



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Appeal 200 of 2003

AFRICAN LINEAR AGENCIES LTD.....APPELLANT

VERSUS

AFROREIGHT FORWARDERS LTD.....RESPONDENT

(Arising from Chief Magistrate's Court Civil Case No. 2525 of 2002 at Mombasa)

JUDGMENT

By a plaint dated 23rd July 2002, Afrofreight Forwarders Ltd, hereinafter referred to as the Respondent, sued African Liner Agencies Ltd., hereinafter referred to as the Appellant, claiming to be paid a sum of Kshs. 359,686/= in respect of railage services the Respondent gave the Appellant in the year 1997. The Appellant filed a defence to deny the Respondent's claim. After undergoing a trial before the Resident Magistrate's Mombasa, judgment in the sum of Kshs. 342,625/= was awarded to Respondent. Being aggrieved by this decision the Appellant preferred this appeal to challenge the judgment in its entirety.

On appeal, the Appellant has raised four main grounds to attack the judgment namely:

- (i) That the trial court erred in law in holding that the Appellant was not acting for a disclosed principal.***
- (ii) That the trial magistrate erred in law and in fact by failing to consider that the Plaintiff's claim being a liquidated one, ought to have been specifically pleaded and proved.***
- (iii) That the trial magistrate erred in law by holding that the Plaintiff had proved its claim to an extend of Kshs. 342,625/=.***
- (iv) That the learned trial magistrate erred in law and in fact by failing to find that the Plaintiff's claim is time-barred under the Limitation of Actions Act.***

Let me set out the case that was before the trial Resident Magistrate's court before considering the

aforesaid grounds of appeal. The plaintiff's (Respondent's) case before the trial court was supported by the evidence of one Moses Mwangi Mwaura (PW1) an accountant with the Respondent. It is the evidence of PW1 that the Appellant approached the Respondent in the year 1996 to transport some containers from the port of Mombasa to Embakasi and as a result the Respondent issued the Appellant with a quotation dated 14-2-1996 which quotation he produced in evidence. PW1 said the Appellant sent to the Respondent a list of the containers it wanted to be railed to Embakasi. PW1 produced four invoices and two debit notes as proof of the Appellant's indebtedness to the Respondent particularized as follows:

<u>Date</u>	<u>Service Rendered</u>		<u>Debit/Invoice</u>
8-3-96	Port charges	Kshs. 8,176/=	D/N
1-4-96	Railage Charges	Kshs. 42,618/=	D/N
12-3-96	“	“ 85,323/=	Invoice
3-4-96	“	“ 35,310/=	“
17-9-96	“	“ 16,681/=	“
1-7-96	“	“ 16,681/=	“

PW1 said the original of the abovementioned debit notes and invoices were sent to the Appellant on different dates but the same were not settled within six months from the date of issue. In other words PW1 was saying that there was a grace period of 6 months given to the Appellant to settle the debt from the date of demand or issue of invoices. It is however admitted that there was no written contract over the issue. Letters were produced to indicate that the grace period arose out of trade practices and usages between the parties.

The Defendant's (Appellant's) case on the other hand was supported by the evidence of the Hannigton King'oo (DW1) an accountant with the Appellant. DW1 told the trial Resident Magistrate that the Respondent demanded conflicting amounts in three different statements. He produced statements showing that on 13-7-2000 and on 28-3-2002 the Respondent demanded payment of kshs. 281,869 and Kshs. 317,192/= respectively. DW1 denied having received a statement in respect of the suit sum of Kshs. 359,686/=. DW2 denied that the Appellant was given a grace period of 6 months to settle the debt but that the debt was due for settlement upon presentation of the invoices and the debit notes. DW1 also claimed that the Respondent was not entitled to sue because it was an agent of a known principal called Global Container Lines. DW1 admitted that he had no personal knowledge of the contractual relationship between the Appellant and the Respondent and that he only relied on documentary evidence in his possession to testify on behalf of the Appellant. He told the trial court that the transaction was handled by the Defendant's (Appellant's) general manager who has since then left the Appellant Company's employment. DW1 said he joined the Appellant's employment in 1999 long after the transaction in dispute had been concluded. DW1 claimed that there was no acknowledgement of the debt by the Appellant hence the debt was time barred under the statute of Limitations of actions. In a nutshell that was the case that was before the subordinate court. It is now appropriate at this juncture to consider the grounds argued on appeal.

The first ground argued on appeal is to the effect that the learned Resident magistrate erred in law by holding that the Defendant (Appellant) was not acting for a disclosed principal. It is the argument of Mr. Balala Advocate for the Appellant that the trial magistrate failed to appreciate the evidence of the Appellant's witness which clearly pointed out to the fact the Appellant was an agent. It is the learned advocate's view that the learned Resident Magistrate ignored DW1's evidence over the issue. On her part Mrs. Maina advocate for the Respondent urged this court to reject this ground on the basis that the Appellant failed to prove before the trial court that it acted as an agent. The Respondent's learned advocate was of the view that the Respondent admitted having been paid directly hence there was no privity of contract between the Respondent and the Appellant's alleged principal. I have considered the

rivaling submissions over this ground. Let me re-evaluate the evidence that were tendered before the trial court over this issue. It is clear from the evidence of Hannington King'oo (DW1) that he told the trial Resident Magistrate as follows:

“The Defendant is an agent of another company on commission basis-Global Containers Lines is the Principal. It is on our letterhead Plaintiff's exhibit 15 shows that relationship.

All our letters show that relationship expressly. Some of the money was paid in 1996. I have not brought the records.”

I have examined exhibit 15. It is a letter dated 3-4-2000 written by the Appellant herein to the Respondent in which the Appellant was requesting for copies of the debit notes. The letter is signed by one Salahuddin M. Yahya on behalf of African Liner Agencies Ltd. (Appellant) as agents for G.C.L. It has been argued that the trial Resident Magistrate did not consider this aspect. I have carefully examined the judgment of the learned Resident Magistrate and I am satisfied that he ably considered the Appellant's evidence and had this to say:

“ On the issue of agency I agree with the Defendant that where there is a disclosed Principal, the principal is the one sued for the omissions/commissions of the agent. In the present case the quotation was addressed to the Defendant (Plaintiff exhibit 1). The Defendant admitted through DW1 – King'oo that they pay to the Plaintiff for services rendered. From the way the parties were conducting business, therefore, S.16 of the Evidence Act. Facts exist showing that the Defendant dealt directly with the Plaintiff. They paid them hence if they (Defendant) failed to pay one would naturally expect the Plaintiff to sue the Defendant. The Defendant cannot hide the issue of agency. There was no express agreement showing the Defendant were acting on behalf of the said principal.”

The Appellant's submission on this must substantially fail. My evaluation of the issue touching on the agency – relationship is simple. To be fair to the parties, the issue of agency arose in the year 2000 when demand for payment was raised. There was no evidence from the onset that the Appellant was willing to disclose its Principal. It was only disclosed its principal much later when it became apparent that the Respondent was seriously making a follow up to recover its money. To summarize this matter I will adopt the position captured in the treatise of Stephen and Bonnie on Merchantile Law 15th Edition by Gordon J. Borrie at Page 133-134 that is:-

“Whether principal or agent or both, are liable on a given contract is a matter depending upon the intention of the parties and authority of the agent. Generally, an agent is not liable on the contract and a principal is, but to this rule many exceptions are found, most of them depending upon the rule that if by his conduct one person causes another to believe that a principal is being dealt with, he cannot put that other in a worse position by any subsequent disclosure of his character as agent.”

It is clear from the above quotation that the Appellant is estopped in raising such a defence. I am satisfied that the trial Resident Magistrate came to the correct decision and I see no reason to fault his findings on the issue. The principle of estoppel bars the Appellant from raising such a defence when the deal which was previously sweet goes sour.

The second ground raised on appeal is that the learned Resident Magistrate failed to appreciate the fact that the Respondent's claim being a liquidated sum was not specifically pleaded and proved. It is the submission of Mr Balala advocate for the Appellant that the Respondent should have particularized its claim. He was of the view that the claim was not strictly proved. Mrs. Maina on her part was of the view that the claim was specifically pleaded and proved. I have taken into account these competing submissions. I have also perused the pleadings and the evidence tendered before the trial court. It is quite explicit that the Respondent prayed for judgment in the sum of kshs. 359,689.00 in the Plaintiff. The same is specifically pleaded in paragraph 5 of the Plaintiff. The Appellant's contention is that the Respondent claims for port charges yet the same were not prayed for in the Plaintiff. I agree with the submissions of Mr. Balala advocate for the Appellant that the issue on port charges was not pleaded. But after a careful perusal of the proceedings it is clear that though the issue was not pleaded, the parties left it to the trial

court to decide. The nature of the case is that it was not possible to separate port charges from railage charges. One must pay for port charges before the goods are released to be transported to the client's destination. Though the trial Resident Magistrate did not address himself to this issue he nevertheless came to the correct conclusion. He was entitled to consider the issue the way he did it.

To conclude the remaining issue as to whether or not the claim was strictly proved. I have carefully considered the testimony of the Appellant and I am convinced that the debit notes and the invoices produced established that the Appellant was truly indebted to the Respondent in the sum of kshs. 342,625/=. These documents were not discredited in any way by the Appellant and its legal team. The finding on this ground has finally answered the 3rd ground of appeal.

The final ground argued on appeal is that the Appellant's claim is time barred and that the trial magistrate was wrong where he ruled otherwise. It is the view of Mr. Balala that by the time the Respondent filed the claim the same was already time barred hence there was no competent suit before the trial court. It is argued that the trial magistrate erred when he came to an erroneous conclusion that the Appellant had acknowledged the Respondent's debt. The learned advocate further argued that the purported admission did not meet the requirements of section 23 and 24(1) of the Limitation of Actions Act. Mr. Balala further attacked the learned Resident Magistrate's view that there was no such a plea. On her part Mrs. Maina was of the view that the claim was not time barred because the debt was acknowledged in the year 2000 by the letter dated 3-4-2000. The learned advocates had raised the issue touching on Limitation of time to sue before the learned Resident Magistrate. The trial court was of the view that the cause of action arose in 1996 and that there was no proof that there was an agreement that the Respondent be given a grace period of 6 months to settle the debt. On this score I agree with the learned Resident Magistrate. The trial magistrate further came to the conclusion that the action could have been time-barred save that the Appellant acknowledged the same in its faxed letter of 4th July 2000. I have carefully examined the contents of the aforesaid letter. It is imperative to reproduce the relevant contents of the letter in order for one to appreciate its applicability and relevance to the dispute at hand. The letter which was produced by the Plaintiff (Respondent) as exhibit No. 14 reads as follows:

"We acknowledge receipt of your letter 1-7-2000. Since it is a very old outstanding issue and we do not have all invoices available with us our accounts department will communicate with you for the full details which please assist once we have fully reconciled your account we will revert back to you."

A close perusal of the above quoted fax letter will reveal that it amounts to nothing but a request for particulars of the debt. It cannot be said to amount to an admission of the debt under Section 23(3) of the Evidence Act. The Appellant in that letter does not admit the claim but it is requesting to be given invoices for reconciliation and thereafter revert back to the Respondent. That is where the learned Resident Magistrate misapprehended the point. Since there is no dispute that the debt arose sometime in 1996 and the action was filed on 23rd July 2002 then the action was time barred hence incompetent. From the invoices and debit notes tendered by the Appellant's witness, it is clear that the cause of action arose between 1st April 1996 and 1st July 1996. By the 23rd day of July 2002 six (6) years 22 days had lapsed for the last debt.

In the final analysis I am satisfied that the appeal should be allowed on this ground. Consequently the appeal is allowed with the result that the learned Resident Magistrate's judgment of 12th November 2003 is set aside and substituted with an order striking out the suit with costs to the Appellant. The Appellant shall also be entitled to the costs of this appeal.

Dated and delivered this 3rd day of November 2006.

J. K. SERGON

JUDGE