



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 205 OF 2001**

MITCHELL COTTS FREIGHT (K) LTD.....PLAINTIFF

VERSUS

MARSHIP LIMITED.....DEFENDANT

Coram:Before Hon. Justice Mwera

Omondi for Applicant/Plaintiff

Nanji for Defendant/Respondent

Court clerk – Kazungu

RULING

By the Notice of Motion dated 22-10-2001 and brought under O.35 rr.1, 8,) O6 r.13 (1) (b) (c) (d) Civil Procedure Rules the plaintiff company sought two main orders.

1. That summary judgement be entered for the plaintiff against the defendant for the sum of shs. 526,950/= as per the plaint and
2. That the defence filed herein be struck out for being scandalous, vexatious and an abuse of the court process.

The grounds in the body of the application and the depositions in the supporting affidavit of one Daniel Tanui, were presented with the emphasis on what Mr. Omondi thought about the Plaintiff's case: That it was plain, clear and not able of being traversed by the defence filed here on 7-8-01. That such defence should not entitle the defendant to an un-conditional leave to defend. That indeed that defence had no merit except to delay the final determination of this suit. The court was told that the plaintiff hired some containers for use by depositing Kshs. 526,950/= refundable on returning the containers. That the containers were returned yet the defendant had failed to effect the refund.

Mr. Omondi maintained that although the forms of guarantee read that the defendant was acting as agent for M/s Ignazio Messina & (S.P.a of Genoa Italy, the relationship and the nature of the transaction was that the two litigants were dealing directly with each other and so such was the liability between them.

Mr. Nanji posited that all the time the plaintiff knew that his clients were only agents. That the plaintiff had pleaded so in the plaint, and alone signed the guarantee forms, all the time aware of the agency relationship. And that that having been raised in the defence, it was a triable issue that should go to trial.

Having heard counsel, perused the pleadings and the annexures herein, this court is satisfied that even with one triable issue only, and here it is that all the time, the defendant acted as agents of Ignazio Messina and the plaintiff knew it, this matter should go for trial. The dispute is not such as to end here with judgement for the plaintiff. In all this, it is not in dispute that the guarantees/undertakings were entered into, money was paid, the containers released and later returned.

And that the refund of the deposited money was not effected. To this end some parts of pleadings/depositions etc will have to be reproduced beginning with the plaintiff.

The plaintiff filed here on 25-4-2001 partly pleaded in paragraph 4:

“4. The Plaintiff states that pursuant to the terms contained in the Container Guarantee/Undertaking forms the defendant acting as agents of Ignazio Messina & C.s.p.a Shipping Line ----- released the containers ----- upon (receiving) -----refundable container deposit of shs. 526,950/- -----.” (Underlining supplied)

And the defence of 3-8-01 answered in paragraph 2:

“2. The defendant will contend that this suit is misconceived and bad in law in that the defendant was as is stated in paragraph 4 of the plaintiff, merely an agent of Ignazio Messina & C.s.p.a and cannot therefore be personally liable for -----shs. 529,950.00-----.” (underlining supplied)

The guarantee forms stated:

“MARSHIP LTD
P. O. Box 80443, MOMBASA
AS AGENTS FOR IGNAZIO MESSINA & C S.p.a,
GENDA, ITALY”

(again underlining supplied)

The receipt that the defendant issued on 23-11-98 to the plaintiff (both sides did not dispute it) read:

“I. MESSINA A/C”

The record has a demand letter from the plaintiff’s lawyers to the defendant dated 26-8-99. It was headed in part:

CONTAINER DEPOSITS – KSH. 526956/=

and it read inter alia:

“We are informed that you were at the material time acting as agents of Messina Lines.”

In the final paragraph thereof:

“-----we have firm instructions to institute legal

proceedings against you jointly with your principals for recovery -----.”

From all the foregoing the defendant is granted unconditional leave to defend this suit. There is a triable issue of agency – an aspect the plaintiff seemed to be aware of all the time. Accordingly the application herein is dismissed with costs.

Orders delivered on 2nd June 2005.

J. W. MWERA

JUDGE