



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)**

CIVIL CASE NO. 309 OF 2010

NEW TRADECO INVESTMENTS 2000 LIMITEDPLAINTIFF/APPLICANT

- VERSUS -

**1. ANYANG SENLI TRADE CO. LIMITED
2. DEL MAS [CHINA] SHIPPING CO. LTDDEFENDANTS/RESPONDENTS
3. CMA CGM [KENYA] LIMITED**

RULING

The plaintiff moved the Court originally by Chamber Summons dated **3rd September, 2010** which was substituted by the amended Chamber Summons of **7th September, 2010**, brought under ss.1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap. 21, Laws of Kenya), and Order XXXIX, rules 1,2,8 of the Civil Procedure Rules.

In this much - canvassed application, there were two substantive prayers:

(i) **that, pending the hearing and determination of the application, an injunction do issue compelling the defendants to cause trans-shipment/delivery of the consignment 2 x 40 ft container Nos. GESU 4518939 bearing seal No. 8857536 subject of Bill of Lading No. DHTP 101079 dated 1st July, 2010 from the Port of Mombasa to the port of discharge, Dar-es-Salaam, Tanzania upon appropriate security/guarantee being given by the plaintiff;**

(ii) **that, “pending hearing and determination of the suit, an injunction do issue restraining the defendants [from], by themselves, their servants, workmen and agents or otherwise howsoever to the detriment/prejudice of the plaintiff, interfering, trespassing, removing or in any manner whatsoever dealing with the consignment of 2 x 40 ft container Nos. GESU4518939 bearing seal No. 8857472 and GESU4188708 bearing seal No. 8857536 subject of Bill of Lading No. DHTP101079 dated 1st July, 2010 save for trans-shipment and delivery of the same to the port of discharge, Dar-es-Salaam Tanzania.”**

This Court gave an order *ex parte* at the first instance, on **7th September, 2010** granting the first of the two prayers.

The 3rd defendant was immediately aggrieved by the *ex parte* order, and moved the Court by Chamber Summons of **17th September, 2010**, brought under ss.1A, 1B, 3A and 63 (e) of the Civil procedure Act, and Orders XXXIX [rule 4] and XXV [rule 1] of the Civil Procedure Rules. The three main prayers in this application were set out as follows:

(i) **“pending the hearing and determination of this application inter partes this Court be pleased to stay the order compelling the defendants to cause trans-shipment/delivery of the consignment 2 x 40ft container Nos. GESU 4518939 bearing seal No. 8857472 and GESU 4188708 bearing seal No. 8857536 subject to the Bill of Lading No. DHTP 101079 dated 1st July, 2010 from the Port of Mombasa to the Port of discharge, Dar-es-Salaam, Tanzania upon security/guarantee being given by the plaintiffs.”**

- (ii) **The orders of this Court issued on 7th September, 2010 be discharged and/or set aside;**
(iii) **“pending the hearing and determination of this application inter partes the defendants be at liberty to release the consignment, the two 2 x40ft container Nos. GESU 4518939 bearing seal No. 8857472 and GESU 4188708 bearing seal No. 8857536 subject to the Bill of Lading No. DHTP 101079 dated 1st July, 2010 to Golden Star Investment Ltd, the consignee in the said Bill of Lading upon such terms as the Court may find just to impose.”**

As the two applications, both certified urgent, and the evidence tendered in the form of affidavits, were diametrically opposed over quite specific issues, I gave the direction, on **20th September, 2010** that they be consolidated and heard together.

On the first day of hearing, on **1st October, 2010** learned counsel, **Mr. Mogaka** represented the plaintiff; learned counsel **Mr. Adhoch** represented 1st defendant; and learned counsel **Mr. Wameyo** represented 2nd and 3rd defendants. On that occasion it became clear that the main contest was between the plaintiff, on one side, and 2nd and 3rd defendants, on the other; learned counsel **Mr. Adhoch** signalled that he would not oppose the application by the 2nd and 3rd defendants.

The contest was sharpened further still, with the plaintiff’s Chamber Summons of **16th September, 2010** seeking the committal to jail of 3rd defendant’s managing director, for non-compliance with the *exparte* orders of **7th September, 2010**: this application being brought under ss. 1A, 1B, 3A and 63 (c) of the Civil Procedure Act, and Orders XXXIX [Rule 2A (2)] and I[Rule 10] of the Civil procedure Rules. The directions given on **29th September, 2010** were intended to resolve the merits of the claims first; for the contempt matter, on practical grounds, would be dependent on the issues of merit.

Starting from basic facts, that 1st defendant was the shipper, the supplier of the goods; 2nd defendant, the shipping line; and 3rd defendant, the agent of 2nd defendant — learned counsel, **Mr. Mogaka** submitted that the supplier had not sworn an affidavit saying he had sold the goods to a **third party**, but he instead excused himself and indicated his support for 2nd and 3rd defendants. Counsel urged that the third party said to have bought the goods had sworn no affidavit, had not sought joinder in the suit, and had not come openly to seek custody of the goods. Counsel disputed the claim that the said goods had indeed been sold to a third party, instead of to his client; for the shipper had not said the goods had been sold to a third party. **Mr. Mogaka** urged that the defendants had been moved by lack of *bona fides*; they had improperly introduced the name of Golden Star Investment Limited as the purchasing third party, whereas, in counsel’s perception, the original sale and shipment documents were being falsified to introduce the third party, in place of his client in Dar-es-Salaam.

Counsel apprehended falsification in the fact that the defendants had annexed to their documents of evidence a “draft bill of lading” which bore all the particulars previously shown in the bill of lading for delivery of the goods at the Port of Dar-es-Salaam. Counsel also contested the notion of “draft bill of lading”, because it was not shown that this would be replaced by a final bill of lading; but, considering an original bill of lading annexed to a supplementary affidavit, showing the third party as the intended recipient of the goods, counsel submitted that this new bill of lading was a fabrication. Counsel urged that the defendants had converted the original delivery documents and specifications for the use of the third party — and that all such particulars had been intended specifically for delivery to his client in Dar-es-Salaam.

Mr. Mogaka submitted that, by the existing contractual arrangements, the goods were to go to the plaintiff in Dar-es-Salaam; the plaintiff learned that the defendants were diverting the goods to a third party, *via* the Port of Mombasa; the plaintiff got interim orders against such conduct by the defendants; the defendants have disobeyed those orders, and hence it was a fit case for committal of the offender to jail.

Mr. Mogaka highlighted an e-mail message attached to the plaintiff’s affidavit of **16th September, 2010**, coming from the shipper of the goods (1st defendant); it read (in part) as follows:

“We are very [surprised] to receive your attachment (Civil Case No. 309 of 2010). We do not understand at all [how][the plaintiff] [has] [a] right to prevent us....from dealing with our goods, [when] [the plaintiff has] made [much] trouble and [caused us] extra cost [at] our company.

“We shipped the goods according to the L/c made by the plaintiff on 1st July and, [up to the] expiry date, the plaintiff paid nothing to us. In order to protect our goods, we [transferred] them to another

buyer, to avoid loss; this is very reasonable in business; yet the [plaintiff] accuses us: why? As an Advocate, you should give us a reasonable explanation for this”.

Learned counsel **Mr. Mogaka’s** assessment of the tenor and effect of the foregoing communication from the shipper is: **“they admit their mischief; they shipped the goods according to the plaintiff’s letter of credit; they transported to another buyer to avoid loss. The goods were shipped to the plaintiff; but now they are transferring these goods to a third party. So they are in contempt, willingly.....Court orders must be obeyed”.**

The emerging issues, and the yardsticks for resolving the contest coming up, were further illuminated by learned counsel, **Mr. Wameyo**. Counsel began from the footing that the pertinent facts are not controversial: 1st defendant is the shipper or consignor; 2nd defendant is the carrier; 3rd defendant is an agent of 2nd defendant; it is the case of a disclosed principal; the cargo was to be transported by sea; the bill of lading mentioned the plaintiff as the consignee; but that bill of lading was subsequently **cancelled** and replaced with another, three copies of which were surrendered by 1st defendant to 2nd defendant; the cancellation of the first bill of lading was caused by **the consignor** (1st defendant).

The basic facts being common ground, **Mr. Wameyo** urged that the Court is to be mainly concerned with issues of **legality**; and he asked: “is a shipper allowed to instruct a carrier to change the name of the consignee?” His answer: **“This is allowed; it is lawful. The bill of lading is the contractual document between the carrier and the shipper (owner)....The consignee is not privy to that contract. So the carrier and the shipper can agree and change the terms of their agreement.”**

Learned counsel invoked the supporting authority of **Pil Kenya Limited v. Joseph Oppong**, Civil Appeal No. 102 of 2007 [Mombasa], in which the following passage (**Bosire, J.A**) appears: **“.....the appellant had a legal duty on the basis of the amended bill of lading to deliver the container to the respondent at the earliest possible time”**

In the **Pil Kenya** case, a dispute had arisen between the consignee [such as the plaintiff, in the instant matter] and the shipper [such as the 1st defendant in the instant matter], and the shipper decided to **change the bill of lading**, specifying a new consignee; and the Court held that change to represent the valid position in any claims.

Mr. Wameyo stated from the evidentiary papers, that the purchaser-third-party in the instant case, is Golden Star Investment Limited, based in Uganda — and so the suit cargo is now destined to Kampala, Uganda; the consignee had not been served with suit papers and, therefore, did not appear as a party in this case; and besides, even if they were served, they are not parties to the bill of lading contract, and their position is exactly like that of the plaintiff herein.

Counsel relied on **Raoul Colinvaux’s, Carver’s Carriage by Sea**, vol.2 (London: Stevens, 1971) where the following passage appears (pp.46-47 (paras. 56, 57) :

“When goods are delivered to a carrier without any specific contract being made, the right to sue for breach of duty on the carrier’s part appears to be in the person to whom the goods belonged at the time of the bailment, or who is to bear the risk of the transit. If the actual sender is acting on the owner’s instructions, the latter is regarded as the contracting party, and he becomes entitled to sue for the goods, and is liable to pay the freight, and otherwise to perform the implied contract.

“ But when a special contract is made with the carrier, its terms must be looked at; and if it appears that the shipper was himself the contracting party, he is the person able to sue, and liable upon the contract, although he may have been acting for the benefit of another, and may have no interest in the goods.”

On the principles above-stated, **Mr. Wameyo** urged that goods when delivered to the carrier in the instant case, were so delivered without any special contract apart from the **bill of lading**; and in bill-of-lading contract, the primary character is **the shipper**: he is the one to sue, and to be sued — and he is the one who can sue 2nd and/or 3rd defendant. Counsel submitted that the carrier’s responsibility is to **transport the goods**, rather than to undertake negotiations with others: so in the instant case, if the plaintiff had any negotiated entitlement involving the cargo in question, that would not involve 2nd or 3rd defendant. Relying on the same work (**Carver’s Carriage by Sea** (p.1236, paragraph.1471)), learned counsel urged that the plaintiff herein could only sue for breach of contract if he came as a **trustee** of 1st defendant, or as an **insurer** — both of which categories the plaintiff did not fall under. Counsel submitted that the plaintiff had no **locus standi** and could not maintain the suit.

This led counsel to further submit that it was not in accordance with the law, for the plaintiff to ask this Court to release the goods to him: whereas the Court’s orders or **7th September, 2010** could be made on a

first impression that the plaintiff was the consignee, now the identity of the consignee has become a disputed matter, and so the release of the goods as ordered *exparte* is no longer tenable. On the question whether the law allowed the consignor to vary the bill of lading and to specify a different consignee, counsel submitted that the law was clear: and the plaintiff herein was no longer the consignee. There was evidence of a dispute between the consignor and the plaintiff, regarding payments; and it is in this business-context, that the plaintiff gave the name of a different consignee.

Learned counsel submitted that the defendants had not disobeyed the orders of the Court: although they believe there is nothing illegal in releasing the cargo to the third party, they have not done so, but have preserved the goods until further orders are given by this Court.

Mr. Wameyo submitted that while it is true the plaintiff was at first the consignee of the subject goods, he never paid for these goods; a dispute arose; the consignor re-directed the goods to a different consignee; if there had been any contract between 1st defendant and the plaintiff, it would have been one not supported by any consideration on the part of the plaintiff.

Mr. Wameyo submitted that there was no basis for the plaintiff's contempt application of **16th September, 2010**, as the hearing of the several applications on the merits, *inter partes*, shows that there are no rights vesting in the plaintiff, in respect of the cargo in question. Besides, counsel urged, there was no evidence that personal service of the *exparte* orders of **7th September, 2010** had been made upon the alleged contemnor.

In relation to proper conduct of judicial work, the matter herein points to the special challenges facing a Judge who grants orders in *exparte* proceedings, especially in complex commercial and related matters. In such cases, *prima facie* impressions may be deceptive, or could turn out to be not in accord with relevant law.

In this case, the governing law for the primary claims is the law of contract relating to the bill of lading. Under that law, the plaintiff herein had no *locus standi* to bring suit against the consignor of the suit cargo, and the said consignor, by established principles of law, was at liberty to vary the bill of lading and re-route the cargo — and that is exactly what he did, as a practical business decision.

The effect of the plaintiff's claim, is that the Court is being asked to enforce a contract between him and 1st defendant which does not exist. Contract is a voluntary legal burden created by parties for themselves; and the Court's role is only, upon being moved by a party, to see to the play of the governing rules. This Court's *ex parte* orders of **7th September, 2010** did not seek to impose a contract on the plaintiff and 1st defendant, and it is now clear the same are to be vacated.

I will make orders as follows:

- (i) **Order No. 2 in the orders of 7th September, 2010 is vacated.**
- (ii) **The plaintiff's amended Chamber Summons of 7th September, 2010 is disallowed; costs to the defendants in any event.**
- (iii) **The plaintiff's Chamber Summons of 16th September, 2010 is disallowed; costs to the defendants in any event.**
- (iv) **The 3rd defendant's Chamber Summons of 17th September, 2010 is allowed; costs to be borne by the plaintiff, in any event.**

DATED and DELIVERED at MOMBASA this 29th day of October, 2010.

.....
J. B. OJWANG
JUDGE

Coram: **Ojwang, J**
Court Clerk: **Ibrahim**
For the Plaintiff: **Mr. Mogaka**
For the Defendants: **Mr. Wameyo, Mr. Adhoch**