



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 447 & 446 of 2000

DOSHI IRON MONGERS LTD.PLAINTIFF

VERSUS

KENYA PORTS AUTHORITYDEFENDANT

J U D G M E N T

This judgment is in respect of two separate suits filed by Doshi Iron Mongers Ltd as the plaintiff against Kenya Ports Authority as the defendant. The first case is in Mombasa H.C.C.C. No. 447 of 2000 by an amended plaint dated 16th May 2005 in which the plaintiff claimed from the defendant for payment of Kshs.4,512,826/- in respect of:

Loss of 254 cartons of Gents Cotton handkerchiefs...Kshs.4,473,326

Surveyors Fees.....Kshs. 29,500

Policy excessKshs. 10,000

TOTAL Kshs. 4,512,826

The second suit is Mombasa H.C.C.C. No. 446 of 2000 expressed in an amended plaint dated 16/5/2005 in respect of a claim by the plaintiff against the defendant for payment of Kshs.6,555,688/- over

Loss of 925 cartons containing 18,500 dozens of

KnivesKshs.6,447,938

Survey feesKshs. 97,750

Policy excessKshs. 10,000

TOTAL Kshs. 6,555,655

The two suits were consolidated and heard together. The parties were in agreement that no evidence would be adduced. The parties were further in agreement that the fact of the loss of 254 cartons of gents handkerchiefs and 925 cartons containing 18,500 dozens of knives be admitted. They also agreed to make submissions on the following issues:-

- (a) The exchange rate to be applied to the plaintiff's two claims.
- (b) Whether or not the two claims fall under the provisions section 23 of the K.P.A. Act.
- (c) If the said claim fall under section 23 of the aforesaid Act, is the defendant only liable for the declared value of the goods i.e. net of any duty, VAT and excise paid by the plaintiff.
- (d) Does the suit disclose any cause of action against the Defendant as pleaded and is it dependant upon contractual relationship between the parties.

The parties chose to begin with the last issue, that is what sort of

an action is this? It is the submission of Mr. Oyatsi learned advocate for the defendant that the plaintiff's suit is on the basis of a contractual relationship. The learned advocate is of the view that there was no contractual relationship between the plaintiff and the defendant. It is the opinion of Mr. Oyatsi that it was only open for the plaintiff to sue the defendant for breach of a statutory duty. The learned advocate cited the case of **Gullino (Aden) Ltd =vs= The trustees of the Port of Aden and Another [1960] E.A. P.247** to buttress his argument.

For the above reason the learned advocate urged this court to rule that there was no competent cause of action before this court hence it should strike out the entire suit.

In response to this issue Mr. Inamdar advocate for the plaintiff argued that his client's case is based on the allegation that the defendant breached its statutory duty as a bailee to ensure that the consignment was kept in a safe place. The learned advocate argued that his client's claim was not based on contract as alluded by the defendant, but fell under Section 22 of the Kenya Ports Authority Act.

Upon considering these competing arguments over this issue, I have come to the conclusion that the same goes to the core of this suit in that if the preliminary point is sustained the whole suit must crumble. The issue to me appears to be straightforward. Before delving deep into the arguments over the merits and demerits of the suit let me set down the brief history of this case.

By a combined transport bill of lading dated 26.8.1999 and numbered PSHMBA9997198 Taizhou Foreign Trade Corporation of Qingnian Road Taizhou Jiangsu, china sent a consignment consisting of 384 cartons of cotton handkerchiefs to the plaintiff from Shanghai for delivery at Mombasa. The plaintiff is the holder of the bill of lading and the owner of the consignment. The consignment was shipped to Mombasa. After discharge at the aforesaid port and whilst awaiting clearance and completion of customs and port formalities, it was discovered that the original seal was missing and another seal had been fitted instead. A joint inspection by the plaintiff's surveyors and the defendant's representatives was carried out on 22/10/99 and that is when it was discovered that 254 cartons of the 384 cartons shipped were missing. That is the background of H.C.C.C. No. 447 of 2000.

In respect of H.C.C.C. No. 446 of 2000, it is said that by a combined bill of lading dated 31.8.1999 and numbered CE 2908167 Guangdong Yangjiang Lingidao (Group) Corporation of China, sent a consignment of 925 cartons containing 18,500 dozens of knives to the plaintiff from Shenzhen China for delivery at Mombasa. The plaintiff is the lawful holder of the bill of lading and owner of the consignment. The said consignment was discharged on or about 7th October 1999 at the port of Mombasa. Whilst the container was awaiting for clearance it went missing. It was later discovered that within the port area that on 27th October 1999 the container was loaded on a railway wagon and fitted with a replacement of another seal. The plaintiff's surveyors arranged for a joint inspection in the presence of the defendant's personnel and it was discovered that the entire load of 925 cartons shipped was missing. In brief, that was the scenario that obtained in this case.

Let me now revisit the arguments which counsels submitted before this court. It is stated in paragraph 7 of the two plaints as follows:

“7. The Defendant was under a duty as a bailee to keep the consignment safely and to deliver the same to the plaintiff in the same good order and condition as it was when it was discharged at the port of Mombasa.”

The sum total is that the defendant failed to deliver the two consignments as expected to the plaintiff. The Kenya Ports Authority was established pursuant to section 3 of the Kenya Ports Authority Act. Its functions and powers are spelt out in the aforesaid Act. Its responsibilities as a warehouseman are defined under Sections 22 and 23 of the aforesaid Act. It is admitted that the plaintiff does not base its suit on contract. The issue as to whether or not the plaintiff's suit is based on contract is therefore settled and does not arise for decision. The question which must be answered is whether or not the defendant is liable to settle the plaintiff's claim as a bailee. Basically, bailment is the delivery of the possession of goods on condition, express or implied, that they shall be returned to the bailor or dealt with according to his directions as so as the purpose for which they were bailed is ended. It is the submission of Mr. Inamdar for the plaintiff that the defendant is liable to settle the plaintiff's claim as sub-bailee having received consignments discharged at the port of Mombasa but thereafter failing to provide safe keeping thus defaulting to deliver the same to the plaintiff. I have already said that the defendant is a creature of a statute. It exercises statutory powers donated to it by the Legislature. I am of the considered opinion that the Kenya Ports Authority took possession of the defendant's consignments from shipowners by virtue of the provisions of the Kenya Ports authority Act and subject to the liabilities created and the duties imposed therein. Therefore I do not agree with the submissions of the Plaintiff to the effect that the defendant got possession of the goods from the shipping agents by virtue of any contract or bailment. The court of Appeal for East Africa considered issues similar to those obtaining in this case in the case between **P.Gullino (Aden) Ltd =vs= The Trustees of the Port of Aden and Another [1960] E.A. 247.** In this case, the court of appeal applied and approved the decision in the English case of **Glyn Mills & Co. =vs= East and West India Dock Company (3) [1882] 7 A.C. 591. At Pg 601,** Lord O'hagan said:

“The defendants got possession of the goods from the captain not by virtue of any contract or bailment, as has been contended at the bar, but under the provisions of the statute and subject to the liabilities created and the duties imposed, by it. And amongst them was the obligation to deliver them to such person or persons, and on such conditions, as the statute should be held to have indicated and required to warrant delivery by the Shipowner or the Master. On payment of the freight and the removal of the stop-order it seems to me that they were bound, as he would have been, to deliver them to the person making presentment of the bill of lading.”

Having come to the conclusion that the defendant's liability arises out of its exercise of statutory power as opposed to by contract or bailment then it means that there is no competent suit before this court. It has not been pleaded in the plaints that the plaintiff seeks for redress against the defendant on allegation of breach of a statutory duty.

The other issues raised in my view are dependent on the outcome of the issue I have just determined. Consequently, I do not need to consider them in view of my findings.

The upshot is that the two consolidated suits are ordered struck out with costs to the defendant.

Dated and delivered at Mombasa this 19th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of the plaintiff's counsel Mr. Inamdar and Mr. Onyango h/b Oyatsi for the Defendant.