REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 1390 OF 1999

KINGSWAY MOTORS LIMITED.....PLAINTIFF

VERSUS

CORNER GARAGE TRANSPORT LIMITED.....DEFENDANT

JUDGMENT

(1) By its plaint dated the 13th July, 1999, Kingsway Motors Limited ("**the Plaintiff**"), claims from Corner Garage Transport Limited ("**the Defendant**"), the sum of K.Shs. 1,397,736/= being the value of five units of Daewoo Cielo cars which the Plaintiff consigned to the Defendant to transport to Nairobi from Mombasa by road on the 3rd December, 1996. The claim also includes K.Shs.34,155/= being survey fees.

(2) The Plaintiff alleges that the Defendant is a common carrier and a bailee for reward and was under a duty to deliver the goods to Nairobi undamaged or in the condition in which they were handed over to the Defendant at the Port of Mombasa. The claim is based on negligence and/or breach of contract.

(3) In the Defence dated the 5th January, 2000, the Defendant denies being a common carrier of goods and avers that it is in the business of transportation of vehicles only from Mombasa to Nairobi on the terms and conditions set out in its vehicle's inspection report and the conditions of carriage stipulated and endorsed on the reverse thereof. The Defendant further contends that even if its servants were negligent as alleged, it is not liable to the Plaintiff for the damage that occured. The Defendant further avers that the goods were carried at owner's risk.

(4) The Defendant took out a Third Party Notice against Coast Hauliers Ltd ("**the Third Party**"). In the Notice dated the 5th February, 2002 and filed on the 7th February 2002, the Defendant contended that the accident in which the Plaintiff's goods were damaged was caused by the negligence of the driver of the vehicle belonging to the Third Party. The Defendant claimed total indemnity or contribution in respect of the damages which might be awarded to the Plaintiff

against the Defendant. On the 7th March, 2007, Mr. Mansur Satchu, learned counsel for the Defendant abandoned the Notice after the three witnesses called by the Plaintiff had been cross-examined both by Mr. Satchu and Mr. Luseno the learned Advocate for the Third Party. The Defendant then called one witness, Nuru Nissa Aboo, who was at the material time the Defendant's Administration Manager. She explained the nature of the Defendant's business. She testified they had specialized vehicles which could carry five to six vehicles at a time. She said the Defendant had been carrying vehicles for the Plaintiff for a number of years.

This witness was not cross-examined but at the adjourned hearing on the 24th September 2009, learned counsel for the Defendant informed me that no further evidence would be called.

(5) On the same date, a consent order was recorded in the following terms:

"(a)That no further evidence by the defence to be taken.

(b) That the documents listed as Nos. 1-13 in the Defendant's list of documents filed on the 25th February, 2004 be and are hereby admitted.

(c) That the Defendants hereby admits:-

(i) That it carried the Plaintiff's vehicles subject matter of this suit.

(ii) That the vehicles were damaged in the course of an accident involving the Defendant's vehicle and another while the vehicles were in the Defendant's possession.

(d) The issues for the Court's determination are as follows:-

(i) What were the terms of the contract between the Plaintiff and the Defendant?

(ii) Is the Defendant exempted from liability in view of the terms of contract?

(iii) Costs".

After recording the consent order, Advocates were then directed to file and exchange written submissions.

(6) Before I deal with the submissions, I will first consider the evidence given by the witnesses called by both parties. Peter Agimba Owuor (P.W.1) worked for Kingsway Motors Ltd. as an insurance officer. He joined the company in 2002. He testified that on the 3rd December, 1996, it was agreed between the Plaintiff and the Defendant that the Defendant would transport by road to Nairobi twenty vehicles belonging to the Plaintiff. *En route* to Nairobi, the vehicle carrying the Plaintiff's

motor vehicles collided with another vehicle near Mariakani and five vehicles were extensively damaged. The Plaintiff reported the accident to its insurers and to the Police. He caused the vehicles to be towed to the Plaintiff's workshop. The insurance company (Keninda Assurance Co. Ltd. ("**Kenindia**")) appointed loss adjusters who examined the vehicles and prepared a report. The claim was assessed at K.Shs.1,363,581, which was to be paid to the Plaintiff. The loss adjusters were paid K.Shs. 34,155/=. Cross-examined by Mr. Satchu, the witness said that the Defendant carried the vehicles on certain terms and conditions but he could not tell what they were. In answer to a question put to him by learned counsel for the Third Party, the witness said that he did not know the circumstances in which the accident occurred.

(7) The second witness called by the Plaintiff was Geoffrey Kiambo (P.W.2). He is an engineer and he assessed the damaged vehicles at Customs Bond No. 157 in Nairobi. He had for this purpose a number of documents including bill of lading, supplier's invoice, insurance certificate, delivery note, etc. Mr. Kiambo said that under the insurance policy, the excess was K.Shs. 50,000/= per vehicle. For his work he was paid K.Shs. 34,155/=. He was cross-examined by Mr. Satchu and he testified that in the course of his work he has carried out numerous valuations. This witness was also cross-examined by learned counsel for the Third Party. Not much came out of it.

(8) The last witness called by the Plaintiff was Rickson Lukale (P.W.3), an Administrative Officer at Kenindia . He dealt with marine matters. He said Kenindia granted the Plaintiff a cover to import motor vehicles from Korea to Nairobi via Mombasa. The premium paid for sixty-six vehicles was K.Shs. 23,619,340/=. Corner Garage Transport Ltd. was contracted to transport the vehicles to Nairobi. They used their own vehicle Registration No. KAA 609 L. This vehicle was involved in an accident as a result of which five units were damaged. Kenindia settled the Plaintiff claim at K.Shs. 1,447,836/=. And the Plaintiff subrogated its rights to Kenindia. This witness was also cross-examined by Mr. Satchu and Mr. Luseno (for the Third Party). He said the suit against the Defendant is for damages for breach of contract.

At the conclusion of the Plaintiff's evidence, the Plaint was by consent amended to reduce the claim from K.Shs.1,447,386 to K.Shs. 1,397,736/=.

(9) The Defendant called one witness, Nuru Nissa Aboo who was at the material time the Administration Manager of the Defendant. She was in the Defendant's employment in December 1996 when the accident occurred. She said the Defendant transports goods for established customers, not individuals. It carries vehicles arriving at the Port of Mombasa from foreign countries and those assembled at the AVA plant in Mombasa. She informed the court that the Defendant has specialized vehicles which can carry five to six vehicles at a time, and that the Defendant had been carrying vehicles for the Plaintiff for a number of years prior to the accident.

This witness did not complete her evidence in chief because she was stood down by Mr. Satchu

(learned counsel for the Defendant) to enable him sort out his bundle of documents. That was on the 7th March, 2007. When the hearing resumed on the 24th September, 2009, Mr. Satchu indicated that the documents in question would be admitted by consent under the terms of the consent order recorded on that day. As a result, Ms Aboo did not continue her evidence and she was not cross-examined either.

(10) I will now deal with the submissions made by learned counsel for the parties on the issues framed for determination by the court. The two issues are:

(a) What were the terms of the contract between the Plaintiff and the Defendant; and

(b) Whether the Defendant is exempt from liability in view of the terms of the contract.

Learned counsel for the Plaintiff submitted that although on the face of the Delivery Note it is stated "**At Owners Risk**" and that the vehicles are transported as per the Defendant's conditions of carriage, that alone cannot absolve the Defendant from Liability in case of loss of or damage of the goods because as a bailee for reward or a common carrier, the Defendant was under a duty to safely and securely deliver the goods entrusted to it to the designated destination. It is also submitted that the declaration that the goods were carried at the risk of the Plaintiff and on the Defendant's terms and conditions of carriage cannot exempt the Defendant from liability where loss or damage is caused by negligence on the part of the Defendant or its servant. It was further submitted that the fact that the Plaintiff has successfully made a claim for the damage to its insurers is not a bar to recovery under a subrogatory suit. Learned counsel also pointed out that apart from relying on the exemption printed on the Delivery Note, the Defendant made no attempt to place before the court evidence to show that the accident was not caused by negligence on its part or on the part of its employee for which, of course, it would be vicariously liable.

(11) For the Defendant, it was submitted that the notice that the goods were carried at owner's risk and the express stipulation under the terms and conditions of carriage that the Defendant is exempted from liability whether the loss or damage was caused by negligence fully absolves the Defendant from liability. It was also submitted that since the Defendant is a common carrier it can exempt itself from liability even in a case where negligence is alleged or even proved.

(12) The exemption clause on which the Defendant relies is contained in Consignment Note No. 51300 dated the 3rd December, 1996. It is headed "**VEHICLE INSPECTION REPORT**." Immediately below that are the words "**AT OWNER'S RISK**". And then in brackets it says that "***vehicles are transported as per the conditions of carriage***". The conditions of carriage are set out on the back of the document. Clause No. 2 is in the following terms:

"**Clause (2) The Company shall not be Liable for Loss, Damage, Deviation, Mis-delivery, Delay or Detention of or to a consignment or any part thereof or to any goods whether or not such loss, damage, deviation, mis-delivery, delay or detention was caused by or through or due to the negligence of the Company or Its servants or otherwise".**

And Clause No. 3 states that all goods must be insured by the clients. On the basis of Clause No. 2, it was submitted that whether or not the Defendant is a common carrier, it is exempted from liability for the damage and loss suffered by the Plaintiff. Put another way, what learned counsel is saying is that whether the goods were damaged, stolen, misdelivered through negligence on the part of the Defendant or its employees, it cannot be held liable.

(13) I must reject that submission because that is a very unfair term as it virtually gives the Defendant a ***carte blanche*** (open licence) to steal or damage the Plaintiff's goods with impunity and without right of recourse. Whether as a common carrier or bailee for reward, the Defendant was under a duty to transport the goods in a secure condition and deliver them to the Plaintiff at the agreed destination. Learned counsel submitted that the question whether the Defendant is a common carrier was never established. **Black's Law Dictionary** (7th Edition), defines a common carrier as a carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid. (underlining added). From the nature and type of the Defendant's business, there is no doubt in my mind that the Defendant is a common carrier and as such it cannot exempt itself from liability across the board. (See **Express Transport Co. Ltd., - v – B.A.T. Tanzania Ltd.** (C.A.) [1968] EA 443.

(14) As I have already said, the Third Party Notice which the Defendant issued against Coast Hauliers Ltd. was withdrawn without any explanation, and the only witness called by the Defendant (Ms. Nuru Aboo) was discontinued before she completed her evidence in chief, and was consequently not cross-examined by learned counsel for the Plaintiff on the evidence she had given up to that point. Her evidence did not cover the Defendant's conditions of carriage. There is, of course, no onus or burden on the Defendant to prove anything but at least some evidence should have been placed before the court to explain the circumstances in which the Plaintiff's goods were damaged.

(15) Accordingly, I reject in its entirety the defence put forward by the Defendant that it is exempted from liability under its so called conditions of carriage. I find and hold that the Defendant was a common carrier and/or a bailee for reward and was under a duty to deliver the goods to the Plaintiff in the state in which the goods were when the Defendant received them from the Plaintiff. On the second issue, I hold that the Defendant is not exempted from liability under the terms of the contract.

(16) For the reasons I have given, I find the Defendant liable for the loss and damage caused to the Plaintiff and enter judgment for the Plaintiff against the Defendant for the sum of K.Shs. 1,397,736/= together with interest thereon at court rates from the date of judgment until payment in full. The Plaintiff will also have the costs of the suit.

I so order.

Dated and delivered at Nairobi this 3rd day of June, 2010.

P. Kihara Kariuki

Judge.