



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 1221 of 1999**

**KODAK (K) LIMITED..... PLAINTIFF**

**VERSUS**

**LYNDALIAN FREIGHTERS & FORWARDERS LTD.....1<sup>ST</sup> DEFENDANT**

**KENYA AIRFREIGHT HANDLING LTD.....2<sup>ND</sup> DEFENDANT**

**SAUDI ARABIAN AIRLINES.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed suit seeking judgment be entered against the defendants jointly and severally for the sum of KShs.906,670/50. The plaintiff's claim arose from the loss of a consignment which was supposed to be airfreighted from Nairobi to Asmara, Eritrea by the 3<sup>rd</sup> defendant. According to the amended plaint, the plaintiff averred that it delivered through the 1<sup>st</sup> defendant a consignment of photographic material weighing 665 kilograms to the 2<sup>nd</sup> defendant so that the same could be shipped by air to Asmara. The plaintiff averred that despite the 2<sup>nd</sup> defendant acknowledging receipt of the consignment on behalf of the 3<sup>rd</sup> defendant, the same was lost before the consignment was shipped to Asmara, Eritrea. The plaintiff averred that the consignment was lost while it was in the custody of the 2<sup>nd</sup> defendant and before it was airfreighted to Asmara. The plaintiff stated that its effort to be paid compensation for the loss of the consignment had been frustrated by the defendants who kept passing the buck between themselves, each disclaiming liability for the lost consignment. The plaintiff urged the court to enter judgment in its favour against defendants as prayed in the plaint.

The 1<sup>st</sup> defendant filed a defence to the amended plaint. It denied that it was liable to pay compensation to the plaintiff for the lost consignment. The 1<sup>st</sup> defendant pleaded that the said consignment was lost while in the custody of the 2<sup>nd</sup> defendant. It pleaded that it had fulfilled its part of the contract by handing over the consignment to the 2<sup>nd</sup> defendant. It averred that compensation in respect of the loss of the said consignment was governed by the Carriage by Air Act whose terms the plaintiff had failed to comply with. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiff's as against it suit with costs.

The 2<sup>nd</sup> defendant filed a defence to the amended plaint. It denied that it was responsible for the loss of the consignment as alleged by the plaintiff. It averred that that it was a common carrier or a bailee for reward. It stated that at all the material times it was an agent of a disclosed principal (*the 3<sup>rd</sup> defendant*) and therefore in the event that judgment is entered against the 2<sup>nd</sup> defendant, then it was entitled to be

indemnified by the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant averred that there was no contractual relationship between itself and the plaintiff. It further averred that the carriage of the consignment was governed by the terms of the Carriage by Air Act, 1993 and the IATA Standard Ground Handling Agreement which limits the 2<sup>nd</sup> defendant liability, if any, to \$20 per kilogram. It stated that under the said Act, the 3<sup>rd</sup> defendant as the carrier was required to compensate the plaintiff for any loss that it suffered. It urged the court to dismiss the plaintiff's suit as against the 2<sup>nd</sup> defendant with costs.

The 3<sup>rd</sup> defendant filed defence to the amended plaint. It denied that it was liable to pay compensation to the plaintiff for the loss of the consignment. The 3<sup>rd</sup> defendant denied the plaintiff's averment that the 1<sup>st</sup> defendant was its agent. It averred that the plaintiff's claim as against the 3<sup>rd</sup> defendant was incompetent since the plaintiff had failed to give the requisite notice to the 3<sup>rd</sup> defendant as required provisions of the Carriage by Air Act, 1993. It pleaded that any loss occasioned to the plaintiff could not be attributed to the 3<sup>rd</sup> defendant; that was the reason why the 3<sup>rd</sup> defendant had refused to make good the plaintiff's claim. The 3<sup>rd</sup> defendant denied all the averments made by the plaintiff in its amended plaint and put the plaintiff to strict proof thereof. It urged the court to dismiss the plaintiff's suit with costs.

After the parties had sorted out preliminary issues, including concluding discovery, the hearing of the suit commenced before Mwera J. The learned judge heard four witnesses who adduced evidence on behalf of the plaintiff. The said witnesses were PW1 Ahmed Abdallah Kiarie, PW2 George Mungai, PW3 Jane Frances Ominde and PW4 John Kibuchi. The 1<sup>st</sup> defendant did not offer any evidence in support of its case. The 2<sup>nd</sup> defendant called one witness who testified on its behalf. He was 2<sup>nd</sup> defendant's DW1 Stanley Kiplangat Rono. Thereafter, Mwera J ceased having jurisdiction upon his transfer from Nairobi. On 3<sup>rd</sup> June 2008, the parties to this suit agreed by consent for the proceedings in the suit to continue from where Mwera J had concluded his proceedings. This court heard the 3<sup>rd</sup> defendant's witness i.e. DW1 Yassin Abdul Rahaman. After hearing the said witness, the parties to this suit agreed by consent to file written closing submissions. The plaintiff, the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant filed their respective closing submissions.

From the evidence adduced by the witnesses of the parties to this suit, the undeniable facts of this case are as follows:

The plaintiff was desirous of airlifting a consignment of photographic material weighing 665 kilograms from Nairobi to Asmara in Eritrea. The plaintiff instructed the 1<sup>st</sup> defendant to act as its agent in the airfreight of the said consignment to Eritrea. The consignment was delivered to the warehouse of the 2<sup>nd</sup> defendant at Jomo Kenyatta International Airport on 9<sup>th</sup> November 1998. It was determined that the consignment was to be airlifted by the 3<sup>rd</sup> defendant. The airfreight charges were paid to the 3<sup>rd</sup> defendant and an airway bill was issued by the 3<sup>rd</sup> defendant to the plaintiff's agent, the 1<sup>st</sup> defendant. According to the plaintiff's witness (PW1), the said consignment was not immediately airlifted to Asmara upon its delivery to the warehouse of the 2<sup>nd</sup> defendant on account of the fact that there was no space in the cargo airplane of the 3<sup>rd</sup> defendant to airlift the said consignment as it was of considerable size. According to the plaintiff's witnesses, they were informed that the 3<sup>rd</sup> defendant was unable to airlift the consignment immediately due to the fact that it gave priority to the airlift of perishable goods. In the meantime, the consignment was kept in what PW1 referred to as the security cage within the warehouse of the 2<sup>nd</sup> defendant.

On 30<sup>th</sup> November 1998, according to the 2<sup>nd</sup> defendant's witness, the 3<sup>rd</sup> defendant notified him that there was possibility space would become available for the consignment to be airlifted to Eritrea. The consignment was removed from the security cage and released to the 3<sup>rd</sup> defendant's loading bay. The consignment was not airlifted because, once again, priority was given to fresh produce which had been delivered for airfreight by the 3<sup>rd</sup> defendant. The consignment was returned to the warehouse of the 2<sup>nd</sup> defendant but instead of being kept in the security cage where it had been removed from, it was kept in the general area. The last person who dealt with the said consignment was an employee of the 2<sup>nd</sup>

defendant called Kimwai. He was dismissed from employment after the loss was discovered. The 3<sup>rd</sup> defendant became aware of the loss when it sought to airfreight the consignment on 5<sup>th</sup> December 1998. When the 2<sup>nd</sup> defendant became aware of the loss, it made effort to trace the consignment from other destinations that the same could have been mistakenly been airfreighted to. The 2<sup>nd</sup> defendant's efforts bore no fruits.

It was upon confirmation that the said consignment was lost, that the plaintiff sought compensation from the defendants. From the evidence adduced, including documentary evidence relied on by the plaintiff, the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant, it was evident that each defendant came up with one explanation or the other to avoid being held liable to pay compensation to the plaintiff. As it were, each defendant blamed the other for the loss of the said consignment. The witnesses who testified on behalf of the said defendants continued the passing of the buck. The witness who testified on behalf of the 2<sup>nd</sup> defendant stated that, since it was acting as a disclosed principal of the 3<sup>rd</sup> defendant, under the IATA Standard Ground Handling Agreement, the Warsaw Convention and the Carriage by Air Act, the 3<sup>rd</sup> defendant was liable to pay compensation to the plaintiff for the loss, whether the said consignment was lost in the warehouse of the 2<sup>nd</sup> defendant or whether it was lost when it was in the actual possession of the 3<sup>rd</sup> defendant. On its part, the 3<sup>rd</sup> defendant adduced evidence which attempted to establish that it was due to the gross negligence of the 2<sup>nd</sup> defendant that the said consignment was lost. The 3<sup>rd</sup> defendant adduced evidence to the effect that the 2<sup>nd</sup> defendant made no effort to trace the said consignment when it failed to report the incident to the police for appropriate investigations.

I have carefully considered the evidence that was adduced by the parties to this suit. I have also read the closing written submissions, including the cited authorities relied on by the parties to this suit. As stated earlier in this judgment, there is no dispute that the consignment got lost while it was in possession of the 2<sup>nd</sup> defendant. The consignment could not be airlifted to Asmara by the 3<sup>rd</sup> defendant because it could not be traced when space became available in the 3<sup>rd</sup> defendant's cargo plane. I agree with the submissions made by the 2<sup>nd</sup> defendant that a relationship between the plaintiff on the one hand, and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the other was governed by the Carriage by Air Act, 1993 and the IATA Standard Ground Handling Agreement. It was not an ordinary agency or bailment agreement. The issue for determination by this court therefore is who between the defendants is to bear liability and pay compensation to the plaintiff for the loss that it incurred when the consignment was lost.

Under Section 3 of the Carriage by Air Act, 1993, the rights and liabilities of carriers, carrier servants and agents, consignors, consignees and other persons, as provided by the Convention for the Unification of Certain Rules Relating to International Carriage by Air ("the Warsaw Convention, 1929") and the amendments by The Hague Protocol, 1955, subject to the provisions of the Act, shall have the force of law in Kenya in relation to any carriage by air which the convention applies, irrespective of the nationality of the aircraft performing the carriage. The convention is set out as the 1<sup>st</sup> schedule of the Act. Under Article 18 (1) of the Convention, the carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air. Article 18 (2) defines carriage by air as follows:

*"The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever."*

Under Article 8 of the IATA Standard Ground Handling Agreement under the heading "liability and indemnity", Article 8.1 provides that:

*"Except as stated in Sub-Article 8.5, the Carrier shall not make any claim against the Handling Company and shall indemnify it (subject as hereinafter provided) against any legal liability for claims or suits, including costs and expenses incidental thereto, in respect of:*

- (a) *delay, injury or death of persons carried or to be carried by the Carrier;*
- (b) *Injury or death of any employee of the Carrier;*
- (c) *Damage to or delay or loss of baggage, cargo or mail carried or to be carried by the Carrier, and*
- (d) *Damage to or loss of property owned or operated by, or on behalf of, the Carrier and any consequential loss or damage;*

*arising from an act or omission of the Handling Company in the performance of this Agreement unless done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result.*

*PROVIDED THAT all claims or suits arising hereunder shall be dealt with by the Carrier; and ...”*

Article 8.5 of the convention exempts the carrier from liability if it is established that the loss or damage was occasioned by the negligent operation of ground support equipment by the Handling Company. The proviso to Article 8.5 states that:

*“For the avoidance of doubt, save as expressly stated, this Sub-Article 8.5 does not affect or prejudice the generality of the provisions of Sub-Article 8.1 including the principle that the Carrier shall not make any claim against the Handling Company and shall indemnify it against any liability in respect of any and all consequential loss or damage howsoever arising.”*

It is clear from the above articles of the Warsaw Convention that the 2<sup>nd</sup> defendant is deemed to be the agent of the 3<sup>rd</sup> defendant, a disclosed principal. The 3<sup>rd</sup> defendant, as the carrier, is liable for any breach of the carriage contract committed by the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant can only avoid liability if it establishes that the loss or damage occasioned by the 2<sup>nd</sup> defendant to the claimant was as a result of negligent operation of ground support equipment. In that event, the 2<sup>nd</sup> defendant will be held liable. In the present suit, it was evident that although the 3<sup>rd</sup> defendant attempted to avoid liability in damages to the plaintiff by adducing evidence which pointed to the fact that the loss of the consignment was as a result of the 2<sup>nd</sup> defendant’s negligence, upon evaluating the evidence adduced, it was clear that the 3<sup>rd</sup> defendant failed to establish that the loss of the consignment was as a result of negligence operation of ground support equipment by the 2<sup>nd</sup> defendant.

I therefore hold that the plaintiff established, to the required standard of proof on a balance of probabilities, that it lost its consignment valued at KShs.906,670/50 while the same was in the custody of the 3<sup>rd</sup> defendant’s agent, the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant is therefore liable to compensate the plaintiff for the said lost consignment. I therefore enter judgment in favour of the plaintiff and as against the 3<sup>rd</sup> defendant for the said sum of KShs.906,670/50. The said amount shall be paid with interest from the date of filing suit. The plaintiff shall have the cost of the suit.

The above amount awarded by the court, including costs, shall not exceed \$13,300 calculated at the prevailing exchange rate. This is in view of the limitation placed by Sections 6(1)(b) and 6(2) of the Carriage by Air Act, 1993 that requires this court to limit the damages to be paid to the plaintiff as provided under Article 22 of the Warsaw Convention. The said sum of \$13,300 was arrived at after calculating the weight of the consignment lost at the rate of \$20 per kilogram. The consignment which was lost was 665 kilograms. The plaintiff’s suit as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants is hereby dismissed but with no orders as to costs. The 3<sup>rd</sup> defendant shall pay the 2<sup>nd</sup> defendant’s costs.

DATED at NAIROBI this 19<sup>th</sup> day of NOVEMBER, 2008.

**L. KIMARU**

**JUDGE**