



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
Civil Suit 905 of 2001

SYNGENTA EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

EXPRESS KENYA LIMITED.....DEFENDANT

AND

TORNADO CARRIERS LIMITED.....THIRD PARTY

J U D G M E N T

1. Syngenta East Africa Limited (hereinafter referred to as the plaintiff), is the successor in title and assign of Norvatis East Africa Ltd. By an amended plaint filed on 12th February, 2004, the plaintiff has come to this court seeking judgment against Express Kenya Ltd (hereinafter referred to as the defendant) for Kshs.5,206,188/= together with costs and interest thereon.
2. The plaintiff's claim arises from an agreement entered into with the defendant for clearing and transportation of consignment of goods from the Port of Mombasa to the plaintiff's factory in Nairobi. The plaintiff contended that on 26th April, 1999 and 27th April, 1999, the defendant cleared and delivered through its agent Tornado Carriers Ltd (hereinafter referred to as the Third Party), two consignments of goods to the plaintiff's premises from the Port of Mombasa. However in breach of the contract and or the defendant's duty as a bailee and or common carrier for reward, the goods were short delivered. As a result, the plaintiff suffered loss of Kshs.5,206,158/= being the value of the missing goods, investigators charges, loss adjuster's fee and the policy excess.
3. In its defence, the defendant maintained that the plaintiff appointed it as its clearing and forwarding agents, on terms and conditions which included *inter alia*, that all cargo would be handled, stored and carried uninsured at owner's risk. The defendant maintained that the two consignments were consigned to the plaintiff on house to house basis. The defendant further maintained that the two consignments were verified and sealed by Customs Department.
4. The defendant stated that the two consignments were received by the Third Party as carrier for delivery of the consignment to the plaintiff, and that the Third Party was an independent contractor. The defendant contended that the plaintiff acknowledged receipt of the goods with the container seals and locks intact. The defendant further maintained that if any goods were lost such loss occurred without any default, negligence or breach of duty on the part of the defendant.

5. Pursuant to leave obtained by the defendant on 5th November, 2001, a third party notice was issued against the Third Party, in which the defendant sought judgment in its favour against the Third Party in the event the Court found for the plaintiff. The defendant also sought an order for full indemnity against the Third Party in the event that the court finds for the plaintiff. The defendant alleged that the two consignments were handed over to the Third Party intact for transportation to the plaintiff. The defendant therefore maintained that if there was any loss to the plaintiff, such loss occurred whilst the goods were in the Third Party's custody, during transit of the consignment, by the Third Party to the plaintiff's premises.

6. The Third Party filed a defence in which it admitted transporting the subject consignments but denied the allegations of short delivery. Without prejudice, the Third Party maintained that the containers were carried subject to consignment note No.2157 and consignment note No.2163, pursuant to which the goods were carried at owner's risk, and were not checked. The Third Party therefore denied liability to the defendant and the plaintiff, maintaining that it was not responsible for any shortages or damages with regard to the consignments.

7. This suit was initially heard by Hon. Kasango J., who took the evidence of one witness, and was thereafter transferred to another station. Parties thereafter agreed to have the hearing of the suit proceed *denovo*. In proof of the plaintiff's case, three witnesses testified. These were William Wanyoike Ngugi, Head of Finance and Administration in the plaintiff's company, Joseph Gicheha Kamomoe, a Director with Oceanic Marine Surveyors Ltd and Fabian Lugende Mbele, a Manager with Heritage Insurance Company.

8. Briefly, the plaintiff's case was as follows:

The plaintiff, which was formerly known as Novartis E.A Ltd, is engaged in the business of sale and supply of Agro-chemicals. The company imports the chemicals from overseas. In March, 1999, the plaintiff imported two types of chemicals known as Ridomil Gold Mz and Tilt 250 ES from Novartis Agro-AG in Switzerland. The chemicals were shipped to the Port of Mombasa on different days through two bills of lading which were produced in evidence (P.exh.4 & 5). At the material time, the defendant was the plaintiff's clearing and forwarding agent. It was therefore for the defendant to clear the goods and organize for its transportation to Nairobi. The defendant advised the plaintiff of the arrival of the consignment. The consignments were subsequently released to the defendant through Mombasa Port release orders which were produced in evidence. (P.exh.8 & 9).

9. On 22nd April, 1999, a 20ft container was delivered at the plaintiff's premises by the Third Party. According to the transport delivery note from the defendant (P.exh.11) and the consignment note from the Third Party (P.exh.10), the container was said to be carrying 17 pallets of Ridomil and Tilt weighing 9,132.20 kg. However, the plaintiff noted on exhibit 11 and 10 that only a total of 6,240 kg Ridomil Gold was received.

10. On 25th April, 1999 a 40ft container was delivered at the plaintiff's premises by the Third Party. According to the transport delivery note from the defendant (P.exh.13), the container was carrying 35 pallets (840 boxes) STC Ridomil Gold, weighing 10,465 kg, whilst the consignment note/delivery note from the Third Party (P.exh.12) indicated the consignment to be pallets boxes of Ridomil Gold weighing 15,465 kg. However, the plaintiff noted on exhibit 12 and 13 that only a total of 6,160 kg of Ridomil Gold was received. (It is evident that the weight of 15,465 kg indicated on P.exh.12 was a mistake as the bill of lading (P.exh.4) and the Port release order (P.exh. 8), both indicated the weight of the consignment as 10,465 kg.)

11. Following the short delivery, the plaintiff wrote to the defendant inquiring about the missing goods. There was exchange of correspondence but the defendant finally denied liability. As per the marine certificates of insurance which were produced as P.exh.26 & 27, the plaintiff's two consignments were insured by Heritage A.I.I Insurance Company Ltd, (hereinafter referred to as the insurance company).

12. Upon being advised of the loss, the insurance company appointed Maclarens Toplis Loss Adjusters to survey the loss. An initial investigation was done and a cargo survey report made. (P.exh.23). Further

investigation was done to quantify the loss in respect of the two consignments. The two reports prepared by J.G. Kamomoe (P.exh.24A & 25A), quantified the plaintiff's loss as Kshs.3,225,436/= and Kshs.1,297,820/= respectively.

13. The insurance company paid Maclarens Toplis Loss Adjusters Kshs.99,993/= and Kshs.51,175/= for the two surveys. The insurance company also instructed Wisemen Investigations Company to investigate the loss. Payment of Kshs.273,240/= and Kshs.161,025/= was made to Wisemen Investigation company for the investigations. Subsequently, the insurance company paid the plaintiff Kshs.778,692/= and Kshs.1,935,262/= being 60% of the loss suffered by the plaintiff. As a result, the plaintiff subrogated its rights to the insurance company (P.exh.21 & 22).

14. The defendant testified through a claims officer, Lucy Mwiwaki Kang'ethe (Mwiwaki). Mwiwaki testified that the plaintiff and the defendant have been having a trading relationship going back to the year 1993. She stated that the defendant was the only clearing and forwarding company for the plaintiff. Mwiwaki testified that the defendant used to contract the Third Party to transport its client's goods after clearing the goods. Mwiwaki produced a copy of an agreement signed between the defendant and the third Party which showed that the Third Party was using the defendant's motor vehicles for transportation of the client's goods, on condition that the Third Party was to be liable for any claims regarding the motor vehicles used.

15. Mwiwaki testified that the defendant's records indicated that the plaintiff's consignments were received and cleared in accordance with the bill of lading. Customs verification was done in the presence of Port officials, the police the defendant and Maclarens Toplis. Thereafter, the consignments were sealed and delivered to the third Party with the delivery note for transportation and delivery of the consignments to the plaintiff. The witness maintained that the defendant did not handle the consignment after handing it over to the Third Party nor did it have any agent at the plaintiff's company at the time of offloading and delivery of the consignment.

16. Upon receipt of the report concerning the missing consignment, the defendant engaged a security firm to investigate the matter. The defendant maintained that the Third Party was the one liable for the loss.

17. The Third Party called two witnesses. These were Patrick Munala (Munala), and Mbacho Kililo (Kililo). At the material time Munala and Kililo were employed by the Third Party as accountant and driver respectively. Their evidence was that the Third Party was incorporated in 1996. By the year 1999, the Third Party used to carry cargo for various clients as agents of the defendant. With regard to the consignment in question, the witnesses explained that the Third Party transported the consignments on the instructions of the defendant. Kililo was one of the drivers who drove the trucks which transported the goods.

18. The Third Party's witness maintained that the Third Party was not involved in the verification or weighing of the cargo, but was only handed over the Containers for transportation. The Third Party got the information concerning the weight of the consignment from the delivery notes handed over by the defendant. The Third Party carried the goods in accordance with their terms of carriage, which were that the goods in transit were uninsured by the carrier, and transported at owner's risk. At the time of transportation, the container had a Custom's seal as well as the Third Party's seal.

19. The witness maintained that the Third Party delivered the two consignments at the plaintiff's premises on 26th April, 1999 and 27th April, 1999. No interference with the seals was noted on the delivery notes. About a week later, a complaint was received from the defendant alleging that the goods were short-landed. The Third Party denied any responsibility for the short-landing, maintaining that there was no indication by the recipient on their delivery note of any short-landing. The Third Party further maintained that they were not involved in the verification or weighing of the goods, both at the time of picking the goods at the Port, and at the time of delivering the goods at the plaintiff's premises. It was further maintained that at the time of transportation and delivery of the goods, the trucks used by the Third Party belonged to the defendant. The trucks were transferred to the Third Party in the year 2001.

20. As per a consent recorded on 6th February, 2008 the issues for determination were agreed by the parties as follows:

- (i) What were the terms and conditions upon which the defendant was appointed by the plaintiff as the plaintiff's clearing and forwarding agent?
- (ii) Whether the defendant was at all material times a common carrier of the plaintiff's goods?
- (iii) Whether it was a term and condition of the subject contract that "all cargo would be handled stored and carried uninsured at the owner's risk"?
- (iv) Whether the plaintiff delivered its consignment (of 17 pallets Ridomil and Tilt and 35 pallets of Ridomil) to the defendant or to the Third Party for delivery to the plaintiff in Nairobi?
- (v) Whether the Third Party was an agent of the defendant or an independent contractor?
- (vi) What were the terms and conditions upon which the Third Party carried/transported the consignment?
- (vii) Whether there was under delivery or short delivery to the plaintiff as alleged and if so, in what respect(s)? Who is liable the defendant or the Third Party if at all?
- (viii) Whether the plaintiff has suffered loss and damage and if so, the quantum thereof?
- (ix) Whether the plaintiff is entitled to the reliefs sought and if so, against which party?
- (x) Whether the Third Party is liable to the defendant?
- (xi) Whether the defendant is liable to the plaintiff as prayed and if so, whether the defendant is entitled to full indemnity from the Third Party?
- (xii) What order should be made as to costs?

21. Counsel for each party filed written submissions urging the court to find in favour of their client. For the plaintiff, it was submitted that the plaintiff had no direct dealings with the Third Party and therefore, any contract of carriage executed between the defendant and the Third Party was not binding on the plaintiff. It was maintained that the endorsement on the transportation documents that goods were carried at the owner's risk, was not binding on the plaintiff as the documents were issued as between the defendant and the Third Party, and the plaintiff only saw the documents when the goods arrived in Nairobi.

22. Reliance was placed on the case of *Express Transport Company Ltd vs B.A.T. Tanzania Ltd [1968] EA 443*, wherein the Court of Appeal held that a similar statement not having been brought to the attention of any responsible officer of B.A.T Tanzania, the appellant was a common carrier with a wider liability and the words "owner's risk" could not exempt the appellant from liability. It was maintained that the defendant and the Third Party were common carriers who carried goods for hire as a business. In this regard, *Coggs vs Bernard [1558-1774] All ER* and *Halsburys Laws of England, 3rd Edition Vol.4 page 134* were also cited.

23. Counsel for the plaintiff submitted that there was sufficient evidence including P.exh.4, 5, 6, 7, 8 & 9, which confirmed that the consignment of Ridomil Gold and Tilt were imported by the plaintiff and that as per P.exh.10, 11, 12 & 13 the consignments were received by the defendant and loaded into the Third Party's vehicles, for delivery at the plaintiff's premises. The documents also confirmed that there was a shortfall between the weight consigned and the weight received. It was submitted that the defendant through its agents the Third Party, was in breach of contract as it failed to securely deliver the consigned goods. It was maintained that the defendant breached its duty to the plaintiff as bailee and common

carrier.

24. Relying on D.exh.2, counsel for the plaintiff maintained that as at the time of carrying the goods, the Third Party owned the motor vehicle KAA 882 JZA 6841, and that the Third Party assumed liability for all claims arising from the use of the vehicle. The agreement also confirmed that the defendant was to insure the goods being conveyed by the vehicle. It was further submitted that the plaintiff having insured the consignments, it was entitled in law to subrogate its rights to the insurer. It was argued that the doctrine of subrogation enables the insurer to seek recovery from the party responsible for the insured's loss, and that, it was no defence for the person liable for the loss, that the insured has been indemnified by the insurer. The court was therefore urged to enter judgment in favour of the plaintiff as prayed.

25. Counsel for the defendant submitted that since the plaintiff and the defendant had no formal contract, their relationship must have been governed by the customs, usage and traditions existing in a Clearing and Forwarding type of business. It was submitted that the plaintiff and the defendant had a long relationship, the defendant being the plaintiff's sole clearing agent. It was maintained that the consignment were delivered accompanied by delivery notes, a sample of which were P.exh.11 & 12. It was contended that the words "carried uninsured at owner's risk" was always embodied on the delivery note, and that it was customary for the defendant to further write by hand on the delivery note that it was not a common carrier. It was therefore maintained that through this custom the plaintiff was fully aware that the goods were always carried by the defendant at owner's risk.

26. Counsel for the defendant distinguished the case of *B.A.T Tanzania* (Supra) contending that unlike the present case, there was no long relationship in existence. Moreover, the plaintiff herein had the benefit of past delivery notes which bore the exclusion clause and therefore the argument that the plaintiff only came to see the exclusion clause at the time of delivery, could not hold any water.

27. Counsel for the defendant maintained that the defendant was not a common carrier as it was free to choose whose goods to carry. It was maintained that the plaintiff did not adduce any evidence to establish that the defendant was a common carrier. Nor did the plaintiff adduce any evidence to show that the defendant was not free to charge any fee that it deemed appropriate for business. It was therefore submitted that the defendant could only be assumed to be a private carrier whose liability was limited to loss and damage caused by its own employee's negligent act. It was argued that the plaintiff's claim against the defendant could not succeed as it was not anchored on negligence.

28. It was maintained that the possibility of the consignment shortage having originated from the exporters, could not be ruled out. This was because the documentary exhibits produced only showed that a cursory examination was undertaken at the Port of Mombasa in the presence of Port Officials, Customs Officials, Police Officers, Kenya Bureau of Standard and a representative of Maclaren Toplis, which ruled out visible signs of tampering with the containers. However, no stripping of the container to tally the goods was done and therefore one cannot be certain as to whether the correct amount of the consignment was shipped.

29. Regarding the issue as to whether the Third Party was an agent of the defendant or an independent contractor, it was submitted that according to *Blacks Law Dictionary, 2004, 8th Edition, 2785*, an independent contractor was defined as one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. Reference was also made to *Chitty on Contracts, 26th Edition, Par. 2504*, which states that an independent contractor is not under orders of the principal in the manner of execution. It was maintained that the Third Party squarely fell within the above description of an independent contractor. It was stated that according to the evidence, the Third Party was independent as it had the liberty to sub-contract its operations. It was submitted that the evidence produced showed that once the defendant handed over the consignment to the Third Party for delivery to a customer it was upon the Third Party to determine how it execute the work. It was therefore maintained that the Third Party should be held wholly and solely liable for any dereliction of duty on their part.

30. It was submitted that the defendant diligently, prudently and reasonably handled the cargo from the

time it came into its custody. The defendant took part in the verification exercise at the Port and being satisfied that the consignment had no tampering, affixed its seals on the containers and then handed the containers to the Third Party for onward delivery to the plaintiff. It was maintained that the alleged loss/theft of the consignment took place after the consignment had left the Port, by which time the consignment was in the hands of the Third Party. It was submitted that the Third Party handled the consignment casually and recklessly as it did not employ any security for the consignment at the stopovers in Maungu and Mlolongo, and even left the consignment to be offloaded in their absence. It was maintained that the Third Party was entirely to blame for the loss and should be held wholly to blame as independent contractors.

31. Regarding the quantum of loss suffered by the plaintiff, it was contended that mathematical calculations of the itemized loss gave a total of Kshs.5,196,158/=, and not the sum of Kshs.5,206,158/= claimed by the plaintiff. It was contended that the plaintiff did not take any steps to mitigate its loss to recover the 112 litres of the chemical which was recovered by the police. The court was urged to deduct the value of the recovered goods i.e. Kshs.194,594/= from the plaintiff's claim.

32. Further, it was maintained that the plaintiff had unjustifiably increased its loss because in its letters of subrogation the amount of loss was clearly indicated to be Kshs.1,935,262/= and Kshs.778,692/=. It was therefore not clear how the plaintiff arrived at the figure of Kshs.1,297,820/= and Kshs.3,225,436/=: which was claimed. It was further contended that the claim in respect of the investigator's charges was not proved as no investigator was called to establish whether any investigation was done. Neither was any report of the investigation produced to the court. It was contended that the invoices and the vouchers produced were not sufficient to prove the claim in respect of the investigation charges and loss adjuster's fee.

33. For the Third Party, it was submitted that neither the plaintiff nor the defendant had a cause of action against the Third Party. It was maintained that the Third Party was never appointed by the plaintiff as its agent. It was further submitted that there was evidence, that the Third Party carried the goods at all times at owner's risk. A fact which was well known to the defendant before it handed over the goods to the Third Party. It was submitted that the Third Party transported the Containers subject of consignment notes which clearly indicated that the goods were carried at owner's risk. It was contended that the goods were received by the plaintiff in good order and condition hence the Third Party should not be held liable for any loss that arose thereafter.

34. It was maintained that the Third Party was not present during the verification of the goods by Customs Officers, Port Officials, the Police, the Plaintiff and the Defendant nor did they participate in any physical weighing of the goods. The Third Party did not know the quantity of the goods as they were in sealed Containers. It was maintained that the Third Party's role was to deliver the Container intact to the plaintiff. It was contended that the weight of the container was not taken into account whilst weighing the consignment.

35. It was argued that the consignment having arrived at the Port of Mombasa on 10th April, 1999 and stayed at the Port for 11 days before being loaded on 22nd April, 1999, the theft could have occurred at the Port. It was submitted that it was the responsibility of the plaintiff to strip the Container and verify the consignment. By failing to do so, the plaintiff assumed a risk and should therefore take responsibility for the loss.

36. It was further submitted that the Third Party was at all material times an agent of the defendant. It was maintained that the Third Party was acting under the instructions and authority given to it by the defendant to deliver the goods handed over to it to the consignee, a task which the Third Party accomplished. The Third Party therefore held the defendant liable as principal for any liability, loss or damage arising from the agency.

37. Reliance was placed on *Halsbury's Laws of England 3rd Edition Vol. 3 page 195*, for the proposition that an agent has a right of indemnity against the principal for liabilities and losses which arise when the agent is acting within the general scope of his authority. It was maintained that "the

defendants are held liable for the acts of the plaintiff an agent who was acting on behalf of his principal. The Third Party acted under authority given to it by the defendant by delivering the goods handed to the plaintiff”.

38. It was contended that the plaintiff’s case being one based on subrogation, there was no evidence to prove the alleged payments of Kshs.2,713,954/=. It was further contended that the special damage in respect of the investigator’s cost of Kshs.424,265/= were not proved, as the investigator was not called nor any receipts produced to confirm payment. It was contended that the plaintiff having been paid only 60% of this claim, he cannot claim what has not been paid as there was no explanation why the balance was not paid.

39. Further, it was maintained that the plaintiff’s claim is statute barred, the cause of action having arisen in April, 1999, and the limitation period having since long expired. It was contended that the Third Party provided the necessary security for the goods while the goods were being transported and the Third Party was not involved in the verification of the goods, the consignment having been delivered to the plaintiff with the seal intact. Finally, it was submitted that the Third Party was not liable to the defendant or the plaintiff, but that the defendant was liable for any loss or liability that might have arisen in this case during the transportation of the goods.

40. From the evidence adduced, it is not disputed that at the material time the plaintiff and the defendant had an agreement pursuant to which the defendant was the plaintiff’s sole clearing and forwarding agent. It is also not disputed that two consignments consigned to the plaintiff were received at the Port of Mombasa by the defendant on behalf of the plaintiff. It is further evident that the goods were subsequently transported by the Third Party to Nairobi and delivered at the plaintiff’s premises.

41. There was no written agreement which was availed to the court by either party, regarding the terms of the clearing and forwarding agreement between the plaintiff and the defendant. A question therefore arises as to what were the terms and conditions governing the relationship between the plaintiff and the defendant. The attempt by the defendants through its witness Lucy Waiyaki Kangethe, to establish these terms by producing a document allegedly showing the defendant’s general terms of trade, was not of much assistance. Firstly, because the document was not showing general terms of trade but was apparently showing rate of fees charged and secondly, because there was absolutely no evidence that that document was brought to the attention of the plaintiff or its predecessors.

42. The plaintiff’s witness William Wanyoike Ngugi, maintained that the defendant was charged with the responsibility of clearing and forwarding the goods to the plaintiff and that it was the defendant who was to organize for the transportation of goods to Nairobi. This witness’ evidence is supported by the Import Advice Memos in respect of the two consignments (i.e. P.exh.6 & 7).

43. The two documents which were addressed by the defendant to the plaintiff, indicate that the defendant understood the plaintiff’s disposal instructions to be “CLEAR AND DELIVER TO CLIENT”. The documents also contained the following:

“IMPORTANT

We confirm receipt of instructions to clear and forward this importation. Please check the above details most carefully and draw our attention immediately to any discrepancies between these and your wishes.

It may be necessary for us to request a deposit from you to cover the major cash disbursements of Customs duty, Port charges and railages before commencing to clear the consignment. If this proves to be so we shall contact you: If a request is made please meet it at once in order to limit or avoid Port rent accruing.

‘Any indemnities/guarantees given by this Company for the above consignment will be on your behalf such that any claims arising there of will be reverted to you.’

All services rendered are subject to our standard trading conditions, a copy of which is available on request.”

44. Thus, it is evident that the defendant was under an obligation not only to clear the goods but also to deliver the same to the client. It is also evident that the services were being rendered in accordance with the defendant's standard trading conditions. This is re-enforced by the defendant's transport delivery notes (P.exh.11 & 13) which indicated that the “*goods accepted carried and stored on our usual conditions which are available on request.*” It is worthy of note that the alleged standard trading conditions were not availed to this court by the defendant. Nor did the plaintiff make any effort to procure the same through discovery and production of documents under Order X of the Civil Procedure Rules.

45. It is not disputed that the defendant did clear the two consignments from the Port of Mombasa. The defendant thereafter, handed over the goods to the Third Party for delivery to the plaintiff. This is evident from the defendant's transport delivery notes (P.exh.11 & 13) and the Third Party's consignment notes (P.exh.10 & 12). Thus, in transporting the two consignments, the Third Party was acting as an agent of the defendant in fulfilling the defendant's contract with the plaintiff for the clearing and forwarding of the consignments.

46. It is clear from the above that the contract between the plaintiff and the defendant included a contract of carriage. The next issue which arises is whether the defendant was a common carrier. That question is one of fact to be determined by the circumstances established. The test as provided in ***Halsbury's Laws of England Vol.4 para 365***, is that:

“To constitute a person a common carrier he must be ready to carry for hire as a business and not as a casual occupation. It is essential that he should hold himself out as being ready to carry goods for any person or to carry any passengers no matter who they may be. If he carries for particular persons or certain passengers only he is not a common carrier, and the relationship between him and the owner of the goods or the passenger is one of special contract. If he retains a right of selection as to whom or what he shall carry he is not a common carrier.

That was the test which was also applied in ***Express Transport Co, Ltd vs B.A.T Tanzania Limited [1968] E.A 443.***

47. In this case, it is evident that part of the defendant's business constituted carrying goods as part of its contract of clearing and forwarding. No evidence was however adduced before this court to show that the defendant held itself out as ready to carry goods for any person. The evidence before this court is that the two consignments were being carried/transported pursuant to a special relationship between the defendant and the plaintiff arising from the clearing and forwarding contract.

48. The defendant's transport delivery notes (P.exh.11 & 13) showed that the terms upon which the goods were transported for delivery include the condition that the goods were uninsured and carried at owner's risk. Although these documents were only to be given to the plaintiff at the time of delivery of the goods, the plaintiff cannot feign ignorance of that provision, given that the parties had a long history of previous transactions. Moreover, in this regard, this case is distinguishable from the case of ***Express Transport Co, Ltd vs B.A.T Tanzania*** (Supra), as no evidence was adduced by the plaintiff to show that these documents were never brought to the attention of the plaintiff's senior officers. Thus, the evidence before this court shows that the defendant was not a common carrier.

49. It is evident that the Third Party did not have any direct agreement with the plaintiff. The transportation of the consignment by the Third Party from Mombasa to the plaintiff's premises in Nairobi was pursuant to an agreement entered into between the Third Party and the defendant. Since the defendant was the one contracted by the plaintiff to clear and deliver the goods to the plaintiff in Nairobi, the Third Party was an agent of the defendant. The defendant was under specific instructions from the plaintiff to deliver the goods in Nairobi. Although the defendant subcontracted that responsibility, the defendant remained fully liable to the plaintiff and the issue of an independent contractor does not arise.

50. It was clear from the evidence that the defendant took part in the verification process at the Port and confirmed that the two consignments were received intact. The two consignments were handed over to the Third Party by the defendant. The delivery notes prepared by both the Third Party and the defendant showed the weight of the consignments, which tallied with the weight indicated in the two bills of lading. The Third Party's consignment's note (P.exh 10 & 12), showed that upon delivery the consignments was less than indicated in the bill of lading and the delivery/consignment notes. The issue of the loss of the goods having taken place at the Port cannot arise. There is evidence pointing to the loss of the goods having occurred whilst the two consignments were in transit i.e. between the time they left the Port and the time they were delivered to the plaintiff and weight confirmed to be less than had been verified at the Port. Although the goods were in the custody of the Third Party during the loss, as between the plaintiff and the defendant, the defendant was responsible for the short-delivery as the 3rd party was its agent. Since the defendant was not a common carrier, the liability of the defendant to the plaintiff could only have arisen in negligence.

51. The plaintiff suit was however not grounded in negligence. Moreover, even assuming that the plaintiff's claim could be sustained in contract, the defendant is able to escape liability through the exclusion clause indicated in the transport delivery notes that the goods were carried "uninsured and at owners risk".

52. Further, in regard to the loss allegedly suffered by the plaintiff, the report of the investigator not having been produced in evidence, the sum of Kshs.424,265/= incurred as investigator's charges could not be recoverable. Although the plaintiff was only paid 60% of its loss by its insurers, it subrogated its full rights to the insurers and therefore the claim for recovery of 100% loss is proper.

53. The upshot of the above is that the plaintiff's suit against the defendant fails. It is accordingly dismissed with no orders as to costs. I award the defendant costs as against the Third Party.

Those shall be the orders of this court.

Dated and delivered this 29th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ngechu H/B for Mrs Githae for the plaintiff

Ms. Kagondu H/B for Thuita for the defendant

Waweru H/B for Kamande for the Third Party