



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
HIGH COURT CIVIL CASE NO. 309 OF 2010

AUTOLITHO LIMITED.....PLAINTIFF
VS
DHL GLOBAL FORWARDING KENYA LTD.....DEFENDANT

RULING

1. By a Notice of Motion dated 12th May 2010 and expressed to be brought under Section 3A of the Civil procedure Act and all other enabling provisions of the law, the Plaintiff/Applicant seeks for orders of mandatory injunction to issue against the Defendant/Respondent compelling it to release and deliver the plaintiff's container held in Mombasa and containing press printing machinery and accessories.

2. It is the plaintiff's case that by an agreement dated 3rd June 2009 between the parties, the defendant agreed to ship the plaintiff's goods consisting of press printing machinery and accessories placed in eleven containers from the United Kingdom to Kenya. The Agreement provided that the Defendant would provide all services relating to ocean freight forwarding, customs clearing and transport of the goods until delivery to the plaintiff's premises. The plaintiff avers in breach of the agreement, the Defendant shipped the goods without arranging for pre-shipment inspection and obtaining a certificate of conformity. As a consequence of this breach, when the shipment arrived in Mombasa on 3rd August 2009, the Defendant could not clear the goods within the time allowed as a result of which the shipment was subjected to penalties, storage charges and demurrage. Eventually, the Defendant managed to clear and deliver only ten containers, leaving the eleventh still detained owing to the said charges, penalties and demurrage.

3. The plaintiff contends that as a result of the above breach, the plaintiff has suffered substantial loss as the machinery delivered in the ten containers cannot be assembled without the parts and accessories contained in the eleventh container. The plaintiff estimates its loss at Kshs. 17,000,000/- per month and holds the Defendant liable to damages arising from this monthly loss. With regard to the Defendant's counterclaim of Kshs. 3, 723,403.04, the plaintiff avers that the sum claimed is a direct result of the Defendant's breach of contract hence the plaintiff cannot be held liable in that respect.

4. From the written submissions by learned counsel for the plaintiff, the following additional arguments are made:

1) The plaintiff surrendered and placed all obligations relating to the shipment upon the Defendant. At Page 8 of the contract, the clause headed "strategic intent" captures the Defendant's commitment to meet the expectations of the Plaintiff in relation to the shipment. The plaintiff had no role to play other than placing the order for freight services with the Defendant, which it did. It was therefore for the Defendant to do everything to ensure that the shipment was delivered.

2) Under Clause 3 of the Agreement, it was for the shipper to arrange for inspection and to obtain the certificate of compliance. It was also for the Defendant to ensure that it obtained all the necessary export documents and to advise on the vessel details.

3) The letter of offer of services at clause 6 made it clear that storage charges and accrued demurrage would be paid by the party at fault. The Defendant was negligent in failing to obtain the certificate of conformity hence should be held liable for the detained container.

4) A mandatory injunction can be granted for the release of detained cargo: **Cheshire & Fifoot's Law of Contract 10th Edition pgs. 559-561 and The Despina Pontikos (1975) EALR pg 38.**

5) Damages cannot be sufficient remedy as the machinery in the 10 containers delivered cannot be assembled without the parts and equipment in the eleventh container.

6) There are special circumstances in the present suit that merit grant of a mandatory injunction: **Showind Industries Limited Vs. Guardian Bank Limited and Another.** [2002] 1EA 284.

7) The defendant was the shipper within the definition of Black's Law Dictionary.

5. The application is opposed. There is a replying affidavit sworn by Martin Kairugithi the Trade Lane manager of the Defendant/Respondent on 11/6/2010 and filed on 11th June 2010. Learned counsel for the Defendant/Respondent also filed skeleton submissions on 19th November 2010 to reinforce the position of the Defendant on the claim herein.

6. The Defendant's reply to the application can be summarized in the following points:

1) There has been inordinate delay by the Applicant in bringing the injunction application. In this regard, the Defendant argues that the container in issue has been held by the Defendant since 6th October 2009. The present application was filed on 13th May 2010 which was seven months later. The remedy sought by the Plaintiff is therefore defeated by laches.

2) The Plaintiff/Applicant's own documents do not support its case. There is no prime facie case meriting the injunction orders sought as in the supporting affidavit of Amit Chotai. The letter from the Defendant dated 3rd June 2009 and annexed as 'AC1' makes reference to "shipper" which is reference to the Plaintiff's supplier and not the Defendant. The Defendant contends that it was the responsibility of the supplier to carry out the pre-inspection of goods and not the Defendant. The Defendant further contends that at page 3 part 6 of the annexure to the affidavit of Amit Chotai, it is discernible that it was the plaintiff's responsibility to ensure that the goods were inspected and a certificate of conformity issued. This was then to be supplied to the Defendant by the Plaintiff.

3) Under the terms and conditions of service agreed upon by the parties, part 9 thereof clearly shows that failure to conform with pre-inspection of the goods was not to attract any liability on the Defendant. Further, the description of the parties to the Agreement shows that the Plaintiff is the client and the defendant the agent, but not the shipper. It is therefore the shipper which should bear liability for failure to pre-inspect the goods. The Court cannot therefore imply further terms to the contract as to render the Defendant the shipper. In this regard, the Court was referred to the case of **Muthuri Vs. NIC Bank. Civil Case No.793 of 2001 [2003] KLR 145**

4) The Plaintiff/Applicant had not come to court with clean hands as to merit an order of mandatory injunction in that the Plaintiff had not paid the defendant for services rendered. The container held by the defendant has been held for failure to pay for services rendered. Further, the Applicant had also not shown that it would suffer irreparable damage which cannot be compensated by damages. On a balance of convenience, the same tilts in favor of the Defendant.

5) Mandatory injunction orders carry a high standard of proof and must be used sparingly: **Showind**

Industries Ltd Vs. Guardian Bank. In that sense, there were no special circumstances meriting grant of a mandatory injunction in the present matter especially because the facts are seriously disputed and not supported by documents: **Malindi Air services Vs. Halima. Abdinoor Hassan civil Appeal No. Nai 2002 of 1998**

7. I have carefully perused the application, the supporting documents, the replying affidavit and the rival written submissions of learned counsel for both parties. I have also considered the authorities referred to me by learned counsel.

8. In my view, the issues I need to determine are:

- 1) Which party was responsible for the carrying out of pre-inspection of the goods and for obtaining the certificate of conformity; and,
- 2) Whether the Plaintiff/Applicant has met the requirements of grant of orders of mandatory injunction.

9. With regard to the issue of which party ought to have arranged pre-shipment inspection of the goods, the competing positions obtaining are that, for the plaintiff, it was the Defendant's role as the shipper of the goods to ensure that pre-inspection of the goods was carried out and all necessary importation documents obtained. In response, the Defendant denies that it was not the shipper of the goods and sees the Plaintiff's supplier as such shipper, and therefore as the party which should have undertaken pre-inspection of the goods.

10. The answer to the above competing positions, in my view, is available from an analysis of the contractual documents relating to the agreement entered into between the parties for the shipment of the eleven containers. There are two main documents in this regard: an estimate of ocean freight forwarding, customs clearance and transport charges dated 3rd June 2009 (hereinafter called "the estimate") and Sea Freight Forwarding, Customs Brokerage and Standard Operating Procedure, also dated 3rd June 2009 (hereinafter called the "SOP"). My perusal of the two documents reveals that the former is a standard quotation for the ocean freight services to be provided while the latter is the operational contract capturing the actual roles of the parties in the contract. The duties, responsibilities, obligations and liabilities of the parties are therefore crystallized in the SOP.

11. Suffice it to point out that from the estimate letter, it is discernible that the services intended to be rendered covered shipment of goods from Parkside Flexibles, Tyler Close, Normanton Wakefield, United Kingdom to Mombasa and eventually Nairobi. The said UK town is an inter land town in West Yorkshire in the UK and the costs estimates included truck haulage charges from Wakefield to the port of origin, Felixstowe, in the United Kingdom. The significance of this is that the Defendant took charge of the goods from the manufacturer's premises and the expectation was that it would deal with all matters appurtenant to the carriage of the goods all the way to Nairobi. It is further discernible from the table of charges under both the sea freight forwarding charges and the equipment charges that a charge headed 'documentation' is provided for under the head "origin charges and trucking". It is not certain what documents are envisaged under the above heads but the charge on 'documentation' does imply that the Plaintiff was obligated to pay for documentation through the Defendant which would in turn procure the documentation. Otherwise why would the documentation charge be placed in the quotation?

12. It is also worth noting that under the under the Terms & Conditions and Regulations attached to the estimate, Par 9 thereof points out that all cargo to Kenya is subject to "Pre-Verification of Conformity (PVOC)" unless otherwise exempt. The paragraph is however silent as to two issues arising namely, whether the goods in issue were subject to PVOC and, secondly, which party was obligated to ensure that the PVOC is carried out. Learned counsel for the Defendant did point out to the court that under paragraph 6 at page 3 of the estimates letter, there is a requirement in the following wording:

"You should ensure that the supplier inspects the goods either SGS or INTERTEK to obtain a certificate of conformity unless where the goods are exempted from inspection".

While this requirement pointed to the Plaintiff to ensure that the goods are inspected, the instruction was

not conclusive as to whether the particular goods were subject to inspection and therefore whether the Plaintiff was obliged to commission the inspection. It was therefore still a standard term not customized to the particular contract and which would only be determinable upon reviewing the actual implementation document viz. the SOP.

13. As indicated above, the SOP was the main document governing implementation of the Freight Services Agreement entered into between the parties on 3rd June 2009. The foundational purport of the SOP is set out under the head “Strategic Intent” as follows:

“The strategic purpose of this document is to position DHL Global Forwarding Kenya Limited (Agent) as a company, so that it completely understands the service expectations of Autolitho Limited (Client) so that it is able to conform to those service expectations for implementation. It is also DHL’s intention to review those service requirements and propose innovation when and where possible wherever such innovation may become appropriate within the total supply chain”.(emphasis added).

Under the head ‘Responsibilities’, the following statement is pertinent, as to the extent of services to be provided:

“Such processes are subject to this Standard Operating Procedure and relates to all aspects of the supply chain (emphasis added) as provided by DHL Global Forwarding...”

The critical position emerging from the above quoted phrases is that the Defendant was expressing a commitment to deal with all aspects of the supply chain pertaining to the Plaintiff’s goods. The question that emerges then is whether the pre-inspection of goods was a responsibility falling within the ambit of the supply chain for which the Defendant had been engaged by the Plaintiff.

14. The question of whether or not pre-shipment inspection of the goods was a task falling within the supply chain for the goods is well covered at part 3 of the SOP in the table headed “overview of operational procedures” which is at page 10 of exhibit “AC1” of the supporting affidavit of Amit Chotai. This table comprises of three columns under the heads “Procedures”, “Initiating Responsibilities” and “Confirming Responsibilities”. The issue of pre-inspection is covered under the third and fourth rows of the table which are reproduced below as follows:

Procedures	Initiating Responsibilities	Confirming Responsibilities
Shipper to arrange inspection, carry out the inspection and obtain certificate of shipper conformity	Shipper	DHLGF Origin to maintain close contact with shippers regarding orders and to communicate this to DHLGF Kenya.
DHLGF Origin to ensure all necessary export requirements/documents and advise vessel details	DHLGF Origin	DHLGF Kenya to advise CLIENT of Shipping details and ETD etc.

Under the third row of the table (reproduced as first row above), the procedure given is that the shipper should arrange inspection of the goods. The extent of responsibility to the shipper is given as an initiating responsibility. However, the confirming responsibility is passed on to DHLGF Origin which is the office of the Defendant Company’s corresponding office in the United Kingdom. This office was to confirm inspection of the goods and communicate to DHLGF Kenya office before any shipment was carried out. Without more therefore, it is already discernible that inspection of the goods was to be verified by the Defendant through its corresponding office in the United Kingdom.

15. Even if the third row above is ambiguous as to where the responsibility to inspect the goods was vested, any such ambiguity is clarified by the following row (reproduced as second row in the above table) in which the procedure given is that DHLGF Origin was to ensure that all necessary export requirements/documents were in place and to advise vessel details. Under this row, DHLGF Origin has the Initiating Responsibility while DHLGF Kenya has the Confirming Responsibility in which it is

required to advise Client (being the Plaintiff) of the shipping details. In my humble view, the above arrangement makes it conclusively obvious that the Plaintiff, as the Client, had no role to play in ensuring that pre-shipment inspection of the goods was done and a certificate of conformity issued. That role had been delegated to the Defendant within SOP. Indeed, in the whole table headed “overview of operational procedures” the only responsibility of the Plaintiff as Client is given under the first row and which is merely to place an order for the goods and forward the order to the supplier. The rest of all the procedures and activities pertaining to the shipment of the goods from the point of origin and all the way to the Plaintiff’s premises are delegated to the Defendant Company. It is therefore strange for the Defendant to seek to argue that there was one isolated procedure that the Client was expected to carry out within the whole supply chain particularly having given a “strategic Intent” to render services that covered the whole array of the supply chain. This is particularly so in view of the Defendant having also committed to “propose innovation when and where possible, whenever such innovation may become appropriate within the total supply chain”. In my view, the least the Client expected of such “innovation” would have been for the Defendant to ensure that the goods never got on board a vessel without pre-shipment inspection or to at least let the Client know of the omission before commencement of shipment. It was also, in the same vein, the core responsibility of the Defendant to advise the Client if the goods were of a type subjected to pre-shipment inspection.

16. Learned counsel for both parties made spirited arguments as to which party in the agreement constituted the “shipper”. Determination of “shipper” was critical because under the SOP, it was the responsibility of the shipper to ensure that the goods had been inspected before shipment. On the plaintiff’s behalf, it was argued that “shipper” was the Defendant Company because under the agreement, it had the responsibility to ship the goods. For the Defendant, the argument advanced was that the shipper of the goods was the supplier of the goods. My take on this contested issue is that as the goods in question were being freighted “ex-works”, the supplier of the goods had no role to play in the transportation of the goods and therefore in any attendant procedures and documentation including pre-inspection and obtaining of certificate of conformity. In that context, “shipper” would remain a term attributable to either the Plaintiff or the Defendant. The Plaintiff, as owner of the goods, had delegated the whole shipment process, services and activities to the Defendant. The Plaintiff was “Client” and the defendant “Agent” with regard to shipment of the goods. Within the context of the Agreement between the parties therefore, the Plaintiff was nothing more than the importer of the goods, but the effective shipper of the goods had to be the Defendant. This conclusion is not farfetched, as it is well established that a shipping agent can indeed be defined as the shipper of goods. The Black’s Law Dictionary which learned counsel for the Plaintiff referred the court to renders the definition of “shipper” thus:

“1. One who ships goods to another. 2. One who contracts with a carrier for the transportation of cargo. *As a legal term of art, shipper may not be the person who owns the cargo, but the agent or an independent contractor”.

With this definition, I would have no doubts whatsoever that in the present case, the Defendant was the shipper of the goods in its capacity as the agent of the Plaintiff. In that capacity of shipper, the Defendant was obligated to ensure pre-inspection of the goods and must therefore bear the legal responsibility for the omission to carry out such pre-inspection and which has eventually resulted in the charges leading to the detention of the eleventh container, the subject matter of the present application.

17. Turning to the question of whether the Plaintiff/Applicant has met the requirements for grant of a mandatory injunction, it has been submitted that mandatory injunction orders carry a high standard of proof and must be used sparingly as was held in the case of **Showind Industries Ltd Vs. Guardian Bank Limited (supra)**. The court has also been referred to **Cherire & Fifoot (supra)** where the authors argue that specific performance is not a matter of right but of discretion of the court and that the purpose of a decree of specific performance is to ensure that justice is done. In that regard, there ought to be special circumstances meriting grant of a mandatory injunction, and certainly not in a case where the facts are seriously disputed and not supported by documents: see **Malindi Air services Vs. Halima**. (Supra).

18. In the present matter, we have already shown that the Defendant was culpable in its failure to ensure that pre-shipment of goods was done before commencement of shipment. [This omission is what led to

detention of the eleventh container.] The omission is also the reason for the sum of Kshs. 3, 723,403.04 which the Defendant claims from the Plaintiff. If therefore the Defendant is responsible for the detained container, the sum demanded from the Plaintiff may indeed not be due and payable as demanded. In that case, the Plaintiff has made a prima facie case in favour of release of the detained container. But the most compelling special circumstances arising from the facts of this case are, firstly, that the detained container contains parts and accessories of a printing press comprised in all the eleven containers and which cannot be assembled unless the detained eleventh container is released. In other words, the whole shipment is useless unless the eleventh container is released. Secondly, the Plaintiff has indicated that as a consequence of the detention of the eleventh container, it is incurring financial losses estimated to be in the range of Kshs. 17,000,000/- per month which is a colossal sum. That continued detention of the container may eventually make difficult to remedy by way of damages. In the circumstances, I think this is a proper case for grant of a mandatory injunction for the release of the eleventh container, as its continued detention does not serve the interests of either party and it is just and equitable that the container is delivered to the plaintiff, even as the parties haggle over what damages are payable and by whom and to whom. In **The Despina Pontikos (supra)**, a mandatory injunction was granted for the release of detained cargo in similar circumstances hence the conclusion we reach here is well founded in precedent. In that case, the court also had to grapple with the question of whether or not the order for the release of the cargo was capable of being complied with by the defendant. In the present case, I do not see any difficulty or impossibility which the Defendant would face in complying with the order to release the container, if the only reason of detention of the container is the sum it demands from the Plaintiff.

19. In the circumstances, I am inclined to allow the Notice of Motion dated 12th May 2010 with costs to the Plaintiff/Applicant.

20. I further direct that the parties do take steps to comply with all pre-trial requirements within 30 days from the date of this ruling and that the matter be mentioned within 14 days thereafter for purposes of reviewing compliance and fixing a hearing date for the main suit.

DATED, SIGNED and DELIVERED in Nairobi this 19th of January 2012.

J. M. MUTAVA
JUDGE