REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2983 OF 1994

ROYAL INSURANCE COMPANY OF EAST AFRICA & ANOTHER …...PLAINTIFFS

VERSUS

SUPERFREIGHTERS LTD & 4 OTHERS…….....DEFENDANTS

JUDGMENT

In a plaint filed on 17.8.94 and amended on 18.2.97 and 14.11.03, it is averred as follows: That during or about the month of August, 1993, the 2nd plaintiff purchased a consignment of 240 bags of simlaw seeds from J E Ohlsens Enke, Hamburg, which was insured by the 1st plaintiff. The consignment was shipped in one house to house container No WECU 550457.3. The 1st defendant was contracted by the 2nd plaintiff to clear the consignment at the port of Mombasa and to arrange for its safe transportation from Mombasa to the 2nd plaintiff's premises in Nairobi.

The 1st defendant then assigned the duty of transporting the container to the 2nd, 3rd, 4th and 5th defendants who were trading as Akil transporters. Akil transporters, acting as common carriers and on behalf of the 1st defendant (the plaintiff's clearing and forwarding agent) took delivery of the consignment from the port on 4.10.93, transported the same in their lorry registration number KWQ 705 to their warehouse where the defendants collectively chose to partially strip the container purportedly to lighten it by 80 bags for transportation to the 2nd defendant's (sic) premises in Nairobi. After stripping the container 80 bags were removed therefrom and transported to Nairobi in a different motor vehicle but the defendants did not verify the quantity of the bags that had remained in the container. Without verifying the quantity of the remaining bags in the container, Akil transporters then transported the container to Nairobi, their delivery note of 4.10.93 indicating that 160 bags were in transit. However, when the container was delivered to the 2nd plaintiff's premises and the bags counted only 126 bags were found. There was a shortfall of 34 bags.

The plaintiffs contend that in breach of their duty as common carriers, Akil transporters did not safely or securely carry the container and states that the 34 bags were lost while in possession of either the clearing and forwarding agent, Akil transporters or both of them, the suppliers having confirmed that 240 bags were shipped. The plaintiffs further contend that such loss of 34 bags was as a result of the defendants' negligence. The particulars of negligence pleaded are failure to provide a lorry capable of carrying the consignment intact instead of stripping the container, failing to count the bags left in the container, failing to exercise reasonable care in ensuring the safe delivery of the consignment, and that by stripping the container the defendants' knew or ought to have known that they were exposing the contents of the container to a possible risk of loss. As a result to the breach of the transporter's duty as common carriers the plaintiff has suffered loss and damage.

The plaintiffs particularized and quantified their respective loses in paragraph 14 of the said amended plaint. They pray for judgment against all the defendants jointly and severally for general damages, special damages, interest and costs.

In a defence to the amended plaint filed on 14.6.01, the 1st defendant avers as follows. Ignorance is professed of the 2nd plaintiffs purchase of the goods in question and their shipping. It denies assigning the duty of transporting the container to Akil transporters and contends that the said transporter was the approved or one of the approved transporters of the 2nd plaintiff. It denies that the transporters were its agents and avers that they were either independent contractors or agents of the 2nd plaintiff.

The details about the transportation of the goods from Mombasa to Nairobi and the stripping of the container are denied. The defendant also professes ignorance of the number of bags unloaded by the transporters. It does not know about the shortfall of 34 bags. It never had in its possession any of the bags which were allegedly lost. It denies that 240 bags were in the container or that it was negligent as alleged. Loss to the plaintiffs is denied.

The plaint does not disclose any reasonable cause of action in favour of the 1st plaintiff.

In their amended statement of defence filed on 29.5.1997, the transporters aver as follows. They were not common carriers but private carriers with limiting conditions on liability. They were contracted by the 1st defendant to safely transport a consignment of goods from the port of Mombasa to Nairobi. They deny that the 2nd plaintiff had purchased 240 bags which were shipped in one container. They were contracted by the 1st defendant with the authority of the 2nd plaintiff under their own terms and conditions stipulated in their delivery note dated 4.10.93. The 1st defendant and the

2nd plaintiff knew that their motor vehicle KQW 705 could not carry the full capacity of the container from the port of Mombasa to Nairobi and hence the instructions to remove 80 bags from the container leaving. The particulars of negligence are denied. They took possession of the consignment from the port of Mombasa under the instructions, orders and constant supervision of the 1st defendant who was an agent of the 2nd plaintiff. No bags were lost on transit and they safely delivered what they took possession of. If any bags were lost on the way, the defendants would not be liable under their specific terms and conditions of carriage. If the plaintiffs suffered loss of 34 bags the loss was due to their negligence in that they failed to ensure that they had actually received delivery of 240 bags by counting the goods in the container on arrival at Mombasa.

Since the pleadings were concluded the 1st plaintiff has withdrawn from the suit and the claim against the 2nd defendant has abated. Accordingly, the parties to the suit now are the 2nd plaintiff on the one hand and the 1st, 3rd, 4th and 5th defendants on the other hand.

On the basis of the pleadings as they stand, I think the principal issues to be answered in this trial are (i) how many bags of seed were in the consignment shipped to the 2nd plaintiff in Mombasa; (ii) were 34 of those bags lost either in the possession of the 1st defendant or the 2nd, 3rd, 4th and 5th defendants (the transporter) or both of them as a result of their alleged negligence; (iii) if yes, who is to bear the loss; (iv) what is the quantum of such loss?

The plaintiff called only one witness in support of his case. He was Nathan Kiprop. The witness testified that the company imported 240 bags of seed from Denmark. In support of their case, he referred to a list and bundle of documents filed by the plaintiff on 12.11.02. The bill of lading dated 6.8.93 shows that 240 bags of simlaw seeds were consigned to the plaintiff for discharge at the port of Mombasa. The clear report of findings prepared by Cotecna Inspection S A on behalf of and for the use of Kenyan Authorities dated 17.8.93 also shows that the consignment consisted of 240 bags. The packing list by the shippers also shows that 240 bags were packed. The invoices from the seller also show that same were in respect of 240 bags. The plaintiff paid sterling pounds 65,994.55 for the said goods. The bill from the bank shows that the plaintiff paid an amount of Kshs 7,229,337/= inclusive of bank charges for the goods. In addition freight and insurance charges in the sum of Kshs 251,890.80 and Kshs 110,581/= respectively were paid as per import entry form. The witness also testified that it was the plaintiff company which instructed the

1st defendant to clear the goods on its behalf. The making of arrangements to transport the goods was part of the assignment. The plaintiff company did not give Akil transporters any instructions on the matter. There is a delivery note dated 4.10.93 and acknowledged by the plaintiff on 6.10.93 whereby plaintiff acknowledges receipt of 126 and not 160 bags indicated thereon. The said delivery note also indicated that 80 bags were to follow later. The witness was present when the said goods were received. There is a goods received note dated 6.10.93 also confirming that the plaintiff received 126 bags from the transporter. The witness confirmed that the transporter subsequently delivered another 80 bags as per delivery note dated 5.10.93 and the goods receipt note of 6.10.93. The witness testified that 34 bags were found missing when they physically counted the goods on delivery of the first consignment. They notified the transporter of the missing bags. There is a fax letter dated 7th October, 1993 addressed to seller which was copied to the transporter giving the number and particulars of the bags found to be missing. The seller replied that all goods bought were staffed into the container as per the clean report of findings. On 12.10.93 the clearing agent wrote to the transports intimating their intention to claim the value of the missing 34 bags from them. In the same letter the plaintiff was requested to advice on the value of the 34 bags. On 18.10.93, they advised the value as Kshs 4,698,333.60. The clearing agent did not dispute the value of the said bags. In a letter dated 19.10.93 addressed to the plaintiff, the clearing agent concedes that the seals on the container were intact before the container was opened by the customs for verification.

The operation to remove 80 bags therefrom and to secure the container with padlocks by the clearing agent and the transporter was under the direct supervision of the clearing and forwarding manager of the 1st defendant. The first defendant was unable to explain the shortfall of the 34 bags in view of the measures taken to secure the container and suggested that the same could only be attributed to miscount or pilferage prior to the arrival of the container at the port of Mombasa in light of the non existence of possibility of removal of any bags from the container from the time of verification to its final delivery. The witness testified that the possibility of less than 240 bags being shipped from the seller was dispelled by the bill of lading and the report of the clean findings which indicated the consignment to consist of 240 bags. The witness further testified that they replied to the clearing agent's letter on 22.10.93. They stated that the decision to open the container at the transporter's premises having been made by the clearing agent, they expected them to assume responsibility for ascertaining the contents thereof. It was expected they would recount the bags after the unloading of some. The witness contended that if the container had been transported as it was, they would not have blamed the first defendant for the shortfall. The witness further testified that by reason of the defendants having broken the container, the plaintiff could not have an effective claim against the suppliers for an independent count of the bags was not possible after that. He blamed the defendants for the loss of the bags whose value was Kshs 4,698,333.60. He also prayed for costs and interest.

In cross examination, the witness stated that the transaction in question was the first time the plaintiff's goods had been transported by Akil transporters. The transportation contract with Akil was signed by the clearing agent and there was no direct contract between the plaintiff and Akil. The plaintiff did not send any representative to Mombasa when the consignment arrived. Their agent did not inform them of the decision to open the container. He was not aware whether Superfreight verified the contents of the container before handing over goods to the transporter.

He was one of the persons who counted the bags when the consignment arrived in Nairobi. The container was securely padlocked and the keys were delivered to them after the arrival of the container. Although the sender's signature was not on the delivery note, he received the goods as he had received the keys to the container and knew where the goods had come from. The clearing agent was informed of the shortfall the same day. The agent blamed the loss on the possible short count and load by the suppliers as per letter of 19.10.93. The agent also conceded that he did not count the remaining bags in the container after the 80 bags were removed at the Transporter's premises. The witness insisted that it was the duty of the clearing agent to verify the contents of the container. He conceded that in their letter of 22.10.93, they blamed their clearing agent for the loss. He also conceded that they had no evidence that the 34 bags were stolen when the container was opened at the Transporter's premises contrary to the assertion in the letter of 22.110.93 that that was the case.

The plaintiff company paid Kshs 7,031,758.27 for the entire consignment at the port.

In re-examination, the witness reiterated that he had no reason to doubt that the consignment received at their Nairobi premises came from the sender. He also pointed out that in the letter of 12th October, 1993 addressed to the transporter by the clearing agent, the latter blamed the loss of 34 bags on the transporter. He further clarified that the insurance, clearing, transport and bank charges claimed were an apportionment in respect of 34 bags as a fraction of 240 bags.

The first defendant did not attend the trial although it was duly served with a hearing notice. And the 2nd to the 5th defendants, though represented by counsel at the trial, elected not to call any evidence.

The parties filed written submissions which are on record and spoke to them on 12.11.03.

Having considered the pleadings, the plaintiff's evidence and the submission made on behalf of the parties I make the following findings with regard to the principal issues. The number of bags in the container shipped to the 2nd plaintiff were 240. I make the finding on the basis of the plaintiff's own oral evidence and the documentary evidence tendered.

The plaintiff's evidence shows that it purchased 240 bags from the seller and both the packing list from the seller, the bill of lading, the clear report of findings and the invoices indicate that 240 bags were consigned to the 2nd plaintiff. On that evidence, I think it is more probable than not that an amount of 240 bags of seed maize was bought in Denmark and shipped to the plaintiff in Mombasa. I also find that of those bags only 206 were delivered by the transporter to 2nd plaintiff's premises in Nairobi. There was thus a shortfall of 34 bags. Where were those bags lost? On the evidence on record, the container arrived at the port of Mombasa intact. It was cleared at the port and loaded in the Transporter's lorry KWQ 705 in one piece and delivered to their premises. The container was there stripped at the suggestion of the transporter and the contents delivered to the 2nd plaintiff at Nairobi in two loads of 126 and 80 bags respectively. The containers delivered in Nairobi were securely locked by both the transporter and the clearing agent and they were unopened. In those premises two clear findings must be made. First, the unbroken container cleared at the port and delivered to the transporter's premises contained 240 bags. Secondly, the number of bags delivered to Nairobi in two securely locked containers which were not tampered with enroute were 206. The 34 bags must therefore have been lost when the consignment was in the possession of the transporter in their own premises between the time the container was broken and stripped of 80 bags and the subsequent loading of the goods for transport to Nairobi. In short, the answer to the second principal question is that the 34 bags were lost in the possession of 2nd – 5th defendants. The next question is who is to bear the loss.

From the plaintiff's unchallenged evidence, the plaintiff's contract for clearing and forwarding the said goods was with the 1st defendant. It was a principal/agent relationship. Accordingly, any contract of carriage made by the agent with the transporter was in law a contract between the plaintiff (consignee) and the transporter. Be that as it may, from the pleadings, the plaintiff has elected to predicate its cause of action against the defendants in tort rather than contract. It is claiming damages for breach of duty of care. The transporter denies liability on two grounds: first, that they were not common carriers as alleged but private carriers, and accordingly, they could not be liable to the plaintiff except for proved negligence; and secondly, if they were negligent, they were exempted from liability by the express conditions in the contract of carriage in clauses 7 and 8 thereof to the effect that goods are carried at owner's risk and that they are not liable for loss, damage, deviation etc of or to a consignment or any part thereof no matter how such loss was caused and whether the company was negligent or not. In those premises, the first sub issue is whether Akil were common carriers or private carriers. None of the advocates ventured into the distinction. They contended themselves with categorical assertions on whether the 2nd – 5th defendants were or were not common carriers. My own research reveals the following instructive opinion by Sir Charles Newbold, P in *Express Transport Co Ltd v BAT Tanzania Ltd* [1968] EA 443, at P 447 letters F-I:

"There has never been in England complete certainty as to the attributes a carrier must possess before he can be said to be a common carrier as opposed to a private carrier. It is clear, however, that before a carrier can be said to be a common carrier of goods he must hold himself out as ready to carry the goods of any person and not of a particular person. There is no necessity that there should be a fixed route or a stated timetable; and the fact that the carrier refuses to carry certain goods, for example, dangerous goods,

does not mean that the carrier is not a common carrier. I have come to the conclusion, after a close examination of a number of cases and bearing in mind that the judgments in each case are related to the facts of the particular case, that the essential attribute which determines whether a carrier is a common carrier is that the carrier must hold himself out to the public as prepared to carry generally for the public and not for particular members thereof.

If, therefore, a carrier reserved to himself, either by public notification or by course of practice, complete freedom of selection as to the persons for whom he will carry the goods, he is not a common carrier. On the other hand, if a carrier holds himself out as prepared to carry generally for the public, the mere fact that he may refuse for good reason in a particular case to carry for a particular person does not mean that he ceases to be a common carrier".

The test therefore of whether a carrier is a common carrier as opposed to a private carrier is whether he holds himself out as prepared to carry generally for the public. And obviously that is a question of fact.

In that regard, I must say that no evidence was tendered by any party on the matter. Akil would have the issue resolved on the basis of the law of pleadings only. In that regard, it was argued on their behalf that having in their defence denied that they were common carriers and asserted that they were private carriers, and the 2nd plaintiff having not replied to such statement of defence, the 2nd plaintiff must be deemed to admit that Akil were not common carriers. Order VI rule 9 (1) provides:-

"Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it."

Rule 10 of the same order provides –

"(1) If there is no reply to a defence, there is a joinder of issue on that defence;

(2) Subject to subrule (3) –

(a) there is at the close of pleadings a joinder of issue on the pleading last filed;

(3) There can be no joinder of issue on a plaint or counterclaim."

My understanding of the above provisions in the context of the matter at hand is this. The transporter having pleaded in its defence that it was not a common carrier, as alleged in the plaint, but that it was a private carrier, an issue was joined on that defence as to whether the defendant was not common carrier but a private carrier and such joinder of issue operated as a denial of the fact. In the premises, the issue of whether or not the transporter was a common carrier or a private carrier was open to adjudication on the basis of evidence and was not concluded by the pleadings.

In that regard, the principle of adjective law is that he who asserts must prove. The 2nd plaintiff having asserted that the 2nd – 5th defendants were a common carrier, it was incumbent on them to prove that by leading evidence that the said defendants had held themselves out to the public as prepared to carry generally for such public and not for particular members thereof. In the event, the plaintiff did not call any such evidence and it has accordingly failed to discharge the evidential burden of proof which it bore that the defendants were a common carrier. In the premises it is not open to find liability against it unless negligence is proved. Was any such negligence proved?

Having already found that the 34 bags were lost while in the possession of the transporter and the transporter having failed to explain the loss, I think this Court is justified to invoke the rule of evidence (which is sometimes, erroneously though, said to be as a maxim or principle of law) expressed in Latin as *res ipsa loquitor*. In the absence of any explanation as to how the loss occurred, the Court must presume that it was as a result of the Transporter's negligence for goods in the possession of a bailee do not just disappear in thin air without some intervening human act or omission.

The first defendant, too, cannot escape liability in the circumstances of this case. Indeed the plaintiff blames the 1st defendant for the loss for not verifying the contents of the container before handing over the goods to

the transporter and not counting the bags left in the container after its stripping, for participating in the stripping of the container knowing or having reason to have known that they were exposing the contents of the container to a possible risk of loss, and generally failing to exercise reasonable care in ensuring the safe deliver of the consignment. I accept that the 1st defendant was negligent in those respects. Accordingly, I find that both the 1st defendant and the 3rd, 4th and 5th defendants are liable to the 2nd plaintiff for its loss.

The last issue is the quantum of such loss. The 2nd plaintiff pleaded special damages in the sum of Kshs 4,698,333.60. Its evidence thereon was not seriously challenged. I will accept it. In the result I find that the plaintiff's loss arising from the shortfall of 34 bags in the delivery of the consignment is proved in the sum of Kshs 4,698,333.60.

The upshot of this trial is that there will be judgment for the 2nd plaintiff against the 1st defendant and the 3rd, 4th and 5th defendants jointly and severally for Kshs 4,698,333.60 together with interest thereon at court rates and the costs of the suit.

Dated and delivered at Nairobi this 8th day of December, 2003

A.G. Ringera

……

JUDGE