



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO.607 OF 2001**  
**LIBERT FORWARDERS (K) LTD.....APPLICANT/PLAINTIFF**  
**=VERSUS=**  
**KENYA PORTS AUTHORITY.....RESPONDENT/DEFENDANT**

**R U L I N G**

This application is brought under Section 3, 3A of the Civil Procedure Act, Order XXXIX Rule 1, 2, 3 and 9, and Order VI rule 17 of the Civil Procedure Rules. It is dated 30.11.2001 and seeks mainly that the Defendant/Respondent and/or its agents be compelled to release containers Numbers INBU-3649543 and TPHL-8211638 and the cargo therein to the Plaintiff/Applicants herein.

The facts of the case are that the Applicant is a Clearing Agent who operates at Mombasa. It was appointed by another company called Avis Company Ltd of Kampala to clear and forward to Kampala the above mentioned containers, containing 160 drums of 32.8 metric tons of white oil. The latter is said to be a perishable commodity.

The Bills of Lading confirm that the containers are shipped in favour of Avis Company Ltd of Kampala; Uganda. The Import/Transit Declaration shows that the Applicant/Plaintiff is the agent, while the consignee is the said Avis Company Ltd. The Kenya Ports Authority Release Order also gives the Applicant/Plaintiff as the clearing agent while the importer is shown as the said Avis Company Ltd. And finally, the supporting affidavit by Sammy Wabwire Baraza the Manager of the Applicant/Plaintiff company confirms in his paragraph 3 of the affidavit that Avis Company Ltd contracted the Plaintiff/Applicant as its agent to clear the two containers for them. The goods were accordingly cleared and the Plaintiff/Applicant obtained a clearing document called Mombasa Port Release Order. Thereafter, all that remained to be done to complete the process was the release of the containers to the Plaintiffs/Applicants by the Defendant. It was at this moment in time when the Defendant/Respondent refused to release the consignment. The ground given for the refusal is that the consignment belonged to the importer, the said Avis Company Ltd., who had for sometime through another clearing agent called Interborder Express Agencies, owed them (the Defendants/Respondents) a sum of Kshs.327,000/- and that the latter had a right under the law to detain the consignment either until the said sum is settled or it could even sell the consignment to raise the sum outstanding subject only that the sum so outstanding was part of unpaid rate or port charge due from the said Avis Company Ltd in respect of any goods earlier cleared through the Port. Upon this refusal to release the consignments by the Defendant/Respondent, the Plaintiff/Applicant proceeded to file this claim together with this application on 30.4.2001.

The Applicant/Plaintiff through Mr. Gikandi, argued that Defendant/Respondent has no legal right to refuse to release the consignment because it had fully paid to it the outstanding rates or charges and that it had already given to the Applicant a release order. That at that stage nothing remained to be done to fulfil the contract of clearing the consignment. That further, at that stage the process of clearing was over and detention of the consignment was unjustified and untenable under any law. Furthermore that the earlier failure to pay the said sum of Kshs.327,000/- by Avis Company Ltd., who was its principal in the clearing of the relevant consignment, had legally nothing to do with the Plaintiff/Applicant who was a mere clearing agent and was not connected with the earlier default by another clearing agent – the Interborder Express Agencies – of paying Kshs.327,000/-. Mr. Gikandi concluded that the court should proceed to issue an order to compel the Defendant to release the consignment.

Mr. Shah, in reply, stated that the Applicant/Plaintiff cannot obtain the mandatory injunction applied for because –

- a) *The Plaintiff has no capacity as an agent of the said Avis company Ltd., to sue independently.*
- b) *The order sought is not available under Order 39 of the Civil Procedure Rules as the prayer is for a mandatory injunction while the order 39 above, provides only for prohibitive injunctions.*
- c) *The applicant has not demonstrated that he has a prima facie case and has failed to prove all the necessary or relevant conditions required before an injunction, especially, a mandatory injunction, can be issued.*
- d) *The granting of the order sought is as good as granting the final order sought in the plaint. He referred to prayer (a) in the plaint.*
- e) *That the plaint should contain a sustainable claim to justify the granting of an injunction.*
- f) *That in any case, the Defendant was under S.26 of the Kenya Ports Authority Act (Cap.391) entitled to detain the said consignment until any earlier outstanding rates or charges are paid or even sell some to recover the rates or charges.*

There is no dispute and it is indeed confirmed by the Applicant/Plaintiff's affidavit that it, at all material time, acted merely as an agent of the said Avis Company Ltd in the process of clearing of the relevant consignment hereinabove mentioned. The Defendant/Respondent knew from the beginning that the Applicant was merely an agent of the Respondent and it so dealt with the Applicant. Did the Applicant/Plaintiff accordingly, have the independent capacity to sue the Defendant? According to the general rule of agency as given on page 400 of 'Bowstead on Agency' under the title

*"Rights of Agents Against Third Parties" it is stated:- "Where an agent makes a contract, solely in his capacity as agent, between principal and third party, he may not sue the third party on it ..... the agent does not purport to contract personally, and so cannot sue. This applies even where the agent is a del credere agent ....."*

This same principle is re-stated in the 'The Law of Agency' by G.H.L. Fridman (2nd Ed.) on page 169 top where it states:-

*".....the normal, general, effect of the making of a contract by the agent on his principal's behalf is that the agent is not a party to the relationship created by such contract. He cannot be sued by the third party on the contract he has made for his principal, nor can he sue the third party on such contract ....."*

The submission made in this application by Mr. Shah is covered by the above general principle. The Applicant all the time acted as an agent of Avis Company Ltd in the process of clearing the consignment. It confirmed this relationship affirmatively in the affidavit sworn by its manager in support of this application. It is the finding of this court therefore that the Applicant/Plaintiff has no legal capacity in

respect to this case to sue the Respondent/Defendant. There is no direct contractual relationship between the Applicants and Respondents herein since one merely acted as the agent of the other and no more. In proper circumstances in fact this court could be in a position to listen and consider whether there are not enough grounds on the record to consider an application to strike out the claim as showing no cause of action under the proper rules of procedure. For similar grounds I hold that under the circumstances the Applicant/Plaintiff has failed to prove a prima facie case with a probability of success upon which inter alia, an injunction order could be grounded. Furthermore, I do not believe that this court's refusal to grant the injunction sought would make the Applicant suffer irreparable damage which would not be adequately compensated with an award of damages. The sum involved is Kshs.327,000/- not too great a sum to the two parties involved in the case. The Applicant could choose to clear the amount on terms or without prejudice, subject to the result of this case, instead of letting the consignment goods get damaged or wasted. On the other hand if the Defendant lost this case eventually, it certainly, in my opinion, will be able to pay any kind of damages that may be awarded. The above consideration in my view have adequately disposed of this application.

However, it is appropriate to consider the argument raised by Mr. Shah for the Respondent concerning the provisions of Section 26 of the Kenya Ports Authority Act (cap.391) of the Laws of Kenya. The said section provides as follows:-

*“(1) Where any person fails to pay on demand made by an authorized employee any rate or charge due from him in respect of any goods, the Authority may detain the whole or any part of the goods or, if they have been removed from the possession of the Authority, any other goods of such person which may be in, or may thereafter come into, the possession of the Authority.*

*(2) Where any goods have been detained under sub -section (1), the Authority may, if the rate or charge due is not sooner paid, sell by public auction sufficient of the goods to produce the rate or charge so owing and all the expenses of such detention and sale .....*”.

It is my finding that this section gave the Defendant/Respondent power and authority to detain any property belonging to Avis Company Ltd for any past rates or charges arising from a similar former transaction such as the one in issue. It is my further finding that as long as the Respondent/Defendant had a bona fide claim however mistaken, against Avis Company Ltd., it could under the above section 26 of the Ports Authority Act, detain Avis Company Ltd's consignment in question in this case. I hold that in this case the Respondent/Defendant's claim against Avis Company Ltd has not been shown to be mala fides and that it may have existed and may have been justified. I accordingly hold that Respondent/Defendant's act of detaining the consignments, the subject matter of this claim was justified and lawful.

The said section in fact even gives the Applicant authority to auction the consignment in question to raise not only the existing debt but also any costs or charges of storage and sale.

The upshot of all my considerations herein above is that the Applicant's application for a mandatory injunction fails. It is hereby dismissed with costs to the Respondent.

**Dated and delivered at Mombasa this 6th day of February, 2002.**

**D.A. ONYANCHA**

**J U D G E**

**Plaintiff represented by Kilonzo for Wameyo for Plaintiff.**

**Defendant represented by Shah for Defendant.**

