



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 360 of 2007

TOYOTA EAST AFRICA LTD.PLAINTIFF

VERSUS

EXPRESS KENYA LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff pleads that at all material time the Defendant was carrying on business of a common carrier for reward and at the material time was acting as a Clearing and Forwarding Agent for the Plaintiff.

On or about 21.09.2004, the Plaintiff instructed the Defendant to clear 68 units of Toyota Motor vehicles through Mombasa port to Bond 377 in Nairobi. On or about 21.09.2004 for hire and reward and through its authorized agent drove motor vehicle No. KAH 375L Toyota DYNA hauling trailer ZB6508 Landen with two new units of Toyota Land Cruiser Model AZJ78 of Chassis No.JTERB71JXO-0022990 and Engine No.IHZ 045 7617 the other Chassis No.JTERB71J20-0023034 Engine No.IHZ 0457913 Hard Body for onward delivery to the Plaintiffs premises in Nairobi. In the premises the Defendant was under a duty as a bailee and/or carrier for reward of the said units to take reasonable care of the same and deliver them safely and intact to the Plaintiffs premises in Nairobi as aforesaid.

However, in breach of its duty to the Plaintiff the Defendant failed to deliver the said units safely or at all to the Plaintiffs order. The particulars of breach and negligence are set out. The particulars of loss expenses and damages are set out amounting to Kshs.9,077,070.00 which is the sum claimed in the plaint with costs and interest.

The Defendant admits matters stated under paragraphs 3, 4, 5, & 6 that it was engaged by Plaintiff to transport the aforesaid items from Mombasa port to Nairobi as a common carrier and a clearing and forwarding agents for plaintiff.

The Defendant however, denies breach of duty of care and negligence and states that it with its employees exercised reasonable care at all times. It is denied that the vehicles were lost in transit and avers that the said motor vehicles were robbed off its servants at gun point on the highway. In circumstances that were beyond defendants control. The defendant denies liability for the vehicles for loss occasioned by assumed robbery. From the pleadings as above stated, the Defendant has admitted that it did take the vehicles as pleaded by Plaintiff. The parties agreed on issues filed in court on 28.01.2008.

At the trial the Plaintiff witness Lilian Wambui Njeru testified and produced all documents involved in the Plaintiffs case. She said that the vehicles did not arrive. She confirms that the Insurance Company paid compensation Kshs.8,957,346.00. The other witness (PW2) was Daniel Ndeto a Marine Insurance surveyor who on 02.09.2004 received instructions from Lion Insurance of Kenya to undertake inspection

of the vehicles at the port. He did so and produced a report dated 27.10.23004. Later, he came to Nairobi to await the vehicles arrival. He was then informed the vehicles were missing and he quantified the loss. He testified that according to the information obtained from the Driver Mr. Mutero and the turnboy, the driver was confronted by thugs at 8.30. There was a highjacking with guns and pistol.

The Plaintiff also called a manager from Lion Insurance who testified on the investigations carried out on the claim. For the Defendant no evidence was led. The Counsel had opportunity to lead the Defence case but he never produced any witness.

Written submissions were filed by both parties. For the Plaintiff it is submitted that the Defendant was a common carrier and bailee for reward and quoted the case of ***B.A.T Kenya Ltd. and Another –vs- Express Transport Company Ltd & Another 1968 E.A 171*** where the duties of common carrier/bailee were defined

“A common carrier would be responsible for the safety of goods in all events except if the loss or injury arose solely from the Act of God or hostilities involving the state, or from fault of the consignor or inherent vice in goods themselves.”

Again the case of Coggs –vs- Bernard 1558-1774 All E.R.1-10. “As to the fifth sort bailment, Viz a delivery to carry otherwise manage for a reward to be paid to the bailee if it be to a person of the first sort and he is to have a reward, he is bound to answer for the goods in all events. This is the case of the common carrier.

The law charges this person thus entrusted to carry goods against all events but acts of God, and of the enemies of the King. For though the force be never so great as if an irresistible multitude of people should rob him, he is chargeable. This is a politic establishment contrived by the policy of law for safety of all persons, that may be safe in their wars of dealing for else these carriers might have an opportunity of undoing all persons had dealings with them by combining with thieves etc, and yet doing it in a clandestine manner as would not be possible to be discovered.

Therefore the liability of carriers is strict. The goods would be with the carrier who would be having possession by the process of carriage.

In fact the Defendant admits being in possession of the vehicles for purpose of transporting the same to the Plaintiff's order. Therefore the Defendant was under strict liability to take care of the goods against all events.

The evidence in the statement of driver Mutero admits that the drivers had agreed to leave in a convoy obviously to avoid such incidents as described here, but he choose to be left behind. He also admitted that the stolen vehicles were being carried with their keys which would make it easier for robbers to drive off the vehicles.

In this regard evidence of PW1 was that Defendant had agreed to send car keys separately via securicor and not with the car carriers.

The Defendants in their statement of defence pleaded that the vehicles were taken by robbers but no evidence was led to prove that explanation. No proof was offered that the loss of vehicles was not due to negligence. The statement of the turnboy indicates that the driver was talking with two men in Kikuyu language at length and was reluctant to call the manager. This goes on to show that the carriers were not taking their duties seriously and were negligent.

The issue has arisen as to the right of Plaintiff to receive compensation. However, PW3 Samuel Maina Nganga was an employee of the Insurance Company which compensated the Plaintiff under insurance policy. He exhibited payment voucher and said they are to recover if the judgment is given in Plaintiff's favour.

Upon considering the evidence tendered and the exhibits annexed, I am satisfied that the Plaintiff has proved on a balance of probability that the Defendant was liable for the loss incurred. I find the liability was strict and no explanation was given to avoid liability

I enter judgment for Plaintiff in the sum of Kshs.9,077,070.00 as claimed, plus costs and interest at court rates from 17.07.2007 until payment in full.

Orders accordingly.

DATED this 13th day of February 2009.

JOYCE N. KHAMINWA

JUDGE