



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 622 of 2001**

**M. A. BAYUSUF & SONS LIMITED.....PLAINTIFF**

**VERSUS**

**EXPRESS KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**CHINA ROAD AND BRIDGES CORPORATION .....2<sup>ND</sup>  
DEFENDANT**

**JUDGEMENT**

In the amended plaint filed in court on 6<sup>th</sup> April, 2004 the plaintiff states in paragraph 3;

“By an agreement made orally in part and in correspondences during the month of November, December, 2000, the 1<sup>st</sup> Defendant requested the Plaintiff to give a quotation for transportation of various machineries and equipment from various destinations to Nairobi and Ethiopia. By a letter dated 29.11.00 the 1<sup>st</sup> Defendant specifically requested the Plaintiff to give quotations for the following transportation;-

Description	Weight	Dimensions	location
2 x Bulldozer	31500 kg	8400 x 4100 x 3550	Man-Eaters
1 x Bulldozer	21150 kg	6900 x 3700 x 2600m	Man-Eaters
3 x Bulldozer	9000 kg	7619 x 2950 x 3440mm	Man-Eaters
2 x Wheel Loader	18840 Kg	8000 x 2900 x 2450 mm	Man-Eaters
1 x Melting Unit	18000 kg	6000 x 3000 x 1000 mm	Man-Eaters
1 Bulldozer	21150 kg	6900 x 3700 x 2600 mm	Garsell

The Plaintiff did by a faxmille transmission dated 1.12.00 quote for 8 (eight) low loaders at USD 10,000 per loader. The Plaintiff will refer to the said correspondences for their full meaning and purport.

And in paragraph 4 it states;

“By letters dated 5.12.00, 11.12.00 and 14.12.00 the Defendant duly accepted the quotation hereinbefore

cited and gave details of the scheduled dates for the machinery to be transported. The Plaintiff will rely on the said letter for its full meaning and purport”.

In short the plaintiff's claim against the 1<sup>st</sup> defendant is for the sum of USD 62500 being the balance of the amount due and owing in respect of transportation charges or services rendered by the plaintiff to the 2<sup>nd</sup> defendant for goods to be moved from Kenya to Ethiopia at the 1<sup>st</sup> defendant's request and/or instructions sometimes December 2000 to January 2001. It is the contention of the plaintiff that its supply to the 1<sup>st</sup> defendant with the necessary motor vehicles to move equipment that belonged to 2<sup>nd</sup> defendant and payment of the balance was to be done within two weeks after the delivery of the equipments to the specified destinations. The 1<sup>st</sup> defendant in its amended defence filed in court on 8<sup>th</sup> April, 2004 denies owing the plaintiff the sum of USD 62500 and puts the plaintiff to strict proof. However it confirms that having been contracted by the 2<sup>nd</sup> defendant to move its goods from Nairobi to various destinations in Ethiopia consequently it subcontracted the plaintiff to provide the transportation services in strict accordance to transportation agreement made between the 1<sup>st</sup> and the 2<sup>nd</sup> defendant. It also contends that the 1<sup>st</sup> defendant was a disclosed principal and that knowledge was brought to the attention of the plaintiff. It is also the case of the 1<sup>st</sup> defendant that the transport of machinery and goods was to be strictly on scheduled dates and that the plaintiff failed to observe the schedules and guidelines thereby exposing the 1<sup>st</sup> defendant to grave loss and damage. It is for that reason that the 1<sup>st</sup> defendant states that it incurred huge sums of monies as a result of the plaintiff's failure to honour the transportation agreement.

On the part of the 2<sup>nd</sup> defendant it states that it was an undisclosed principal who had nothing to do with the dispute between the plaintiff and the 1<sup>st</sup> defendant. It states that the 1<sup>st</sup> defendant did not disclose the nature of the urgency to the plaintiff and therefore cannot be held for the actions and omissions of the 1<sup>st</sup> defendant.

It is undisputed that the plaintiff in support of its case called one witness while the 1<sup>st</sup> defendant called its transport manager in support of its case. On the other hand the 2<sup>nd</sup> defendant did not call any witness to give witness before court. It is also clear that the 2<sup>nd</sup> defendant had goods to be transported to Ethiopia from Kenya within the specified period and terms that was agreed with the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant entered into an agreement with the 1<sup>st</sup> defendant who would provide the transportation services required by the 1<sup>st</sup> defendant. It is undisputed that the 1<sup>st</sup> defendant did not have all the necessary vehicles and equipment thereby necessitating the contract given to the Plaintiff who was to provide and did provide motor vehicles that were necessary for the completion of the agreement between the defendants herein. It is also pertinent to note that the plaintiff was not a party to the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein, while it is also true that the 2<sup>nd</sup> defendant was not a party to the agreement between the plaintiff and 1<sup>st</sup> defendant.

The plaintiff and the 1<sup>st</sup> defendant agreed on the number of vehicles and the rate to be charged for the transportation in question. And at the time the dispute arose the balance was USD62500 since the whole contractual amount was USD125,000. No doubt that the 1<sup>st</sup> defendant paid 50% of the total sum leaving the balance in dispute. The Plaintiff and the 1<sup>st</sup> defendant exchanged various documents and letters before and after the completion of the transportation which was produced before this court. The production and the contents of the said documents is not contested by the parties. But it suffices to say that there was no formal contract that was executed between the plaintiff and the 1<sup>st</sup> defendant. The question is whether the written contract between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant was disclosed by the 1<sup>st</sup> defendant to the plaintiff before the commencement of the transportation of the goods to Ethiopia. And whether the plaintiff was in breach of the contract or negligence in performing the contract allegedly entered with the 1<sup>st</sup> defendant. No doubt all the goods entrusted to the plaintiff was delivered at the point of destination despite numerous delays and various hiccups.

As stated the plaintiff's case was led by PW1 who produced documentary evidence in support of the

allegations set out in the amended plaint. The witness stated that the agreement drawn by the 1<sup>st</sup> defendant though forwarded to the plaintiff was not signed and executed between the parties. It is therefore the case of the plaintiff that it cannot be bound by non existing contract and that the operative document is the letter dated 18<sup>th</sup> December 2007. The letter reads;

“Further to our arrangement of sending you low loaders. However, most low loaders will be in Nairobi today the 18<sup>th</sup> December, 2000 few of the remaining low loaders will be there with you tomorrow. Our arrangement with you is that we carry goods and transport goods at owners risk and you should insure your cargo from point of loading which are Garsen, Man Easters and Nairobi to Awash in Ethiopia. The date of the loading will be from 18<sup>th</sup> or 19<sup>th</sup> December, 2000 and there will be no demurrage charges for us for the delay of supplying you with the low loaders since it is due to circumstances beyond our control. This should be acceptable to you.

The total amount for the said transportation is USD 125,000/-. Also it was agreed as per our request you should pay us 50% advance payment before the low loaders leaves for Ethiopia and 50% after receiving the signed documents when the goods are received at site. There should be no delays in off loading at the site. We are giving you one day for off loading the cargo after which we will charge you USD 400 per day for any delay at the off loading site. All documentation at the Kenyan-Ethiopia border should be handled by you and at your cost. These conditions should be accepted before our trucks move for Ethiopia”.

The plaintiff contends that the contents of the above letter was certified by the 1<sup>st</sup> defendant through letters dated 20<sup>th</sup> December and 29<sup>th</sup> December, 2000. And that the 1<sup>st</sup> defendant has no basis of raising any send off or counterclaim to the claim raised by the plaintiff. In short the plaintiff asserts that it did not at any time agree and/or accept to be bound by the terms of the written contract between the defendants from which the basis of surcharge for the delay and other items arise from. The plaintiff therefore prays for judgement against the 1<sup>st</sup> defendant for USD 62500 being the balance of the transportation charges rendered for and on behalf of the 1<sup>st</sup> defendant.

I have considered the pleadings, documents and evidence adduced by all the parties in this dispute. I have also considered the rival submissions of the three advocates acting for the parties herein. The first point for determination is whether there is a claim that can succeed against the 2<sup>nd</sup> defendant. Ms Karano learned counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff had no direct dealings with the 2<sup>nd</sup> defendant and that they did not render any services under instructions from the 1<sup>st</sup> defendant. She also contended that there was no agreement between the plaintiff and the 1<sup>st</sup> defendant that the plaintiff would be paid by the 2<sup>nd</sup> defendant. Hence there is no cause of action against the 2<sup>nd</sup> defendant. She also admitted that she does not understand why the 2<sup>nd</sup> defendant was joined in this suit. In her support of that contention she relied on evidence given by DW1 Mr. Jimnah Mwangi who told this court that there was no contractual relationship between the plaintiff and the 2<sup>nd</sup> defendant. It was also the evidence of Mr. Mwangi that the 2<sup>nd</sup> defendant did not syndicate or contribute to the issues in dispute between the plaintiff and the 1<sup>st</sup> defendant. I am therefore in agreement with the learned counsel for the 2<sup>nd</sup> defendant that the plaintiff was given instructions by the 1<sup>st</sup> defendant and there was no implying authority that came from the 2<sup>nd</sup> defendant. It means the 2<sup>nd</sup> defendant cannot be held liable for the dispute between the plaintiff and the 1<sup>st</sup> defendant. Clearly the plaintiff was issued with instructions by the 1<sup>st</sup> defendant who did not in any way purport to be acting for and on behalf of the 2<sup>nd</sup> defendant. Therefore the claim against the 2<sup>nd</sup> defendant by the plaintiff has no basis in law and it is hereby dismissed with costs.

On the other hand the plaintiff did not at any time agree to the terms set out by the 1<sup>st</sup> defendant to be a basis for the transportation agreement. DW1 confirmed having entered into contract with the 2<sup>nd</sup> defendant to transport machinery and equipment to Ethiopia. He also confirmed substantial part of that contract was performed by the plaintiff. He also confirmed that the 1<sup>st</sup> defendant sub-contracted the plaintiff without permission of the 2<sup>nd</sup> defendant. And that it did not disclose the details of the contract

between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. It is for that reason that I make a finding that there was no written agreement between the plaintiff and the 1<sup>st</sup> defendant. However, it is clear that the plaintiff performed its part by delivering the goods and equipment as per the destination in the correspondences exchanged between the parties herein. In reply the 1<sup>st</sup> defendant contested that the plaintiff performed its part of the agreement as agreed and expected. The 1<sup>st</sup> defendant says that the machinery was to be moved within the specified time and delivered as scheduled in Ethiopia. Secondly that the plaintiff had endorsed the mileage of each truck from the point of departure in the truck way bills to be returned and delivered to the 1<sup>st</sup> defendant to process payment. Thirdly that the plaintiff was to guarantee its staff, vehicles and trailers would pass the border crossings within the stipulated time and without any problems. It is also alleged that the plaintiff was to provide before departure the necessary documents and information including log books, insurance cover and drivers' names and passports for the same to be processed easily within the border crossing. It was further contended that the plaintiff was negligent in performing the contract thereby causing inordinate delay in the completion of the contract.

On my part and having evaluated the evidence of the plaintiff against that of the 1<sup>st</sup> defendant, I am satisfied that the plaintiff has proved its case on a balance of probability. I say so because the plaintiff did provide to the 1<sup>st</sup> defendant motor vehicles that transported goods to the point of destination upon the 1<sup>st</sup> defendant confirming and agreeing the terms set out in the letter dated 18<sup>th</sup> December 2000 by the plaintiff. There is no evidence to show that the 1<sup>st</sup> defendant paid the balance of the transportation charges rendered by the plaintiff. And in any case it is not the case of the 1<sup>st</sup> defendant that the plaintiff has not rendered the services and therefore is not entitled to payments claimed in this suit. The 1<sup>st</sup> defendant's case is that although the plaintiff rendered services, nevertheless it is responsible for the numerous delays, omissions, inactions and losses incurred by the 1<sup>st</sup> defendant. In that direction the 1<sup>st</sup> defendant in its amended defence enumerated various sums that were allegedly caused by the omission of the plaintiff to transport the goods within the scheduled dates and time. I do not think that such a claim can succeed first because no demand was made and secondly no proper counterclaim or set off was indicated or made by the 1<sup>st</sup> defendant in its amended defence. I therefore think that the assertion by the 1<sup>st</sup> defendant for set off and counterclaim is remarkably misplaced and untenable. It is on the same strength that I make a finding that the 1<sup>st</sup> defendant has not laid basis that it is entitled to be paid a sum of Kshs.4,470,688 as alleged in its amended defence. It is therefore my humble decision that the 1<sup>st</sup> defendant has no proper defence against the claim by the plaintiff hence the defence is a sham and afterthought. It has no basis in law and the proper route is to enter judgement for the plaintiff against the 1<sup>st</sup> defendant plus costs. The plaintiff's claim against the 2<sup>nd</sup> defendant is dismissed with costs. Orders accordingly.

Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of January, 2009.

**M. A. WARSAME**

**JUDGE**