



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1279 OF 1997

PANALPINA (K) LIMITED PLAINTIFF

VERSUS

ELEPHANT SOAP INDUSTRIES LIMITED..... DEFENDANT

RULING

The plaintiff Panalpina (K) Ltd sued the defendant Elephant Soap Industries Ltd seek a sum of Kshs.605,832/= plus interest thereon at the rate of 24% p.a. from the 27th day of December, 1995 until payment in full, and costs of the suit. The plaintiff's cause of action arises from paragraphs 3,4 and 5 of the plaint, para 3 says,

“On divers dates between the 24 th day of August, 1995 and the 27 th day of December, 1995, the defendant instructed the plaintiff to transport its goods from Mombasa and deliver them to its consignees the International Committee of the Red Cross at Goma in Zaire for valuable consideration”.

Paragraph 4 states,

“That the plaintiff did safely deliver the goods to the said defendant's consignee and the said consignee signed the plaintiff's delivery note signifying due and satisfactory receipt. And the plaintiff will crave leave of this court to rely on the said consignment notes for their full intent and purport”.

And finally paragraph 5 reads,

“The plaintiff then duly issued its invoice for settlement by the defendant. The defendant however omitted to pay the sum of Kshs.605,832/= thereof without reasonable cause. And the plaintiff now claims this sum, being the balance of the agreed consideration for services rendered”.

The defendant denied the plaintiff's claim, and in para 5 denied that,

“The plaintiff safely delivered the goods entrusted to it as bailee or at all at the destination and puts the plaintiff to strict proof thereof and ADDS THAT the plaintiff as such bailee short delivered, and also delivered damaged goods to the consignee.....”.

Paragraph 6 reads,

“In the premises the defendant suffered a sum of Kshs.456,290/= for short delivery and damaged goods handed over to the consignee, which sum the defendant claims from the plaintiff”.

On the day of the hearing of the suit, the plaintiff and his lawyer were present, but the defendant's

directors did not appear in court. I conducted a mini-call over of all cases allocated to me for hearing. I did this at 9.00 a.m. and confirmed this case for hearing at 11.00 a.m.

At 9.00 a.m. the defendant's counsel was present. He confirmed that the hearing notice was served on the defendants through their lawyer, however, the defendant's directors were out of the country and the advocate asked for adjournment which I refused and directed that the hearing must proceed.

I recorded the evidence of Yes Desai, the Airfreight Manager with the plaintiff company, which is a transport and freight forwarding agents. According to Desai, the defendant contracted them to deliver soap from Nairobi to Goma in Zaire, at a total cost of Kshs.3,785,922/=. Of this, a sum of Kshs.3,180,090/= was paid, leaving a balance of Kshs.605,832/=. Desai said that the plaintiff delivered all goods as agreed to the consignee UNHCR, Goma Zaire.

He referred to para 3 of the plaint, which was admitted by para 4 of the defence. After delivery, the consignees were issued with delivery notes which they signed. The originals were then left with the consignee and copies were retained by the plaintiff. These were produced in court as Ex.1. The consignees acknowledged receipt of goods which were not rejected.

Desai testified further that there was a claim by the consignees that some of the goods were moist and wet, as the goods, were soap to be distributed to refugees. The delivery note is dated 7th December, 1995. A total of 2000 cartons were delivered to Goma. Out of that, 267 cartons were rain soaked upon delivery, but the consignees did not reject them.

Desai produced as Ex.2 a letter dated 26th November, 1996, written to the consignees. The letter was produced as Ex.2. The letter speaks for itself, really. The 3 consignments were paid after delivery on various dates. The balance was not paid. The plaintiff only did the transportation, and latter requested the defendant to return to alleged damages goods. This was done in a letter produced as Ex.3. The consignee accepted the goods as used them. The defendant did not return any damaged goods rejected by the consignee.

There was no written contract between the plaintiff company and the defendant. What there was was an implied contract to collect soap from the defendant's premises in Mombasa and transport it by road to Goma in Zaire. Mr. Desai referred to a claim from the consignees that one of the tracks overturned and they had to hire another vehicle, and incurred expenses. There was no evidence of that, and therefore no justification for withholding the balance of payment of Kshs.605,832/=.

The witness identified another letter dated 24th April, 1996 written by the defendant to the plaintiff. It gave a list of missing cartons and damaged cartons and put a claim on it. The plaintiff is willing to compensate the defendant for the 39 cartons, but disputes the damaged cartons because they requested for the return of the said damaged cartons but none were returned.

The plaintiff is not willing to pay for the damaged cartons because they were not totally useless. They were used. The plaintiff is also not willing to pay for the accident vehicle as there is no evidence that there was any accident. The plaintiff had actually contracted a company TMK Transport to undertake the actual transportation on their behalf. They had sent the plaintiff a letter dated 23rd July, 1996 produced as Ex.4.

The defendant's did not adduce evidence and did not call any witnesses as none had come to court. They decided to close their case.

In their submissions, the plaintiff's counsel repeated the evidence given by Desai, and also the evidence in the pleadings. The defendant's counsel also attacked the defence filed by the defendant calling it a "mere sham". The evidence adduced by the plaintiff's witness is on record and is self explanatory. The letter he produced as Ex.4 was written by TMK, the company which undertook the actual transportation of the 3 consignment of the defendant's goods. It was the plaintiff which contracted that company to undertake the actual transportation. In that letter, TMK gives a brief about each consignment transported.

In the defence, the defendant denied being indebted to the plaintiff in the sum claimed of Kshs.605,832/=. In para 5 of the defence, the defendant stated that the plaintiff short delivered goods and also delivered damaged goods, and for this, the defendant claimed a sum of Kshs.456,290/= money which the defendant said was deducted by the owner of the goods, from the money they paid to the defendant.

Paragraph 8 talks of an accident caused by the plaintiff's transportation of the goods, which accident caused the consignee (owner of goods) to incur expenses in the cross loading of the goods, amounting to Kshs.149,542/95. That this was the cost of transportation of goods from the place of the accident to Goma. This evidence was denied in the reply to the defence and set off. The contents of the defence were further denied by Mr. Desai in his oral evidence in court. The defendant did not adduce any evidence in court to prove the contents of their defence. When given time to make submissions, the defendants' counsel failed and or refused to do so.

The end result of all this therefore is that the plaintiff has on a balance of probabilities proved its case against the defendants and find judgement for the plaintiff against the defendant as prayed in prayer 7(a) and (b) in the plaint dated 15th May, 1997.

Dated at Nairobi this 16th day of May, 2002.

JOYCE ALUOCH

HIGH COURT JUDGE