

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 44 OF 2001

PETER KARANJA LENGARIAME PLAINTIFF

VERSUS

YUASA TRADING CO. & ANOTHER DEFENDANTS

Coram: Before Hon. Justice Mwera
Odiaga for the Plaintiff/Respondent
Ananda for the 2nd Defendant
Court Clerk – Sango

R U L I N G

The second defendant Yuasa Investment Company Ltd. of Kampala Uganda filed two chamber summonses invoking S. 3A Civil Procedure Act, O 21 r 22 Civil Procedure Rules and such other provisions of law as related to moving this court during vacation. The first application dated 3rd August, 2004 prayed for release of some 3 motor vehicles which were in transit, shipped by the 1st defendant of/from Japan to the 2nd defendant. They are all TOYOTA COROLLA by make. Their chasis registration numbers were given as AE 100 – 801 5972, AE 111 – 6019558 and ST 190 – 6022988. The prayer sought was that this court orders a release of these motor vehicles from the custody of M/s Kithemu Auctioneers, agents of the plaintiff.

The application dated 6-8-04 sought same release orders directed towards the same auctioneers and for the same reasons that he had attached a certain TOYOTA CORONA chasis No. AT 190-0133967 on behalf of the plaintiff.

Hearing both counsel, it was not in dispute that the plaintiff who claimed some Sh.461,595/- special damages, general damages and costs, got judgement, seemingly, in default against the 1st defendant following a road accident that took place on 13-10-2000.

The plaintiff must have gotten wind or known that the 1st defendant was shipping the said 4 motor vehicles to the 2nd defendant in Uganda and therefore managed to pounce on them as they were transiting from the port of Mombasa to Kampala. May it be added that on 30-9-03 the plaint which originally featured Yuasa Investment Company of Japan only as the defendant was amended to add the 2nd defendant registered in Uganda. The claim against both was the same (see above). But while it is not in doubt that the plaintiff got judgement against the 1st defendant, he has no judgement against the 2nd defendant/applicant who all along appears set to resist the claim against it. Accordingly when the plaintiff moved to attach the 4 said motor vehicles to satisfy the decretal sum against the 1st defendant, the 2nd defendant has come to court to resist that course of action arguing that the 4 motor vehicles are its property and the plaintiff cannot attach them because of his claim against the 1st defendant. But from all documents including bills of lading, port and transit papers, it appears that the 1st defendant was the shipper of these 4 motor vehicles destined to reach the 2nd defendant/applicant as the importer in Uganda.

Mr. Ananda for the applicant told the court that his client, as the importer and owner of these motor vehicles, had cleared them and paid all duties and expenses to facilitate the transit journey thereof to Uganda. That these motor vehicles were not the property of 1st defendant at all and so the attachment by M/s Kithemu was irregular and invalid. That it must be lifted. That the 2nd defendant was not some other party outside this suit, whose property had been attached for a defendant he did not know, in order to file objection proceedings under O 21 rr 53 to 57 Civil Procedure Rules. That the 2nd defendant was a party in the suit hence laying its claim as it had done in these 2 applications.

Mr. Odiaga for the plaintiff argued the point to the effect that since the goods were still in transit from the 1st defendant to the 2nd defendant, and because the applicant had not reproduced the whole terms and conditions contained in the bill(s) of lading involved in the importation of these motor vehicles, this should be interpreted against the 2nd defendant/applicant that the property in those 4 motor vehicles had yet to pass to it and therefore still remained in the first defendant. That for that reason the attachment was proper and it should remain. While arguing this matter both sides referred to various affidavits filed plus the annexures thereto which were basically shipping and transit documents. The court heard counsel well, perused the affidavits plus the annexures and looked at the authorities which were relied on. Reference may be made to those found vital in the determination to follow.

In this court's opinion there is ample evidence in favour of the applicant that these 4 motor vehicles are its property and unless the plaintiff got judgment/orders against it, they cannot at this juncture be attached pursuant to the judgment obtained against the 1st defendant alone. The two companies are separate entities incorporated or registered in the two countries thousands of kilometers apart. That in Japan, though having a name in some parts similar to that of Uganda, i.e. YUASA, exported the motor vehicles to the entity in Uganda. Save for this trade link it cannot be said that one company is a sister of the other.

Now going by the shipping and transit documents, this court says this: The 4 motor vehicles were shipped from Japan to Uganda via Mombasa port. The exporter is the 1st defendant while the importer is the 2nd defendant/applicant. The latter appointed M/s Tohel Agencies as the clearing agent and all documents show that after the motor vehicles arrived all taxes, duties etc were paid ending with Kenya Ports Authority Mombasa Port Release Order No. 050 84 68 issued to Tohel.

All in all this court is satisfied that the goods belong to the 2nd defendant and it cannot be assumed that since all details on the bill of lading were not reproduced on the copies filed, it must mean that the motor vehicles were still the property of the 1st defendant judgement debtor. There was no evidence in that direction. n sum the prayers sought in both applications are granted with costs.

Orders delivered on 15th September 2004.

J.W. MWERA

JUDGE