



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Case 483 of 1998

M.A. BAYUSUF & SONS

LTD.....PLAINTIFFS

VERSUS

RELIABLE FREIGHT

SERVICES.....RESPONDENTS

JUDGMENT

1. This is an old matter, filed on 30th November, 1998. It concerns a claim by the Plaintiff against the Defendant for a sum of US\$ 8,300.00. It is in respect of demurrage and delay charges for transportation services allegedly rendered by the Plaintiff, at the instance and request of the Defendant some time during 1997 and 1998. There is also a claim for interest at 2% per month on the sum claimed from 15th February 1997 until payment in full. A plaint was filed by the claimant, and subsequently amended on 27th November, 2000.
2. The Defendant's defence was filed on 13th December, 2000. It denies liability for the alleged demurrage and delay charges. It alleges that any such delay or demurrage was caused by the tardiness of the Uganda Revenue Authority, reasonably to be expected by transporters operating within East African. Further, the Defence asserts that once they came to know of the alleged delay, they instructed the Plaintiff not to offload the transported cargo until the Plaintiff had received payment of all delay monies from the consignee.
3. The trial commenced on 9th December, 2003, when the Plaintiff's first witness, Hassan Mzee Hamis, partly testified in chief before Hon. Justice Maraga. That witness then left the Plaintiff's employment and his evidence was expunged on 10th February, 2005. A fresh first witness, Mwango Hamis Mwango then testified for the Plaintiff at the *de novo* hearing on 10th February, 2005.
4. The Plaintiff's case is made out through consignment notes and invoices. PW1 Mwango Hamis testified that the parties had had a long business association. On the defendant's instruction they loaded 2X20 Ft containers at Mombasa Port on 21st December, 1996 onto a lorry KAG 687 L and trailer ZB 5406, delivered then to Kampala on 29th December 1996 and left Kampala on 8th January, 1997 having off-loaded for eight hours. There was a delay of 11 days for which the Plaintiff is claiming for eight (8) days only at US\$ 300 per day making a total of US \$2400.
5. The second consignment was for delivery of 2x20 feet container using lorry KAG 487K and trailer ZB4482. It left Mombasa on 23rd December 1996, arrived in Kampala on 29th December, 1996, and left Kampala on 8th January, 1997. It was delayed for 11 days, for which the Plaintiff is claiming for eight(8)

days only, at US\$ 300 per day in a total of \$2400.

6. According to PW1 Mwango, the Plaintiff raised an invoice for transportation charges and delay charges of US \$ 14,490 broken down as follows: transport for two vehicles \$9,690 and \$4800 delay charges. The witness produced consignment notes and an invoice as **P Exhibits** 1, and 3.

7. The Plaintiff then transported another twenty foot container using lorry KAG 687 L and trailer ZB5149 from Mombasa to Kampala on 25th March, 1998 it arrived in Kampala on 25th March, 1998 and departed on 2nd April, 1998, a delay of 15 days. The Plaintiff has claimed 14 days delay charges of US 3,500 at \$250 per day. The consignment note and invoice were produced as PExhibits 4 and 5. The total amount claimed by the Plaintiff is US\$ 8300 (2400+2400+3500) in delay charges, the transport costs having been paid.

8. On 14th April, 1998, when the last consignment was delayed, the Plaintiff sent a fax to the Defendant complaining about the delay and warning that they would charge for delay. This is shown at **PExhibit 6**. The Defendant replied immediately and told the Plaintiff that before off-loading they were to demand the delay charges from the consignee, Classic Enterprises, in Kampala. This is at **PExhibit 7**. Plaintiff wrote back stating that they did not know the consignee and could not trace him.

9. In cross-examination, Mr. Mwango Hamis confirmed that the consignee is the one who signs the consignment note for return to Defendant; that the Defendant had not signed such note; therefore, that the Defendant could not know of the delay charges in advance; that the goods are transported at owners risk; that the Plaintiff demanded delay charges from the consignees but this was not paid; that despite non-payment by consignees on an earlier occasion, the Plaintiff still transported one year and four months later. There was no re-examination and the Plaintiff closed its case.

10. The Defence case was heard on 5th March, 2012 when Mr. Mahendra Jash Patel, the Managing Director of Reliable Freight Services, gave evidence. He said the Defendant is a clearing and forwarding agent, and had a business relationship with the Plaintiff. This commenced when the late Mr. Mohamed, then Managing Director of the Plaintiff used to accept 50% payment on proof of delivery. Shown the consignment and invoices marked Exhibits 1, 2, 3 and 4, he said the consignees were required to sign at the bottom of the consignment notes, and the note would be returned to the Defendant.

11. The witness asserted that before delivery they had no access to the consignment notes. Those consignment notes did not indicate any delay charges or interest payable thereon at the time of handing over the cargo to the Plaintiff for delivery to consignee. The consignee's details are in those delivery notes. Mr. Patel produced exhibits D1 to D4 containing their instructions to the Plaintiff the terms thereof and showing an acknowledgement by Plaintiff.

These are the Acknowledgment contracts issued by the Defendant to the Plaintiff. They do not contain a provision for interest or delay charges, and the Defendant first heard of delay charges on telephone after some goods were delivered.

12. Shown PExb 6, the fax concerning the delays, the Defendant witness said that they responded via PExh 7 in which they instructed the Plaintiff to demand delay charges from the consignee before off-loading.

13. In cross examination, Mr. Patel said they had dealings with the Plaintiff from before 1996. The arrangement was that transportation rates were agreed which is why they were invoiced and paid 50%. He said it usually took 4 - 5 days to deliver to consignees in Uganda. They would not know of delays unless informed by either the consignee or the Plaintiff. He did not recall any delay arising from the Uganda Revenue Authority. In their response to the fax on delay, they said the consignee would have to pay before loading. In any event they had no knowledge of any delay charges. The interest clause was contained only in the invoice of the Plaintiff.

14. The parties filed written closing submissions. The Defendant argued that there was no evidence adduced showing that it was responsible for the alleged delays, or that the parties had an agreement on delay charges and interest thereon. That no evidence was adduced to show what caused the delays in Kampala, and on what basis the Defendant is liable for the same. The consignment notes were clearly marked “**Owners Risk**”, thus delays were a matter between the owner and transporter. On interest, the two invoices PExb 3 and PExb 5 show 2% and 2¹/₂% respectively. The variance is not explained.

15. Defendant relied on the following authorities:

- **Nairobi City Council vs Co-operative Bank of Kenya Civil** Application Number 212 of 2000 CAK Nairobi where the Court of Appeal declined to award interest in a situation where there had been no explanation whatever of how the rate of interest could be justified.

- **Shah vs Guilders Bank International** Civil Appeal 135/2001 [2001] LLR 3643 CAK. Where the Court of Appeal held that where no interest was fixed on the loan document signed by the parties, interest on the loan would be determined by the ruling rate from time to time for banking advances.

16. The Plaintiff's submission is that the contract for transportation services makes the Defendant liable for the payment of transport charges and incidental costs of charges. The Defendant did not indicate unequivocally that delay charges were not at all payable or not envisaged as being in the contemplation of the parties. They contend that delay charges were within the express or implied terms of the transport contract.

17. Plaintiff contends that the delay charges were raised at the same time as the invoices for the transportation. This was done in dollars in keeping with the fact that the transportation services were to a foreign country. Invoices PExb 3 and PExb 5 show this fact.

18. As for interest, the Plaintiff submits that the Defendant is liable to pay the same. Interest is included in the Transport consignment Notes (Pexb) 1 and 4) which constitute part of the Transportation contract. The terms are very clear on the reverse of the consignment notes. The rate of interest is 2% per month, and it was to accrue from thirty days subsequent to the issuance of an invoice.

19. There are only two issues which I must decide in this matter.

a) Whether the contract between the parties provided for delay charges.

b) If so, whether interest is payable thereon.

Whether the contract between the parties provided for delay charges

20. The parties entered into a contract as follows: The Defendant would, after clearing cargo from the Port, deliver the same to the Plaintiff for transportation to its owners/consignees. With each delivery of cargo to the Plaintiff, the Defendant issued an Acknowledgment of Goods Received to the Plaintiff, which the Plaintiff signed (see DExbs 1, 2, 3, 4, 5 and 6). Each contained the consignee's details and the Plaintiff as carrier indicated the vehicle Number it provided, as follows:

“Please receive the above mentioned goods for carriage at Owners Risk as per our Delivery instructions and subject to our Terms and Conditions as per our acknowledgment contract.”

21. The Plaintiff acknowledged the goods for onward carriage and confirmed:

“...our agreement to deliver the goods to the above mentioned consignee as per Delivery Instructions.”

The Plaintiff as transporter also agreed:

“...to bring the empty Container back to Mombasa within 21 days of the date of loading onto our lorry for destinations outside Kenya otherwise we agree to pay container demurrage charges as per Ships Agents Container Tariff/Debit Note and the full value of the Container if lost or damaged by us”

The Tariff/Debit Note was not introduced in evidence. It is clear that the Plaintiff took responsibility for ensuring there was no delay in delivery and return of container within 21 days of loading.

22. From the evidence, the Defendants Acknowledgement Contract DExb 1 and Exb 4 are readily relatable to the Transport Consignment Pexb 4 and Pexb 2, respectively. I am therefore satisfied that the said Acknowledgment Contracts and Transport Consignments were part of a single contractual transaction.

23. It was not clear from the evidence at what stage the Plaintiff's Transport Consignment Notes were written out. However, from the cross examination of Mwango Hamis (PW1) it is clear from the record that:

“The consignment notes are sent to the Defendant with the invoice after the delivery. The Defendant has not signed the consignment notes. Prior to sending the consignment notes to the Defendant they could not know of the delay charges.”

This evidence coincides with the evidence of Mahendra Patel (DW1) where he said:

“After delivery of consignment we received these after delivery of goods to consignees. We also received the invoices then. Before delivery we had no access to consignment notes. They do not show delay charges or the interest payable...”

24. From the above, I am able to conclude that the Transport Consignment Notes related to carriage of the goods to consignee. The terms thereof included:

- The transportation was at **“Owner Risk”**

The terms of carriage are at the reverse of the Consignment Notes and include:

1. M.A. Bayusuf ; Sons Ltd (the company) shall not be liable for loss, damage, deviation, theft, misdelivery, delay or **detention**, of or to a consignment or any part thereof or to any goods or any part thereof no matter how such loss, damage, deviation, theft, theft, misdelivery delay or detention was caused...

2....

3. Maximum time allowed for off-loading = 8 hours only additional hours will be charged accordingly.

4.

5. Goods transported and handled on owner's risk, payment due by 30 days from date of delivery and interest will be charged be charged 2% per month on all overdue accounts.”

25. Taking the oral and documentary evidence together, it is clear that:

a) The Defendant commenced each transportation contract process using the Acknowledgement Agreement. Its **key** provision was that transportation was at Owner's Risk. That contract was signed by the Plaintiff.

b) The Plaintiff transported the goods on payment of a deposit. The transportation was again at Owner's Risk. The Plaintiff even not liable for delays, deviation, or loss.

c) The off-loading time, delivery to the Consignees, was limited to eight hours otherwise charges would accrue.

d) Payment for the (balance) of the transport consignment cost was due thirty days after the date of delivery and interest on the same would be at 2% pr month on overdue accounts.

e) The Consignment Notes were signed by consignee and brought

to the attention of the Defendant after delivery. Prior to that the Defendant would have no knowledge of whether or not delivery was done or of any delays.

f) Delays, deviations and losses at the Owner's risk.

26. The Owner was the consignee. The fundamental provision as to “**Owner's Risk**” was included in both the Acknowledgement Contract, and in respect of the Consignment Note. Accordingly, all risks were by agreement of the parties, placed upon the owner.

27. In light of the foregoing, I find that the contract between the parties did provide for delay charges. However, the same was to be at owners risk, that is the consignee's risk, as provided in both the Acknowledgement Contract and clearly elaborated in the Transport Consignment Notes.

28. Given the above finding, I view the faxes between the parties, Exhb 6, and PExb 7, as follows. The Plaintiff sought to make the Defendant liable contrary to the clear provisions of both Acknowledgement Contract and Transport Consignment Note. In fact PExb 6 indicates a delay charge of Shs. 15,000/= per day, which information was then being relayed to the Defendant for the first time. It was not agreed or contained anywhere in their contractual documentation PExb 7 which is the Defendant's response clearly advised the Plaintiff not to offload. In reply vide, PExb 8, the Plaintiff said he could not trace the consignee and lamented that this situation had happened once before. The Plaintiff concluded:

“The same problem arose with the last deal we made and we had indicated to you earlier that on such happenings we will be charging you for the delay. We do not know your client, you are the one who hired us...”

29. It is clear to me that, if the same situation had indeed previously occurred, it was for the Plaintiff to seize the moment and clarify, in all future contracts between it and the Defendant, that delays would be at the cost of the Defendant. This was not done. The Plaintiff was astute in recognising the problem, but indolent in fixing it. The Defendant cannot now be made liable after the fact.

30. The second issue, whether interest is payable on the delay is now moot. Having found the Defendant not liable for delay, no interest can be charged thereon. The authorities relied on by the Defendant need therefore not be invoked. No other authorities were cited by either party.

31. The upshot is that the Plaintiff's claim fails and is hereby dismissed with costs to the Defendant.

Dated, signed and delivered this 12th day of September, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwango

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

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