



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)

Civil Case 21 of 2006

ALLTEX EPZ LIMITEDPLAINTIFF

VERSUS

KATE FREIGHT AND TRAVEL LIMITED.....DEFENDANT

RULING

This is an application under Order 6 Rule 13(b) and (d) of the Civil Procedure Rules. The prayers in the application are:

- (1) That this Honourable court do strike out the Plaint herein dated 26.1.2006.
- (2) That the Plaintiff do bear the costs of this suit.

The grounds upon which the prayers are sought;

- (a) The plaint is scandalous, frivolous and vexatious.
- (b) The defendant is an agent of a known principal.
- (c) The plaint is an abuse of the court process.

The application is supported by two affidavits of Mr. Bakulash Patel. The first one is a supporting affidavit and it is dated 31st March, 2006. The second one is a further affidavit and is dated 23rd June, 2006 by the same deponent. It is alleged that the Plaintiff is a garment manufacturer based at Athi River and operating under the Export Processing Zones arrangement. And that the Defendant is a clearing and forwarding agent based at the Industrial Area in Nairobi. At all material times the Defendant was the local agent of an International logistics firm known as Expeditors International having been appointed under an agreement. It is contended that a firm by the name J. C. Penney, a departmental store in U.S.A. was looking for various garments to buy for its stores in the United States. The said firm contracted a New York based broker Matchpoint LLC to source the goods. It was agreed that Matchpoint would supply goods to J. C. Penney under a contract. Wherein J.C. Penny is the purchaser, Matchpoint the seller. And that the terms of sale were Free on board to Expeditors International Mombasa Kenya.

Because Matchpoint was not a manufacturer, it turned to the Plaintiff herein to supply the goods under the AGOA arrangements. It is alleged that J. C. Penney contracted Expeditors International for clearing and forwarding of the said goods. And in turn Expeditors International appointed and/or entered into an arrangement with the Defendant to clear and forward the goods. It is the contention of the Applicant that the arrangements were multiparty transactions involving different contracts i.e.;

- (1) That J. C. Penny buys from Matchpoint LLC with a contract of sale between them. To secure payment to Match Point, J.C. Penney obtained letters of credit in favour of Matchpoint.
- (2) Matchpoint in turn sourced the garments from the Plaintiff herein under a different sale contract and in order to secure payment for the supplier, Matchpoint had letters of Credit in favour of the Plaintiff.
- (3) Since the terms of sale to J. C. Penney was free on Board (F. O.B.) Mombasa, the said firm had to appoint an agent to handle shipment from Mombasa and it is in this regard that they appointed Expeditors International who in turn forwarded the assignment to the Defendant as their local agent in Kenya.
- (4) To facilitate the entire arrangement between the diverse parties a suitable arrangement had to be arrived at to link up all the parties.

It is the case of the applicant that the contract between J. C. Penney and Matchpoint would indicate the garments required and their specifications, which in turn would apply to the contract between Matchpoint and the Plaintiff herein. The Plaintiff would then prepare the garments and when ready for shipment, they would get in touch with the Defendant to commence shipment logistics.

It is alleged that the Plaintiff would be required to deliver the goods to the Defendant and also deliver agreed documents to the Defendant that would facilitate shipping including documents required under the AGOA arrangements. And once the Defendant received the documents including the bill of lading from the shipper, it would in turn issue a Forwarders Cargo Receipt (FCR) to the Plaintiff signifying delivery of goods to the shipper and receipt by the Defendant of the documents of title thereof.

It is further alleged that the F. C. R. issued by the Defendant to the Plaintiff was a requisite document under the L/C between Matchpoint and the Plaintiff and the paying bank would not pay unless the original F. C. R. was produced by the Plaintiff. The Defendant contends that being an agent for Expeditors International and by extension J. C. Penney was required by its principals to send the Bill of Lading, copy of F. C.R. and other attendant documents to J. C. Penny. The F. C. R. is however, not a customs documents and was not necessary for clearing the goods but only a copy was sent to J. C. Penney for information/records.

The Applicant also states that once it issued the F. C. R. to the Plaintiff, the Plaintiff was expected to obtain payment from the paying bank under arrangement with Matchpoint. Matchpoint would also get its requisite documents to allow payment under the L. C. with J. C. Penney while J. C. Penney would get documents to allow it clear and collect the goods at the port of destination.

The subject consignment went through the same procedure except that when the Plaintiff presented the documents including the original F. C. R. to the paying bank under the L/C with Matchpoint, the paying bank returned the documents without payment because the letter of credit by Matchpoint in favour of the Plaintiff had expired without the Plaintiff making sufficient arrangements for its renewal.

And upon failure to obtain payment, the Plaintiff instead of pursuing Matchpoint has sued the Defendant who is not liable at all for paying the Plaintiff. And indeed the defendant's principal J. C. Penney has confirmed making payment to Matchpoint, hence the Plaintiff ought to sue and recover its payments from Matchpoint and not the Defendant. The Defendant therefore, contends that the Plaintiff's suit is scandalous, frivolous and vexatious because;

- (1) The Plaintiff alleges that the Defendant released the consignment of goods at New York (the port of destination) in breach of a constructive trust/fiduciary duty to hold them until payment of the purchase

price. It is alleged that the Plaintiff does not disclose what document or other arrangements that created constructive trust/fiduciary duty. Thus there are no facts alleged which upon proof would create the alleged duty.

(2) It is the view of the Applicant that transaction or question was founded on contract and there being no privity between the Plaintiff and Defendant, then no claim can be sustained against the Defendant.

(3) That the forwarders Cargo Receipt (F.C.R.) at the center of this suit did not provide for the Defendant to hold the goods pending payment of the Plaintiff. It only indicated that goods and documents were forwarded to the consignee.

(4) The Defendant also contends that the Plaintiff being an unpaid seller lost any lien on the goods or right of stoppage in transit when the same were delivered to the Defendant as buyer's agent. Therefore the remedy of the Plaintiff lies in a suit against its buyer Match point and hence the suit against the Defendant is misconceived and vexatious.

(5) The Defendant also maintains that it is an agent of a known principal i.e. Expeditors International and J. C. Penney and no action is maintainable against such agent.

The Applicant also filed a further affidavit in response to the replying affidavit of the Respondent/Plaintiff. In the further affidavit Mr. Bakulash Patel depones that the purpose of Forwarders Cargo Receipt (F. C. R.) was to enable the Plaintiff obtain payment under its letter of credit with Matchpoint and at no time did the F. C. R. replace the bill of Lading. And that it is not true that the Defendant was not required to release the goods to any other party except upon tender of the original F. C. R. as the terms of sale were Free on Board Mombasa-Kenya. He also states that the Defendant has discovered that the letter of credit in favour of the Plaintiff expired on 1st December, 2003 and would not have been valid for payment unless renewed by the parties i.e. the Plaintiff and Matchpoint.

The response of the Respondent is that it is not aware of the existence of the alleged standard operating procedure between the Applicant, Expeditors International and J. C. Penney. The alleged standard operating procedure has neither been issued to the Plaintiff nor used as a reference in previous transactions between the Plaintiff and Defendant herein. And the Forwarders Cargo Receipt (F. C. R.) was issued by the Defendant to evidence receipt by the Defendant of goods and original bill of lading delivered to it by the Plaintiff. It is the contention of the Respondent/Plaintiff that the F. C. R. evidenced ownership of the goods, having replaced the bill of lading on the transaction. And having issued the Forwarders Cargo Receipt to the Plaintiff, the Defendant was not entitled to release the goods to any other party except upon tender of the original Forwarders Cargo Receipt.

It is the case of the Plaintiff/Respondent that the Defendant has several times before forwarded shipments from the Plaintiff to J. C. Penney (the consignee) without any complaint from the Plaintiff. And that in all the past transactions, the F. C. Rs issued by the Defendant to the Plaintiff have been exchanged by the latter for the purchase price of the goods delivered and in accordance with the terms of sale which have always been the same. This practice is not peculiar to the Plaintiff and Defendant, rather it is practice employed internationally between vendors, forwarders and purchasers.

It is also contended by Mr. Karim Dost Mohamed that it is not true that the Defendant had no control over the goods because it had contracted the services of a shipping line to transport the goods to the consignee at the port of destination. It is alleged that the Defendant had a direct and ultimate control over the said goods at all times and it is under, this understanding that the Plaintiff delivered the goods to the defendant and an F. C.R. subsequently issued by the Defendant. It is alleged that the Defendant was only to release goods to the consignee on the presentation of the original Forwarders Cargo Receipt as has been the practice in previous transactions.

The case of the Respondent is that as soon as it delivered the goods and requisite documents to the Defendant/Applicant, and received the Forwarders Cargo Receipt in exchange therefore, a fiduciary relationship arose under which the Defendant had a duty not to release the goods except upon the

presentation of the original F. C. R. by the consignee or its authorized nominees. And by releasing the goods to the consignee as it did, the Defendant breached its fiduciary duty and in so doing divested the Plaintiff of its security of payment. And therefore, the Plaintiff seeks the return of the goods delivered by it to the Defendant, receipt of which is evidenced by the original Forwarders Cargo Receipt issued by the Defendant, which original Forwarders Cargo Receipt is still in the Plaintiff's possession. The alternative prayer of the Plaintiff is that if the Defendant cannot return the said goods, then it ought to pay the full value of the goods delivered to the consignee.

In the premises the Plaintiff alleges that it has a good cause of action against the Defendant, which must be allowed to go to full hearing.

There is no dispute that on or about 16th February, 2004 the Plaintiff delivered to the Defendant goods worth US Dollars 223,740/= for shipment by the Defendant from the port of Mombasa to Newark in U.S.A., where the consignment was to be collected by J. C. Penney, the consignee, to whom the Plaintiff had sold the goods under a purchase order. Upon receipt of the goods the Defendant/Applicant issued a cargo receipt known as Forwarder's Cargo Receipt – (F.C.R.), to the Plaintiff on 12th March, 2004 to evidence receipt of the consignment by the Defendant. It is the case of the Plaintiff that the F.C.R. evidenced ownership of the consignment and was to be sent by the Plaintiff to the consignee upon payment of the full purchase price. And that the Defendant was only entitled to release the consignment upon tender of the original F. C. R. by the consignee. And as a result the Defendant held the consignment on a constructive trust and occupied a fiduciary position as a constructive trustee towards the Plaintiff in respect of the consignment.

And in breach of the said duty, the Defendant released the consignment to the consignee and/or its agents without having received the F. C. R., thereby handing over possession without payment and in effect divesting the Plaintiff of its security for payment. The Applicant's reply is that the whole transaction between the various parties is one founded on contract, yet the Plaintiff alleges breach of fiduciary duty, which was never contracted on. The Applicant contends that it issued the F. C. R. as an agent for Expeditors International and therefore, any liability can only accrue to the principal. And that the said document was issued under instructions of the consignee. The expectation that the Defendant would hold the goods till the production of the original F. C. R. is misplaced and has no legal basis.

The question to determine is whether the Defendant is entitled to the orders sought in the application. From the evidence and documents presented before court, it is evident that the matter calls for caution and extreme care. I am saying so because the dispute is still pending and any attempt to pronounce or determine an issue would be greatly prejudicial to the interest of the parties. Let me say that the court has no business at this stage to consider and determine the merits of the case. All that the court is bound to do is to look at the pleadings and find out whether all facts are undisputed. And that the undisputed facts lead to a clear and inevitable finding that the suit is scandalous, frivolous and vexatious.

The Respondent alleges that its cause of action is not on contract rather, the cause of action is for breach of trust by the Defendant. And that the issuance of the Forwarders Cargo Receipt creates a trust relationship between the issuer and the owner of the goods, such that, in the event the issuer fails to abide by the usage/practice of the F. C. R.s, it breaches its fiduciary duty as a constructive trustee. In my view there was no contractual relationship between the defendant and Plaintiff but the absence of a contractual relationship does not mean that the defendant cannot be liable to the Plaintiff under any other law. I agree that a person who acts for a disclosed agent is not liable but the carrier may eventually be discharged from all liability upon determination of the matter at full hearing. In my opinion the form in which the contract is expressed is crucial to the decision and/or determination of the point in each particular case.

The Plaintiff's case is that there existed a constructive trust between the parties herein and to prove the presence and existence of the same, it requires an opportunity to present evidence to demonstrate the existence of the said trust. It is clear that the Defendant was responsible for preparing all shipping documentations, including commercial invoices, destination customs invoices, letters of credit and F. C.R. in accordance with the Industry standard. The defendant was also acting as the origin office and it was incumbent upon the Defendant to issue house waybills of landing and forwarder's cargo receipts in

agents own name. In deed according to the agreement between the defendant and Expeditors International, the Defendant had a peculiar and unique role to play between the various parties.

I ask myself what is the purpose of issuing a forwarder's cargo Receipts. The matter involves multiparty transactions involving different parties and contracts. The matter also involves international business transactions, which mostly depend on some measure of goodwill, honesty and good faith. Notwithstanding the strength of the contract, parties in International business/trade require considerable amount of goodwill and honesty in their dealings. And in order to avoid bilateral dispute, the court would usually interpret the acts, conduct, general usage and international practice in a manner expedient and prudent to the standard of international law and practice. And when faced with such dispute, the court is usually reluctant to shut out a party before he has presented all his evidence before court. The court must allow international trade to flourish, grow and expand so that the desired result of national development is achieved.

The Applicant states that the Forwarders Cargo Receipt (F. C. R.) at the center of this suit did not provide for the Defendant to hold the goods pending payment of the Plaintiff. And that it indicated that the goods and documents were forwarded to the consignee. No doubt it is Matchpoint, which allegedly sourced the goods from the Plaintiff and it is Matchpoint, which issued the letter of credit, which expired before the delivery of the goods. In ordinary parlance it means the consignee of the goods should have been Matchpoint, since it purchased the goods from the Plaintiff. Here the consignee of the subject goods was J. C. Penney, who allegedly bought the consignment from Matchpoint LLC.

The issue is whether J. C. Penney were to get the goods on Free on Board (F.O.B.) at the port of Mombasa before payment was made to the Plaintiff. Indeed there is no dispute that the Plaintiff was entitled to the value of the goods it supplied. It is alleged that the role of the Defendant was a consignee's agent and upon receipt of the goods, their only role was to forward the same to the consignee J. C. Penney. It is also factually true that the Defendant was not appointed by the alleged consignee M/S J. C. Penney but by Expeditors International who were the Agents of the consignee. The question that calls for answer is how the alleged consignee were able to get the goods Free on Board (F.O.B.) Mombasa – Kenya, when payment was not made. And it had no relationship with the Plaintiff.

The peculiar nature and complexity shows, that the matter required certain documentations to safeguard the interest of all parties. The word agent may mean a person appointed for taking goods on delivery on behalf of the buyer and his role ends when he delivers the goods on the terms agreed. It is not, that the purpose of the Forwarder's Cargo Receipt (F. C. R.) was to enable the Plaintiff obtain payment under its letter of credit with Matchpoint. Here we have three important documents which is central to the success of the Plaintiff's case:

- (1) Letter of credit issued by Match Point.
- (2) Bill of Lading in respect of the consignment.
- (3) Forwarders Cargo Receipt issued by the Defendant.

In my view the centrality of those three documents is fundamental to the success of the respective case of the parties. If I endeavour to determine the legal effect of the three documents, I may be tempted to make final and definite orders, prejudicial to the determination of the case. The letter of credit properly known as L. C. is dated 26th September, 2003 and the date of expiry is shown to be 1st December, 2003. The amount covered in that letter is US dollars 222,440/= and it was made in favour of the Plaintiff by Matchpoint LLC. The circumstances under which the goods were delivered when they were not secured by a valid letter of credit is not clear to me. That responsibility must be apportioned between the Defendant and Plaintiff. If the Plaintiff was negligent in its operation, the court would eventually exonerate the Defendant with costs to be awarded.

It is also essential to determine at full hearing the purpose of the Bill of Lading and Forwarder's Cargo Receipt. In doing so, the court would be able to go through the enormous material presented before me at

this interlocutory stage seeking a summary determination of the matter. The Applicant filed a supporting affidavit and a further affidavit to succeed in its application. I have gone through the various documents presented before me and I must say, the share volume dictates that the case cannot be decided at this summary stage.

In my understanding the power of striking out should be resorted to only after the court has considered all the facts but it must not embark on a process to determine the merits of the case. If that is done, I do not understand what the job/role of the trial Judge would be. At this stage, I am not entitled to express my opinion on the issues with certain finality, as that would prejudice the fair hearing and determination of the matter. It would also, in my view restrict the independence of the Judge who would eventually have the hard task to determine the dispute. A suit should only be struck out if it is so weak or hopeless that it is scandalous, frivolous and vexatious.

In the end the Plaintiff may allege that the duties of the Defendant includes all things commonly understood in the international business and trade, which is ordinarily required from one agent to another in the interest of mutual profit and increased business activity. And to enhance goodwill among international entities, which have very little contact. It is well settled that the practical and legal realities of international trade require certain documents to be exchanged in order ownership and possession of goods to pass from the seller to another party. Although business thrives on goodwill and mutual trust, it is not the practice in international trade for the seller to release his goods before he has secured payment for the same. Equally buyers prefer to have control over their goods before parting with their money.

And because of that conundrum, it has become difficult to match payment with physical delivery. The compromise devised to safeguard the interest of all parties is normally secured by payment by way of letter of credit by a bank. This is usually done against constructive delivery i.e. the handing over of the documents transferring title to or control over the goods. However, the handing over of the goods and its title has a corresponding liability on the conveyor of the goods not to release except with the knowledge and/or instruction of the seller. In this scenario the banks and the shippers play a central role to ensure all parties are protected and secured. The purpose of documentary credit given, is usually meant as a security measure for the parties, more so to protect the interest of the seller.

Perhaps it is important to note that a seller who sells his goods to a consignee in U.S.A. or any other country is in a weaker position unless he has received payment in advance. And it is because of such a situation that the parties herein may have devised the Forwarder's Cargo Receipt as a prudent security function for the interest of the parties. It is upon hearing the evidence tested through cross-examination that the court would determine if that was the intended function. I reckon that the buyer needs security that he will not pay for the goods without receiving them. The security of the buyer is secured in that he would designate the documents against which bank will be entitled to pay. In this case the letter of credit seems to have expired before the goods were delivered. I think the buyer is required to pay by means of documentary credit. Equally I think the consignee was not entitled to take physical possession without the mandate and/or knowledge of the seller. In ordinary cases the seller is in possession of the original bill of lading in order to restrict release by the shipper if payment is not made for the goods supplied.

It is difficult at this stage to understand and pronounce the peculiar nature of this transaction. I think the issue of liability between the parties calls for a full hearing to determine whether the relation is based on contract or constructive trust. It is also important to determine the purpose of issuing the Forwarder's Cargo Receipt and the role of the Defendant in the transaction. On my part I do not see anything indecent or offensive or any imputation against the Defendant that would entitle the claim to be scandalous. I also do not think the pleading as drafted and put forward, amounts to an action without substance. The issue of constructive trust and the purpose of Forwarder's Cargo Receipt are arguable points which must be determined upon hearing witnesses and cross examination of the said witnesses.

It is therefore my decision that the application has no merit and is dismissed with costs to the Plaintiff/Respondent.

Dated and delivered at Nairobi this 16th day of March, 2007.

M. A. WARSAME

JUDGE