



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2408 of 1996

RAYSHIAN APPARELS LIMITED.....PLAINTIFF

VERSUS

P.N. MASHRU TRANSPORTERS LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff brought this suit by way of a plaint dated 26th September 1996 and amended on 8th March 2004 claiming US\$ 1584337.90 being the cost of goods entrusted to the care of the Defendant which got lost while in transit from Mombasa to Nairobi on 10th August 1996 alleging negligence and breach of contract on the part of Defendant. The Defendant on being served with the summons entered appearance and filed a defence dated 4th November 1996 and amended on 6th April 2004 in which he denied the Plaintiff's claim.

Briefly the facts which gave rise to this litigation are as follows. On or about 10th August 1996 the Plaintiff delivered to the Defendant and the Defendant as such common carrier received from the Plaintiff certain goods namely trims (clothing raw materials such as buttons, zippers, elastics, threads strings and ponderings among others) for transportation thereto from Mombasa to Nairobi.

In consideration for the fees to be paid for the said service, the Defendant was to safely transport the said goods from Mombasa to Nairobi. The Plaintiff states that by reason of negligence, breach of duty, fraud and/or breach of contract, the Defendant did not deliver the said goods to Nairobi as contracted but instead were lost during transit. It is said that the vehicle which was transporting those goods broke down on the way and the driver and the turnboy abandoned the vehicle and the goods were stolen.

The Plaintiff states further that as a result of the said events, it has suffered loses such as the value of the goods, the taxes paid for the said goods. Since the goods had been imported from Hong Kong, the expenses incurred in efforts to recover the lost goods and general follow up thereof. The Plaintiff also prays for loss of profits since the said raw materials were for the purposes of manufacturing clothes and/or garments for export abroad.

The value of loses were particularized as follows:-

- (a) Costs of lost trims - US\$ 59888.40
- (b) Customs Duty and VAT on the lost items – US\$ 34921.50
- (c) Expenses - US\$ 3500.00

(d) Loss of profits - US\$ 60128.00

All totaling - US\$ 1584337.90

It is not disputed that the Defendant received from the Plaintiff the said goods to transport to Nairobi in consideration of a fee to be paid for the said service. It is also not disputed that the said goods were allegedly stolen when the vehicle transporting them broke down on the way and both the driver and the turnboy abandoned it. But there is no credible evidence that the goods had in fact been stolen.

The Defendant in its defence denied the Plaintiff's claim. It denied the allegation of fraud and also that it was negligent.

The Defendant went further to submit that the terms and conditions of storage and carriage were that "The Goods were carried at owner's risk." It relied on the exemption clause which stated as follows:

"P N MASHRU LTD (hereby called the company) shall not be liable for loss, damage, deviation mis-delivery and detention of or a consignment or any part thereof no matter how such loss, damage deviation, mis-delivery was caused whether or not such loss damage or mis-delivery deviation or detention was caused by or through or due to the negligence of the company or its servants or agents or otherwise."

The Plaintiff in opposition to reliance of exception clause submitted that these terms and conditions were contained in the Delivery Note which is a post transportation document prepared only at the time when the goods have been delivered to ascertain whether the goods have been safely delivered or not. By its name a Delivery Note cannot therefore at all be a document to show the terms and conditions of carriage as it is not prepared prior but after his transportation when there is exclusionary clause in the written contract it binds the party to that contract. In **PHOTO PRODUCTION LTD VS. SECURICOR TRANSPORT LTD** 1980 1 ALL ER 556 it was held that:

"There was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties' position when there was a breach of contract (whether fundamental or not) or by which an exception clause could be deprived of effect regardless of the terms of the contract, because the parties were free to agree to whatever exclusion or modification of their obligation they choose and therefore the question whether the exception clause applied when there was a fundamental term or any other breach turned on the construction of the whole of the contract, including any exception and clause the parties were free to express words both their primary obligations to do that which they had promised and also any secondary obligation to pay damages arising on breach of a primary obligation.

(ii) Although (in that case) the Defendants were in breach of their implied obligation to operate their services with due and proper regard to safety and security of the Plaintiff's premises, the exception clause was clear and unambiguous and protected the Defendant from liability."

In **SECURICOR (K) VS EA DRAPERS LTD AND ANOTHER** CA NO. 67 OF 1985 the court held that:

"When a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then, if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also, if the servant or agent himself steals them or makes away with them."

Having considered the evidence by both parties and the submission by Counsel and the authorities cited, I do not think that clauses the exemption stated herein can in any way inure to the benefit of the Defendant and reduce its liability to the Plaintiff. Consequently the Plaintiff's suit succeeds and I enter judgment for the Plaintiff and against the Defendant for US\$ 158437.90 with interest at court rates and costs of the suit.

Delivered and dated at Nairobi this 17th day of October 2008.

J. L. A. OSIEMO

JUDGE