



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 1406 OF 1994

TOYOTA (KENYA) LTD PLAINTIFF

VERSUS

EXPRESS KENYA LTDDEFENDANT

JUDGEMENT

On 13th April, 1994 the plaintiff filed a suit in this court in this court claiming from the defendants a sum of Kshs.628,044/= with costs of the suit and interest on the amount at court rates from the date of filing suit until full payment thereof.

According to the plaint, the defendants were, at the time of the event subject to this suit, a firm of clearing and forwarding agents generally appointed by the plaintiff as its representatives at the port of Mombasa for the purposes of receiving and clearing the plaintiff's various shipments of goods sent to the plaintiff on numerous occasions by its suppliers, and thereafter transport the subject goods to the plaintiffs order.

Then the defendants in addition therefore at all material times, were a common carrier of the plaintiffs goods for reward.

That on or about the 26th December, 1991 Messrs Toyota Tsusho Corporation of Nagoya Japan did ship some 61 packages of New Toyota spare parts already prepaid for by the plaintiffs' ex-ocean competence which vessel docked at the port of Mombasa on 21st January, 1992.

That the defendants' servants and/or agents were informed of the arrival of the said goods by Messrs – Walford Meadows, the shipping agents and, as is the normal practice, the defendant's agents were in attendance at the port and participated in the verification process with the customs authority and upon satisfying themselves that the consignment comprised all the specified items in good order and condition, duly locked secured and sealed the subject container, which, henceforth, was in the custody of the defendant as carriers on behalf of the plaintiff.

That in the premises, the defendant was under a duty as bailers and/or common carriers for several of the said goods to take reasonable care of the said goods and deliver them safely to their destination to wit, the plaintiff's premises in Nairobi.

That on or about 17th February, 1992 and in breach of the said contract and/or duty as clearing and forwarding agents and as a common carrier the defendant delivered some one container in motor vehicle registration number KAA 146 H and upon verifying the contents of the said container the plaintiff noted that there was a short delivery of the consigned goods and the defendant was therefore in breach of its duty as a common carrier and in contract as bailer in reward.

The particulars of breach of duty of the defendant are set out in paragraph 7 of the plaint while particulars of their negligence for loss of part of the plaintiffs consignment are contained in paragraph 8 of the said plaint – hence this suit and the prayers as herein before stated.

A defence filed herein on 4th August, 1994 and amended on 20th December, 1999 denies owing a duty of care as bailers or common carriers to the plaintiff as alleged in paragraph 6 of the plaint and also denies that it was a bailee or common carrier for reward or particulars of contractual breach of negligence in the performance of its duty in this exercise.

The suit was heard in this court on 11th July, 19th July, and 18th October, 2001 when submissions were made. The plaintiff's side called 4 witnesses while the defendant called one witness.

The first plaintiffs' witness is a marine insurance surveyor who was instructed by his principles, Lion of Kenya insurance company limited, to proceed to the premises of motor mart group limited the plaintiff being part of it, to examine delivered packages by the defendant. These packages were in form of various New Toyota Genuine parts.

When the witness proceeded to the premises, he found the packages had been offloaded from container No.MOHU2410273 and were on the floor at the entrance of Toyota – Motor Mart Group.

The witness, jointly with an official from the consignees brokers, examined these packages.

He testified that at the end of the examination, he found a lot of packages opened and made a physical count of the parts inside the opened packages; comparing them against the suppliers packing list.

Thereafter the exercise, the witness established that several parts were missing from the opened packages.

According to the witness the driver of the truck which had delivered the parts witnessed the opened package but was not one of the parties who carried out the counting.

That there were a number of packages opened in which various parts were recorded short as recorded in his survey schedule.

The witness compiled his report and quantified the loss based on lost sum insured, which came to Kshs.609,224/=.

In cross examination, the witness stated that when he went to the premises of the plaintiff, he found the plaintiff staff checking the packages and could not state what particular time the parts went missing.

The witness opined that the parts must have been stolen while under the custody of the defendant because while the seals were received intact the cartons were opened.

Ruth Njoki Maina (PW2) is an underwriter in marine department at Lion of Kenya Insurance Company Limited.

During 1992 her employer received a claim from the plaintiffs for spare parts stolen while being imported. That the adjusted loss was Kshs.609,224/= which sum was settled on 9.7.92. According to the witness this is the amount now being claimed from the plaintiffs against the defendant on behalf of the insurance company under the rules of subrogation.

Naomi Waithera (PW3) was an employee of the plaintiff at the material time who worked in parts department. That during 1992 she was in receiving section where she received spare parts locally and from abroad. According to her evidence when the container arrived she noticed the seals were there but when it was opened, there were some cartons open with some items missing.

The witness assisted PW1 to check and count contents of the opened cartons.

That they compared contents in the packages with the invoice to ascertain what was missing and then PW1 compiled a report.

Stephen Karongo Mboe (PW4) worked at Lion of Kenya Insurance Company Limited at the time of this incident. He was the one who signed the insurance certificate issued by Lion of Kenya Insurance Company Limited to the plaintiff.

Rebecca Wambui Munge (PW5) worked at the plaintiff company during the time in question and she identified the subrogation from wherein the insurance company permits insurer to use its name to make a claim.

The defence witness was Jane Victoria Migongo; a claims manager with the defendant company. She testified that in the present case the defendant gave the plaintiff a quotation to show the costs of bringing cargo from Mombasa through inland container depot at Embakasi to their bond at Nairobi.

That after giving the quotation the defendant was given the job. That the quotation contained conditions for the conveyance of the goods.

The witness denied that the defendant is a common carrier. She said that the cargo was released to the defendant on 14th February, 1992 at Mombasa port where a release order was given for use in payment of port charges.

That between the time goods arrived at the port to the time of release of the same to the defendant it was Kenya Ports Authority in charge.

The witness gave the procedure at the port for the examination and verification of the goods in ascertaining payment of duty or that they conform to shipping documents.

That the customs officer chooses some packages at random and opens them with the help of packing list to confirm what kind of cargo is contained in the container.

That in the case subject to this suit 5 parcels were opened and the customs officers confirmed that this was the cargo declared to the customs as having been imported.

According to the witness, the defendant uses its repairer to resea the packages opened so as to fit back into the container and that in this case the firm of Kihanya Ships Contractors were used.

The witness testified that if customs officer concerned discovered that any of the 5 packages opened had been tampered with he would have ordered the container to be disturbed with all the packages being opened to be checked one by one.

According to the witness the container was released on 14th February, 1992 evening and it spent the night at the yard of the defendant and was released on 15th February, 1992.

The defence witness stated that during the offloading and checking the container the defendant was not involved and that they did not verify contents of the container at the port.

On behalf of the defendant the witness denied liability.

In cross examination the witness stated that if there was anything went wrong during verification the defendant would have lodged a protest immediately with the Kenya Ports Authority and a 100% verification would have been ordered which was not the case herein. She also stated that offloading of the cargo is only done after checking and being satisfied of the way it looks.

Counsel for both parties submitted in favour of or against this suit and this is the material the court is to write and deliver judgement thereon.

Paragraphs 7 and 8 of the plaint contain the particulars of breach of contract and/or duty and negligence on the part of the defendant and it is upon the plaintiff to prove each of these particulars on a balance of probability in order to get judgement in its favour.

Where is evidence of such proof in this case? Counsel for the plaintiff submitted that the defence witness had admitted that when goods were verified at the port everything was intact and that the defendant placed a seal thereon and moved the container to its yard.

She asked what security measures were put in place at the defendant's yard which were not disclosed.

That during the conveyance of the goods from Mombasa to Nairobi there was one stop over when the container was left in the open with the turn boy sleeping in the cabin, thus leaving goods at risk.

On another note, PW1 was sure the goods went missing while in the custody of the defendant hence it was liable therefore.

But the evidence adduced herein tends to agree on both sides that after random picking and verification of the contents of the packages, the container was sealed and that on conveyance to the plaintiff's premises, these seals were found un-interfered with. Naomi Waithera (PW3), at least, said so.

However, she testified that whenever any cargo arrives at the plaintiff's yard, an insurance man is called before the goods are offloaded and that this is what happened in this case. She referred to Kimondiu (PW1) as the insurance man.

But PW1 did not agree to this. His evidence was that when he arrived at the scene packages had already been offloaded and were at the entrance of the plaintiff's warehouse.

This tends to reinforce the view that when the cargo was delivered at the plaintiff's premises everything appeared normal, hence the offloading without the "insurance man".

I do not know what the standard practice is in such case as to the sealing of the container after verification but I would expect more than one seal thereon, one for the clearing and forwarding company and the other for the plaintiff, amongst others. This is why PW3 talks of having seen seals thereon and not a seal. If this is/was the case, how can it be affected by what security measures were put in the place when the cargo was kept at the defendants yard after release to it from the customs yard or during the stop over on the way to Nairobi.

And the question of the defendant's custody of the goods; when does it arise? I would not say the defendant has custody of the goods before verification by the customs officers but it is at that stage the consignor (importer) has to satisfy that the cargo conforms to what is said to have been imported for customs and exercise purpose. If not, then the clearing and forwarding agent (herein the defendant) will have nothing to convey.

If this is so, I would expect the plaintiff to be represented at the verification stage and this is why its seal should be fixed on the container after verification.

And it is at the verification stage where there is this random picking of packages for the purpose of the said verification. Thereafter, the package picked randomly are resealed.

But in this case one of the resealed packages, No.062, was one of those found to have been tampered with. Who then between the verifiers and/of resealers would be blamed in this kind of loss.

To my mind either the two would certainly be blamed in this kind of mess and if so can the court be

satisfied, in the circumstances, that the plaintiff has proved the particulars of the defendants breach of contract/duty and/or negligence? I am not so sure that it can.

On another note, while the plaintiff's insurer had discovered loss of some of the goods and that the plaintiff and the defendant were haggling over liability for such loss, it hurried to settle the adjusted loss of Kshs.609,244/= without any document to show settlement of such huge sum of money!

Whatever explanation is given for this serious anomaly, I find it strange and mysterious.

I am not satisfied as to when the packages were tampered with and/or that even if it was, it was not done when the defendants were in custody of the goods. No evidence has been adduced to convince me otherwise.

In consequence of the above observations, this suit is dismissed. But since the two parties have been carrying on this business together for a long time, and so are like friends, I direct that each party do bear their own costs of the suit. Orders accordingly.

Delivered this 29th day of January, 2002.

D.K.S AGANYANYA

JUDGE