



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 446 of 2001

JOSEPH OPPONG PLAINTIFF

VERSUS

PIL KENYA LTD DEFENDANT

J U D G E M E N T

JOSEPH OPPONG a Ghanaian citizen filed this suit in Kenya. He pleads that he resides in Japan engaged in business of purchasing and selling goods, motor vehicle components and electronic goods within the continent of Africa. He states that while in Japan carrying on such business he caused to be consigned a shipment of goods in a container TRIU 9468377 destined to Uganda. The consignee was named as Alice Kamigisha. The defendant a limited liability company was engaged in the transportation of the container to Mombasa port aboard MV Budi Jegyl on 18.3.2002.

Later the plaintiff requested the shipper to amend the name of the consignee from that of Alice Kamigisha to Joseph Oppong care of Catherine Wambuga of Box 3955 Kampala, Uganda.

The plaintiff gave further instruction to amend the status of the container from house to house to “pier to pier” whereby the plaintiff was only to pay US\$ 80 being mandatory terminal handling charge.

The plaintiff pleads that under shipping practice and contractual relationship the defendant should have released the container to plaintiff on 4.4.2000 whereof Alice Kamigisha purported to clear the goods with forged papers. Thereafter there were filed 2 suits in respect of this consignment namely HCC No. 260/00 in Kenya and civil suit No. 390/00 in Kampala Uganda.

The defendant refused to release the container to the plaintiff thus causing the plaintiff to incur heavy demurrage charges, loss and damages as specified in the plaint. The plaintiff claims the loss stipulated and general damages and costs.

The defendant admitted he was the transporter of the container as agent of the shipper of the goods. The defendant denies having received any instructions to make amendments as stated by the plaint. However, defendant also says he could not have complied with instructions since the matter was subjudice by that time. The defendant was only ready to release the goods under order dated 9.12.01 by court. Loss claimed as incurred is denied.

When the trial commenced on 11.6.2002, the plaintiff called PW1 – court clerk to produce court file

No. HCC NO. 260/00 concerning the whole dispute.

The plaintiff himself gave evidence as PW2. He testified regarding how he arranged for his consignment to be shipped. The plaintiff's evidence shows that the defendant refused to release the goods and demanded a court order to order goods be released to him. The plaintiff further testified how he fought cases in Uganda (No. 390/00) and Kenya (HCC No. 260/01) and the goods were eventually released to him by consent order.

Upon examining the evidence, it is clear that the defendant failed to accept the amendment to the name of consignee preferring to accept the name of Alice. This was in breach of instructions received by defendant from Japan. Under the court agreement on 9.2.2001, the plaintiff agreed to pay US\$ 3000 which he paid. The goods were detained between 4.4.2000 to 9.2.2000 a period of 10 months.

The parties did not frame issues for determination. This was a contract for transportation of goods by sea from Japan to the port of Mombasa Kenya. Issues arising:

- Was the defendant bound to release the goods to the consignee at the port of Mombasa?
- Who was the consignee of goods when they arrived at Mombasa?
- Did the defendant release the goods to the lawful consignee?
- If so, did the defendant cause delay in delivering the goods to the consignee, if so for how long was the delay?
- Did the plaintiff suffer loss because of such delay?
- What was the amount of loss and is the defendant liable to the plaintiff?

It is to be noted that the defendant was acting on instructions from PIL Japan and there is evidence that defendant was instructed to amend the documents to read consignee Joseph Oppong of Kampala. The plaintiff went to collect his goods on 4.4.2000 after receiving instructions from his agent (Afex) in Japan. Despite this, the defendant insisted on the plaintiff producing a court order for the release of the goods to him. The correction advise was dated 24.3.2000 and it contained a noted "**remark full set of original B/L was not amended. Please amend as above at yours.**" This message must have been received in Mombasa by defendant. However when the plaintiff traveled to Mombasa to collect his goods, the defendant declined to release them. The defendant ignored instructions from Japan and chose to believe other parties who were also claiming the goods. The defendant therefore was in breach of contractual obligation to hand over the goods as it was bound to do.

The plaintiff was obliged to pay demurrage charges US\$ 4374 and complied with the consent order where he had agreed to pay US\$ 3000 and the container was not released to him. In the HCC Mombasa 260/00 where one Taita was claiming the goods, the defendant evidence was that the goods belonged to the plaintiff who was consignee after the bill of lading was amended. Instead, the defendant demanded a court order in order to release the goods to the plaintiff. There was unnecessary delay and expense before the plaintiff could secure the order. He had start proceedings in Uganda. He incurred expenses in travel and upkeep while pursuing suit in Uganda Civil suit No. 390/00 in Kampala and Kenya HCC No. 260/00.

I accept figures US\$ 2000 and US\$ 8234 as stated under particulars (a) and (b) and the demurrage charges US\$ 3000. however, I find loss of profits not proven and the claim for loss of monthly income in Japan not proven but also too remote damage. It is to be noted that in respect of damages lost, the goods were eventually released to the plaintiff. This cause of action arises out of contract of carriage of goods by sea and damages are not at large but must flow from breach of the contract.

The defendant has filed a long list of authorities. I find the appeal decision in Civil Appeal 154/92 to have relevance on the issue of special damages. In the present case, the claim for special damages is

clearly pleaded with particulars. The plaintiff led evidence in support of his claims but as I have said, I have allowed only the claims I consider pleaded and supported by evidence. The defendant relies on the judgment in the Court of Appeal in **AFRICAN HIGHLAND PRODUCE LTD – VS – KISOMO** which was in respect of a claim for loss of user and the obligation by the plaintiff to mitigate his loss. In the present case, the plaintiff was dealing with court process and not loss of user of motor vehicle and I do not find the plaintiff guilty of failure to mitigate his loss.

In this case, I find the defendant liable. However, in cases of contract damages are not at large, only pleaded and proved damages may be awarded.

In the circumstances of this case, I find for plaintiff and I enter judgment in the sum of:

1. US\$ 2000 per (a)
2. US\$ 8234 per (b)
3. US\$ 3000

Total US\$ 13,234

Other claims are not awarded and are dismissed.

Item (c) costs of this suit in Kenya should be taxed and paid in the usual manner in that suit in addition to US\$ 13234. the defendant shall pay interest at court rates and costs of this suit.

Orders accordingly.

Dated the 15th September 2006.

J KHAMINWA

JUDGE