



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 680 of 2000

THE ROOT FREIGHTER'S LIMITED.....APPELLANT

VERSUS

SPANFREIGHT SHIPPING LIMITED.....RESPONDENT

J U D G M E N T

The Root Freighter's Limited, (hereinafter referred to as the appellant), filed a suit against the Spanfreight Shipping Limited, (hereinafter referred to as the respondent), in the Principal Magistrate's Court at Nairobi. The appellant's claim arose from an agreement entered into with the respondent, a shipping company, pursuant to which the appellant deposited a total sum of Kshs.431,008/= with the respondent to secure release orders from the respondent addressed to the Kenya Ports Authority for release of cargo together with containers to the appellant. The appellant contends that despite prompt return of the containers to the respondent, the respondent has refused to refund the money contending that the same was forfeited as part of demurrage charges incurred by the appellant. The appellant therefore claims the sum of Kshs.431,008/= together with interest thereon as well as special damages for loss of business and general damages for inconveniences and embarrassments.

The respondent filed a defence denying having entered into any agreement with the appellant. The respondent further denied the appellant's claim in respect of the refund of the deposits, damages or loss of business.

During the hearing of the suit before the trial magistrate, the appellant testified through its manager, John Gichugu Wachira. He explained that the appellant company received instructions from one Sally Mohamed of Bujumbura Burundi to clear his cargo which had arrived at the Port of Mombasa. The appellant presented the bill of lading to the respondent who was the agent of the shipping company Western European Containers Liners. The appellants paid the freight charges as well as the handling and container charges. The handling and container charges of Kshs.106,534/= was to be refunded upon the return of the container. The appellant signed all the necessary documents including the container guarantee documents. The respondent then issued the appellant with a release order which the appellant lodged with the Kenya Ports Authority. The release order was however rejected for the reason that the government had as at that time banned all cargo destined for Burundi. On the importer's instructions, the appellant filled the necessary forms for change of destination to Uganda. A manifest collection was then issued approving the change of destination. However, when the appellant approached the Kenya Ports Authority, he was advised that the goods could only be released on authority from the Office of the President. The appellant tried to secure the necessary authority but was not successful. After about a year, the government relaxed the ban on the goods destined for Burundi. On the 5th September, 1997, the goods were released to the appellants. The appellants informed the respondent of the developments. The

goods were subsequently transported to Burundi and the container returned to the respondent within the required 14 days from the date of release of the container to the appellant. The appellant requested for refund of their deposit of Kshs.106,534/= but the respondent refused contending that the appellant owed them for accrued demurrage charges.

On the 6th October, 1997, the appellant paid another sum of Kshs.324,474.85/= as container deposit for another cargo. The appellant delivered the goods and returned the container within the required time. However, the respondent refused to refund the deposit due to demurrage charges incurred in the 1st transaction. The appellant maintained that they were not responsible for the delay in returning the container in the 1st transaction. It maintained that they suffered embarrassment and loss.

The respondent testified through its claims manager, Johannes Andrea Gwada. The witness testified that they brought a container from abroad which was discharged from the vessel on 14th August, 1996 and released to the appellant on 5th September, 1996. The container was returned to the respondent on 21st October, 1997. The container was in the appellant's custody for a total period of 434 days and therefore the appellant owed them demurrage charges of US\$10,696. It was for that reason that the respondent refused to release the deposit. The witness maintained that the container was in the hands of the appellant and not the Kenya Ports Authority.

Counsel for the appellant and counsel for the respondent each filed written submissions, each urging the trial magistrate to find in favour of his client.

In his judgment the trial magistrate found that there was a one year delay in returning the container to the respondent which was contrary to the terms and intentions of the guarantee undertaking executed by the parties and the respondent was therefore entitled to impose demurrage charges. The trial magistrate further found that the appellant was not vigilant in keeping itself abreast with government policies and that the appellant failed to take up the matter with the Kenya Ports Authority causing it to incur demurrage charges for the container. The trial magistrate therefore held that the respondent cannot be held liable for the loss incurred by the appellant in the 1st transaction. As for the 2nd transaction the trial magistrate noted that there was no guarantee undertaking showing the terms and conditions governing this transaction which were produced in evidence. In the absence of any document governing the relationship between the appellant and the respondent regarding the 2nd transaction, the trial magistrate held that there was nothing upon which the court could discern whether the respondent had the right to withhold the deposit. The trial magistrate however found that the withholding of the 2nd deposit was more related to the accrued demurrage charges rather than the delay in returning the 2nd container. Although the trial magistrate was of the view that the factors relating to the 2nd transaction ought to have been considered in a different forum he held that the appellant was not entitled to the sum of Kshs.324,474.85/= from the respondent nor could the appellant be held liable for the appellant's claim for loss of business. The trial magistrate therefore dismissed the appellant's suit.

Being dissatisfied with this judgment, the appellant has brought this appeal raising 10 grounds as follows:

- (i) The learned Senior Principal Magistrate erred in law and in fact by holding that the respondent was entitled to charge demurrage charges on the 1st transaction.
- (ii) The learned Senior Principal Magistrate erred in law and in fact by holding that the respondent was entitled to withhold the second deposit on account of demurrage charges.
- (iii) The learned Senior Principal Magistrate erred in law and in fact by holding that the second deposit is a factor that could not be discerned in the absence of any document showing the relationship between the parties thereby ignoring the oral evidence adduced by the appellant.
- (iv) The learned Senior principal magistrate erred in law and in fact by failing to appreciate the connection between the 1st and 2nd transaction and consequently holding that the second transaction

should have been considered in a different forum.

- (v) The learned Senior Principal Magistrate erred in law and in fact by failing to properly evaluate the evidence before him.
- (vi) The learned Senior Principal magistrate erred in law and in fact by dismissing the appellant's claim.
- (vii) The learned Senior Principal magistrate erred in law and in fact in failing to find that once the appellant established that he had paid a total sum of Kshs.431,008/= to the respondent and that the respondent had failed to refund the same the onus was on the respondent to show that it was entitled to withhold the said money.
- (viii) the learned Senior Principal Magistrate erred in law and in fact by taking into consideration matters not raised in the defendant's defence.
- (ix) The learned Senior Principal Magistrate erred in law and in fact by holding that the defendant was undoubtedly entitled to impose demurrage charges against the plaintiff.
- (x) The learned Senior Principal Magistrate erred in law and in fact by failing to find in favour of the plaintiff in respect of the two container deposits in view of the failure.

In support of the appeal, counsel for the appellant argued that there was no evidence to support the trial magistrate's finding that with regard to the 1st transaction, the container was required to be returned within 30 days, as there was no mention of a specific period in the guarantee which was executed by the parties. The appellant's advocate further submitted that the trial magistrate failed to note that the appellant presented the cargo delivery order to the Kenya Ports Authority and the cargo delivery order was not honoured and that the plaintiff never received the container until 5th September, 1997. The appellant therefore, only had the container in its possession for a period of 14 days and not the period of 434 days as found by the magistrate. It was further submitted that the amount of deposit held by the respondent was much more than whatever they were claiming. As regards the 2nd transaction, it was submitted that there was no dispute that the two transactions were not related and therefore the respondent unilaterally converted the deposits held by them on the appellant's account. It was submitted that the two claims relating to the deposits were actually related and connected and could not therefore be dealt with in different suits.

For the respondent, it was submitted that the evidence revealed that the respondent was entitled to demurrage charges of US\$10.696 for 434 days. It was maintained that in a letter dated 17th November, 1997, the respondent had put the appellant on notice that it would offset the demurrage charges against the container deposits and therefore the respondent had shown that he had a right of lien over any monies that were held as deposits on behalf of the appellant. It was submitted that time started running immediately after the container was released to the appellant and although there was no evidence regarding the return of the container within 30 days, that could be inferred from the circumstances. It was further submitted that the respondent did try to assist in securing the release of the container from the Kenya Ports Authority, although the onus was upon the appellant to ensure that the container was released at the earliest opportunity.

I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. Although the respondent denied in its pleadings that there was any agreement between it and the appellant regarding the use of the containers, the respondent did concede in their evidence before the trial magistrate that there was in fact an agreement pursuant to which the appellant paid deposits for containers. It is clear from the evidence that a deposit was paid for each of the two transactions and that the two transactions were involving different containers. The two transactions were therefore separate transactions independent of each other.

As regards the first transactions, the appellant did produce a guarantee/underwriting signed by it on the

3rd September, 1996 as plaintiff's exhibit 4. The appellant also produced receipts confirming that a deposit of Kshs.106,534/= was paid for the container. The defence witness admitted that the deposit was paid but maintained that the same could not be refunded to the appellant because of the demurrage charges which were incurred by the appellant. The question is whether there were any demurrage charges payable if so, the amount of the accrued demurrage charge and whether the respondent was entitled to withhold the deposit for the container paid by the appellant.

It is noteworthy that page 1 of the guarantee/underwriting for the container which was produced by the appellant as Plaintiff's Exhibit 4, and page 1 of the guarantee/underwriting which was produced by the respondent as Defence Exhibit 1, were not the same. The defence exhibit indicated that the container was to be returned within 30 days. It also indicated the rate of demurrage charges as 8US\$ per day for the 1st seven days, 20US\$ per day for the next 7 days and thereafter 28US\$ per day. The plaintiff's exhibit on the other hand, was blank in that regard, as it did not show any period for return of the container nor did it show the rate for the demurrage charges. Although the trial magistrate appeared to have accepted the rates indicated in the defence exhibit, he did not address this apparent disparity, nor did he give any reason for accepting the defence exhibit. I have examined the defence exhibits and do note that the handwriting indicating the period for the return of the container and the rates for the payment of the demurrage charges appear to be different from the handwriting on the rest of the document. This implies that those terms were added at a later date probably after the signing of the document. Further, the respondent having denied in its pleadings that it entered into any agreement with the appellant, it was bound by its pleadings and could not purport to rely on an agreement whose existence it had specifically denied. The trial magistrate was therefore wrong to go by the defence document.

I find that the guarantee/underwriting signed by the parties actually did not contain any details regarding the period for the return of the container or the rates for the demurrage charges. This is to be found in the bill of lading which was produced by the appellant as plaintiff's exhibit No.1 wherein it was indicated that:

“Upon expiration of free utilization period of container(s), demurrage is to be paid by the merchant prior to release of cargo. Free utilization period and demurrage rate according to carrier's tariff is available upon request.”

No evidence was availed to this court regarding the carrier's tariff on the free utilization period or the demurrage charges so as to bring that clause to play. From the letter dated 27th September, 1997 which was written by the respondent to the appellant and produced as Plaintiff's Exhibit No.12, the respondent was apparently negotiating the demurrage rates and proposed certain figures which were not accepted by the appellant. The respondent also indicated in that letter that the number of days involved was 335 days. This was not consistent with the evidence of the defence witness that the appellant was responsible to the respondent for payment of demurrage charges for a total of 434 days. The appellant has shown that although the respondent issued the cargo release order on 5th September 1996 authorizing the appellant to collect the container, that container was not released to the appellant until 5th September, 1997. The respondent maintains that it was the responsibility of the appellant to ensure release of the container and therefore the container must be deemed to have been in the possession of the appellant from the date when the respondent issued the release order on 5th September, 1996. It is evident that the container was not released because of the ban enforced by the government of Kenya on shipment of goods to Burundi.

It was the responsibility of the consignee and consignor of the goods to appraise themselves with the regulations of the country to which the goods were consigned and ensure that they comply with the regulations and where necessary make appropriate arrangements for release of the goods. In this case, the respondent as agents of the shipping company cannot be held responsible for the inability of the appellant to secure the release of the goods from the Kenya Ports Authority. Therefore, although the container was not released to the appellant, it must be deemed to have been in the possession of the appellant as the delay was in actual fact caused by failure of the consignee, for whom the appellant was acting, to make appropriate arrangements. Thus if there were any charges payable by the appellant to the respondent, the appellant could not avoid responsibility by relying on the ban by the government. That is to say that the

delay in retaining the container ought to have attracted demurrage charges.

Nevertheless, the respondent did not plead in its defence that it was entitled to any demurrage charges nor has the respondent exhibited to this court the number of days for which the demurrage was incurred or the specific rate of the demurrage charges such as would enable one assess the amount of the accrued demurrage charges payable. Since it is not disputed that the appellants paid the deposit for the container in the first transaction and that the appellant subsequently returned the container albeit late, it was for the respondent to justify why it should not refund this deposit. The respondent in its pleadings neither admitted receipt of the deposit nor did the respondent plead any forfeiture, lien or any other factor that would justify it to retain the deposit. For this reason, there was no evidence to justify the respondent's retention of the deposit of Kshs.106,534/= paid by the appellant in the first transaction.

As regards the second transaction, the evidence was clear that the appellant paid a container deposit of Kshs.324,474.85, and that the container was subsequently returned in time. No demurrage charges arose in respect of this second transaction but the respondent withheld the deposit because of the demurrage charges in respect of the first transaction. As stated earlier, the two transactions were separate transactions and the respondent therefore had no right to withhold the deposit because of demurrage charges arising from the first transaction. Moreover, the appellant having established that it had paid the deposit, the evidential burden shifted to the respondent to justify that it was entitled to withhold the deposit. The respondent did not however, show that it had any right of lien over the deposit nor did the respondent establish the amount of the accrued demurrage charges in respect of which the deposit could be retained.

As regards the appellant's claim for special damages for loss of business, no evidence was adduced by the appellant's witness to explain how the alleged loss of business pleaded in paragraph 12 of the plaint arose. The appellant therefore failed to strictly prove its claim for special damages and none can therefore be awarded. I find that the evidence adduced before the trial magistrate was sufficient to prove the appellant's claim for Kshs.431,008/=. The trial magistrate therefore ought to have given judgment on the appellant's favour in this regard. Accordingly, I allow this appeal, set aside the judgment of the lower court and give judgment in favour of the appellant for the sum of Kshs.431,008/= together with interest at court rates from the date of filing suit. I further award costs of the suit and costs of the appeal to the appellant.

Those shall be the orders of this court.

Dated and delivered this 7th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Mwangi for the appellant

Kachuodho H/B for Ouma for the respondent