



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 77 of 2004

RIVERLAND LIMITED.....PLAINTIFF

VERSUS

RISING FREIGHT LIMITED.....DEFENDANT

J U D G E M E N T

The Plaintiff Company, River Land Limited has sued the Defendant Company, Rising Freight Limited as bailee, for negligence and breach of contract leading to loss and damages claimed for in this suit, in the sum of Kshs.9,073,000/-

The suit is brought under the Law of Subrogation in the Plaintiff's name to enable the insurer of the goods Tausi Assurance Company Limited, to recover sum paid by it to the Plaintiff, its insured.

The facts of the case are not in dispute. The Plaintiff Company engaged the Defendant to be its Clearing Agent for the purposes of clearing the consignments of goods imported into the country for sale by the Plaintiff. The Plaintiff's case was that it imported 249 cartons of men's jeans from China. The said goods arrived at Nairobi Inland Container Depot, ICD, on the 29th January, 2001. The Plaintiff duly instructed the Defendant Company to clear the goods and deliver the same to their go down. It is not disputed that the Defendant Company sent its employee, BENEDICT SHIHEMI AYEKHA, to clear the goods and to accompany them to the Plaintiff Company in a vehicle, registration No. KWP 438. The Defendant's employee cleared the goods and the same were released to him on the 9th February, 2001 at 10.00 a.m. The Managing Director of the Defendant Company, Mr. Kundan Solanki testified that he was in constant communication with Shihemi, through radio call. The goods were however never delivered to the Plaintiff Company. The container in which the goods were packed was returned back empty to the ICD the same day. The matter was eventually reported to the police by the Defendant Company after which Shihemi and another were arrested, charged and convicted for the offence of stealing the goods in question. The proceedings into the case were Defendant's exhibit 2.

The Plaintiff claims for loss of the value of the goods in the sum of kshs.9,073,000/- which is inclusive of loss of profit given as Kshs.2,000,000/-. The Plaintiff also seeks the costs of the suit, interest on the value of the goods and the cost at court rates and general damages for negligence.

There is no dispute that the Plaintiff imported the consignment of goods into Kenya as claimed in the plaint. The packing list, invoices, Bill of Lading, and the Interchange documents were all produced as the Plaintiff's exhibits. It is not in dispute that the Defendant's employee cleared the goods after the requisite charges were paid. It is not in dispute that the same Agent collected the goods from ICD for the purposes of delivering them to the Plaintiff's go down and that the goods were never delivered. There is evidence

to show that the container, in which the goods had been packed, was returned to the ICD the same day without the goods.

The Plaintiff has produced insurance documents to show that it insured the goods to the tune of Kshs.9,073,000/-.

I have considered the submissions by counsel. The issues which present themselves are very clear which are whether the Defendant is responsible for the fraud of its servant and whether the Plaintiff needed to prove negligence as against the Defendant.

Ms. Mungai for the Defendant submitted to the effect that since particulars of negligence had been pleaded in the plaint, it was imperative upon the Plaintiff to prove those particulars. Counsel submitted that no attempt was made by the Plaintiff to prove any of the particulars of negligence or to show that the Defendant acted without care and/or due diligence or that it had been negligent in the manner it handled the goods. Although Ms. Mungai did not cite any case in support of her preposition, counsel cited the case of **Securicor Courier (K) Limited vs. Benson David Onyango and Margaret R. Onyango CA No. 323 of 2002**. Counsel relied on this case in support of her submissions that an award in general damages could not be made for breach of contract. That case has however dealt with another issue which is relevant to this case, which is the issue of exemption clauses in contracts for courier service. In that regard, the court of Appeal held that in Kenya such contracts are purely governed by the common law. It went further to hold:

“An exemption clause could be incorporated in contract by, inter alia, signature or notice. Generally speaking, if a party signs contractual documents containing an exemption clause, he is bound by it even though he has not read the terms, unless he signed the documents through fraud or misrepresentation. In L’Estrange vs. F. Graudob Ltd. [1934] 2 K.B. 394; Scrutton L.J. said at page 403:

“When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.”

That case was applied in Curtis vs. Chemical Cleaning & Dyeing Co. Ltd. [1951] 1 All E.R. 631 where Denning L. J. said at page 633 H:

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exemption clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”

I have quoted the above case of Security Courier (K) Limited because it is relevant to the instant case. This case applies in all fours to the instant case in the sense that if the Plaintiff and the Defendant had signed a consignment contract, the terms of that contract would have dictated the relationship of the two parties, and would have been used to determine to what extent if any the Defendant would have been liable for the loss of the consignment in issue in this case. In the instant case the parties did not sign any such contract and they are therefore no exemption clauses applicable and thus their relationship is governed under the common law.

The Plaintiff’s advocate on the other hand submitted that once there was evidence to show that the consignment in issue in this case had been cleared by the Defendant and had been taken over by it for onward delivery to the Plaintiff, and that there being evidence that the loss of the goods was caused by the negligence or fraud of the Defendant’s employee, then the Defendant should be liable for that loss. Mr. Sarvia cited many English cases in support of that preposition. Some of these cases are not quite relevant to the instant case but the general principle is applicable to the instant case. I will cite just a few of them. In **HOULDSWORTH VS. CITY OF GLASGOW BANK [1880] 5 App. Cas. 317:**

“Per Lord Blackburn

‘The very substantial point decided was, as I think, that an innocent principle was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud. This I think is the true principle.’

“Per Lord Show

‘I look upon it as a familiar doctrine, as well a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who cloth that third party as agent with the authority by which he was enabled to commit the fraud.’ ”

That principle has been applied in subsequent English cases which were also cited by Mr. Sarvia in his written submissions.

The principle was applied in the subsequent English case of **MORRIS VS. C.W. MARTIN & SONS LIMITED [1966] E ALL E.R. 725**. In his judgment in the same case, Lord Diplock had this to say (at page 735):

“One of the common law duties owed by a bailee of goods to his bailor is not to convert them, i.e., not to do intentionally in relation to the goods an act inconsistent with the bailor’s right of property therein... This duty, which is common to all bailments as well as to the other relationships which do not amount to bailment, is independent of and additional to the other common law duty of a bailee for reward to take reasonable care of his bailor’s goods. Stealing is the simplest example of conversion... if the bailee in the present case had been a natural person and had converted the Plaintiff’s fur by stealing it himself, no one would have argued that he was not liable to her for its loss; but the defendant bailees are a corporate person. They could not perform their duties to the plaintiff to take reasonable care of the fur and not to convert it otherwise than vicariously by natural persons acting as their servants or agents. It was one of their servants, to whom they had entrusted the care and custody of the fur for the purpose of doing work on it, who converted it by stealing it. Why should they not be vicariously liable for this breach of duty by the vicar whom they had chosen to perform it?

I enter judgment for the Plaintiff against the Defendant:

- (a) In the sum of Kshs.9,073,000/-.**
- (b) The Plaintiff will also get the cost of the suit.**
- (c) The Defendant will pay interest at court rates in (a) and (b) above from the date of judgment until payment in full.**

Dated at Nairobi this 19th day of September, 2008.

LESIIT, J.

JUDGE

Read, Signed and delivered in the presence of:-

Mr. Sarvia for Plaintiff

N/A for Defendant

LESIIT, J.

JUDGE