije would have to be taken as the Plaintiff's agent, if the argument on agency made in his submissions is to be accepted. Ngwabije was, however, not available to give evidence on this agency.

29. The evidence of the sole Defence witness, Mehboob Virji, was as follows; in evidence in chief:

“We have our own trucks and we register sub contractors. Everything is computer generated Every time we had a truck the information is logged in. I check the contracts, transporter and confirm that the clerks follow all the procedures....

We have a contract for Ssuna Dauda.... Ssuna Dauda's representative came to collect the cargo. [later] On the road Consignment Sheet I signed...Bizimungu's name is not indicated anywhere.”

and in cross-examination DW1 stated:

“I validated the loading of the truck of Ssuna Dauda; checking the account of the transporter.... I met Ssuna Duada..

(later)...We have the documents of the transporter in the office.

...(later) All the company subcontracted transporters are issued with a contract.”

30. From the above evidence there is no indication that the Defendant was aware of the existence of a principal, or of the agency of the drivers. It appears that the only person the Defendant dealt with directly was Ssuna Dauda and not the driver. Although the driver, Iddi Kaka said in his evidence that he was the one who “**got the cargo job**”, he also said “**I do not know how to read English**” and in fact gave his testimony in fairly halting Kiswahili. So that, as I perceive it, he could not have entered into a written contract, and that in fact did not happen.

31. The Defendant's answer to the question as to their authority to contract Ssuna Dauda yet he did not have legal title as owner of the vehicles was in the evidence of DW1:

“Ssuna Duada presented the vehicle to us for loading

...if the contractor has the authority of the owner to use the vehicles that is sufficient. This means there was consent between Dauda and Bizimungu to do the delivery.” (underlining mine)

In essence, the Defendant alleged that the vehicles were brought or presented to them by Ssuna Dauda.

32. My interpretation of the situation is as follows: After Iddi Kaka unloaded the cargo he was bringing to Mombasa, he started looking for cargo to carry on the way back. Given his lack of knowledge of English and the halting Kiswahili with which he spoke at trial, he sought assistance. That is when Ssuna Dauda came into the picture and “**assisted**” with the contract. Unknown to the driver/s, Dauda must have craftily got the contract signed in his own name, using the Plaintiff's vehicles and Iddi Kaka's documents. If any deposit was in fact paid by the Defendant, it was paid to Dauda who then melted out of the scene, leaving the driver/s to carry the already loaded goods. But that is speculation.

33. All that said, I am unable to establish from the evidence that there was a contract of agency between the Plaintiff and the Defendant. This is made all the more remote by the absence of the corroborative evidence of James Ngwabije, the other driver who allegedly entered into the first and last of the three contracts with the Defendant. Even if I was minded to find that there was an agency agreement in the circumstances, I would only have found so in respect of Iddi Kaka's consignment, for which there was some evidence by him in that respect.

34. In reaching the above conclusion, my analysis has in fact dealt in detail with issues 1 and 2 of the issues for determination. On the basis of my conclusions herein, however, I do not see any need to deal with issues 3, 4 and 5 which are rendered moot by my above conclusions. They can only be usefully answered if I had found that there was a contract of agency between the Plaintiff and Defendant.

35. The upshot is that the Plaintiff has not proved his claim which is hereby dismissed with costs.

36. On the issue of costs, the same will follow the event.

Dated, signed and delivered this 11th day of January, 2013

R.M. MWONGO
JUDGE

Read in open court

Coram:

Judge: R.M. Mwongo

Court clerk: M. Matano

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....