



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 1009 of 2002**

**BAYER EAST AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**EXPRESS KENYA LIMITED.....DEFENDANT**

**JUDGEMENT**

The plaintiff brought this suit by way of a plaint dated 19<sup>th</sup> August 2002 in which it avers that on 7<sup>th</sup> May 2000, the plaintiff entrusted to the defendant as common carriers or as bailees for hire or reward at Mombasa 360 bags of Bayleton to be carried or conveyed for hire or reward to Nairobi. That the defendant in breach of its duty as a carrier did not carry the said goods securely and safely leading to the loss of 180 bags of Bayleton WP fungicide. In essence the plaintiff's claim is a claim for breach of contract for the failure of the defendant as a common carrier, to deliver as contracted, 360 bags of Bayleton to the plaintiff's warehouse at Nairobi.

The defendant filed its defence and amended it on 12<sup>th</sup> August 2003, in which the defendant save for admitting that it received the said goods described in the plaint specifically denied that it received the same on the alleged terms and date. The defence of the defendant is that it received the goods only for transport from Mombasa to Nairobi upon agreed terms and conditions which inter alia excluded the defendant from any liability on the safety and security of the goods.

The defendant filed an application dated 24<sup>th</sup> February 2004 seeking to join O.J.S. transporters as a 3<sup>rd</sup> party in this suit. The grounds in support of the said application are that the subject of the suit involves goods that were lost/stolen as a result of negligence on the part of O.J.S. transporters. And that the 3<sup>rd</sup> party notice is necessary to enable the court to apportion responsibility for the breach of contract accordingly. The defendant through its advocate had stated in paragraph 3 of the supporting affidavit to the application dated 24.2.2004 as follows:

**“That the subject matter of this suit involves goods that were lost/stolen as a result of negligence on the part of O. J. S. Transporters who had been sub-contracted as agents and entrusted with the duty of care to deliver a consignment of 360 bags of Bayleton got lost/stolen while in the custody of O.J.S. Transporters. It is clear that O.J.S. Transporters was at fault in that in breach of their duty of care as carriers, the said goods were lost/stolen while in their possession”.**

The defendant was granted leave to join the alleged 3<sup>rd</sup> party on 15<sup>th</sup> June 2004 but the defendant was unable to effect service on them through the normal process. The defendant again made an application to serve by way of substituted service which was declined by **Justice Kasango** on 24<sup>th</sup> July 2006.

It is the case of the plaintiff that what is contained in the defence and paragraph 3 of the affidavit of **Njeri Kariuki** Advocate sworn on 6<sup>th</sup> April 2004 in support of the notice of motion dated 6<sup>th</sup> April 2004 amounts to an admission of the plaintiff's claim that 180 bags of Bayleton WP25 were lost in the defendant's possession.

In answer the defendant called one witness who testified that the plaintiff by executing the letter dated 31<sup>st</sup> March 1989, it recognized that all goods to be carried were carried at owner's risk and that the defendant could not accept any liability for damages arising from goods lost while under the care and custody of the defendant or its sub-contractors. It is the testimony of Lucy M. Kangethe that the contract was to be governed by the defendant's standard trading conditions which conditions do, in its pertinent clauses does provide; **“that all goods without exception will be handled, stored**

**and/or transported by the company at owner's risk".**

And the company shall not under any circumstances be liable for any loss, destruction, damage, deficiency or deterioration of any goods whilst the same are in the physical or constructive possession of the company. Without prejudice to the generality of the foregoing, the company shall not be responsible for any loss resulting from the negligence or willful default of the company, its agents and servants or not.

In this case each party called one witness and they were in agreement that there was no written agreement governing this particular transportation of goods from Mombasa to Nairobi. In my understanding the defendant wants to rely on an exclusion clause contained in what it calls standard trading conditions produced by PW1 as exhibit D2. The plaintiff's reply is that for an exclusion clause to be imported into a construction of any contract, it is the burden of the defendant to prove;

- (1) It must be and/or must have been incorporated in the main contract.
- (2) It must fall within the four corners of the contract and not outside it.
- (3) It must be put to the notice of the party against whom it is sought to be relied on .

The evidence of DW1 was that the standard terms and conditions were incorporated into the contract between the parties as it was contained on the reverse side of its letter head. Therefore it was part of the information/correspondences sent to the plaintiff from time to time and hence binding on the plaintiff. Mr. Ambani learned counsel for the defendant that there is a difference between a carrier and a common carrier and that the defendant is not a common carrier. He relied on **HCC No.646/2000 (Nairobi). Eveready Transport Company (K) Ltd vs Proost Paper (E.A.) Ltd.** where it was held;

**"The essential attribute which determines whether a carrier is a common carrier is that the carrier must hold himself out to the public as prepared to carry generally for the public and not for particular members thereof. If therefore, a carrier reserves to himself either by public notification or by a course of practice, complete freedom of selection as to the persons for whom it will carry goods, he is not a common carrier. On the other hand, if a carrier holds himself out as prepared to carry generally for the public, the mere fact that he may refuse for good reason in a particular case to carry for a particular person does not mean that he ceases to be a common carrier".**

**Mr. Ambani** Advocate also contended that in this case, the defendant was only contracted to clear the plaintiff's goods from the port and to make arrangements to have the goods transported to Nairobi. The defendant did not transport the goods and therefore the claim herein does not fall within the ambit of a common carrier. On the contention that the defendant was entrusted the goods as a bailee, **Mr. Ambani** advocate submitted that there is no evidence to show the goods were left in the custody of the defendant.

It is clear that the contract between the plaintiff and defendant was oral and that is why the plaintiff contends that the standard terms and conditions set out in defence exhibit 2 cannot be incorporated in this subject transaction. It follows that once the said terms and conditions could not have been brought to the notice of the parties at the commencement of the contractual relationship.

It is also clear that the witness did not produce any document or material to show that indeed the standard terms and conditions had been brought to the plaintiff's attention or in fact been incorporated into the dealings between the parties. There is ample and uncontroverted evidence to show that the defendant agreed to transport the goods of the plaintiff as a common carrier. The testimony of DW1 is that the defendant clears and carries goods for hire from any individual meeting their terms. The witness also confirmed that the defendant had previously carried the plaintiff's goods for reward. I am in agreement with **Mr. Majanja** Advocate for the plaintiff that a common carrier does not lose his legal character or status because he limits the class of goods he is prepared to carry nor does the manner he chooses to describe himself alter the establishment of his status.

The totality of the evidence tendered before me shows that the defendant is engaged in the business of carrying goods for hire. I therefore make a finding that the defendant as far as the goods in dispute are concerned was a common carrier. And that the standard terms and conditions relied upon by the defendant cannot discharge the fundamental legal obligations against the defendant.

The evidence available and admission by the defendant or its agents that is this dispute involves goods that were stolen as a result of negligence on the part of O.J.S. Transporters who had been sub-contracted as agents and entrusted with the duty of care to deliver the said goods to the plaintiff. The defendant admits;

- (1) the goods of the plaintiff were stolen.
- (2) The goods were stolen as a result of negligence on the part of OJS Transporters.
- (3) That OJS transporters were sub-contracted by the defendant.
- (4) That OJS transporters were agents of the defendant.
- (5) That OJS transporters were entrusted with the duty of care to deliver the goods to the plaintiff.
- (6) That 180 bags of Bayleton WP 25 got lost or stolen while in the custody of the OJS transporters.

It is clear that the agent of the defendant was at fault in that in breach of their duty of care as carriers the said goods were lost or stolen while in their possession.

In the case of express Transport Company Ltd vs B.A.T. Tanzania Ltd (1968) E.A.443 it was held;

**“it is clear that before a carrier can be said to be a common carrier of goods he must carry goods as a business and not casually and he must hold himself out as ready to carry goods of any person and not of any particular person”.**

In this case the defendant agreed to carry the goods of the plaintiff through its own agent and the subject goods were lost through the party sub-contracted by the defendant. If the sub-contractor is negligent then the party who entrusted the goods to the sub-contractor cannot escape liability by making defence that it is not a common carrier. Clearly the defendant admitted that the plaintiff's goods were lost while in the custody and control of the defendant and/or its lawful and/or authorized agent. I therefore think the defence by the defendant is untenable in view of the clear admission made before this court.

I agree with the plaintiff's advocate that it is the duty of the defendant to demonstrate that the loss, theft and/or pilferage was as a result of an act outside its control. The defendant company being a common carrier cannot contract to exclude fundamental breach committed by a party it says was negligent in handling the plaintiff's goods. The negligence of the transporter is clearly attributable to the defendant by failing to ensure that the goods of the plaintiff were delivered safely. That was not done and the defendant says that the loss was due to the negligence of the transporter entrusted with the duty of care to deliver the plaintiff's goods to Nairobi. In short if the party sub-contracted by the defendant was negligent by the defendant's own admission, then prima facie the defendant is liable for the loss and damages suffered by the plaintiff.

The only other issue outstanding is whether the plaintiff's suit was filed out of time and therefore in contravention of the limitation Act. It is clear that the plaintiff's cause of action arises out of a breach of contract as pleaded in paragraph 6 of the plaint. Such an action may be brought within 6 years from the time the cause of action accrued. No doubt that the loss occurred on or about 7<sup>th</sup> May 2000, whilst the present suit was filed on 19<sup>th</sup> August 2001 well within the 6 years limitation period for contractual claims. In my humble view the plaintiff's suit was not filed after expiry of the statutory limitation date as alleged by the defendant. In my decision the defence of limitation is not a serious defence sustainable in law, it is also rejected.

**In conclusion it is my decision that the plaintiff's claim has been proved on the required standard which is balance of probabilities. I am therefore satisfied that the plaintiff is entitled to judgement for the sum of Kshs.6,515,046/= plus costs and interest.**

Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of June, 2008.

**M. A. WARSAME**

**JUDGE**