



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL SUIT NO.193 OF 2000**

**ASECO (K) LTD ..... PLAINTIFF**

**VERSUS**

**KAMAMU FREIGHT FORWARDERS ..... DEFENDANT**

**RULING**

The Plaintiff filed suit claiming judgment against the Defendant a sum of US\$8077.19 with costs and interest. The Defendant filed defence admitting that it was allowed the possession of the container as stated in the plaint, but the container has not been returned yet because it was impounded by authorities in Uganda. The defendant signed document called Container Guarantee exhibit B02 –

*“undertaking full responsibility ----- and to return empty container to Logistic Container Centre Mombasa”*

They also agreed –

*“that we on behalf of our clients shall accept and pay demurrage charges at agreed rates for late return of containers”*

The Defendant’s defence is that he was an agent of a disclosed principal. This was a foreign principal, and therefore the plaintiff should look to the foreign principal for redress.

In Halsbury Laws of England 4th Edition paragraph 825 it is stated

“Where a contract is made by an agent on behalf of a foreign principal there is no presumption that the agent necessarily incurs personal liability and has no authority to establish privity of contract between the principal and third party. Where the intention of the parties is not clear or the terms of the contract are in dispute, the fact that the principal is a foreigner is a factor to be taken into account in determining whether in the circumstances the contract is enforceable by or against the foreign principal or whether the agent is personally liable” At paragraph 827 it is stated:- “Where the other contracting party whether in presence of the principal existence or not, obtains judgment against the agent or, though he knows at the time when the contract is made or discovers afterwards who the principal is, elects to look to the agent to the exclusion of the principal the principal is discharged from liability to the third party and his liability cannot be revived”

In the present case the defendants were forwarding agents and they undertook to transmit the container

containing goods to Kampala. However they undertook to return the containers and to pay demurrage for delay caused.

Looking at paragraph 713 Halsbury Laws of England it will be seen that “There is a custom of trade” that a forwarding agent incurs personal liability for freight charges whether transmission of goods is by sea or air. In this case therefore for the Plaintiff /applicant to claim directly from the agent he must bring him within the exception of the General rule that a principal is responsible for all acts of his agent within the authority of the agent whether the responsibility is contractual or tortuous.

It is clear as stated above that a party can elect to recover from the agent alone in which case the liability of the principal is discharged. On perusing the document signed by the defendant (B02) the Defendant undertook and guaranteed the return of the container as directed by the Plaintiff. This is a separate contract from that of transmission of goods to Uganda. The Defendant could easily have transmitted the goods with other means out of the container but he promised the Plaintiff that he shall return the container in accordance with the terms written on the “Container Guarantee” It appears to me that the Plaintiff never intended to part with the container to a foreign party but that he was releasing the same to the defendant who was trading at Kilindini port.

In the circumstances I find that the Defendant must be held personally liable as is the custom of trade for forwarding agents to be liable for freight charges as stated above particularly seeing that the principal is a foreigner. The cost of hiring the container to transport goods must form part of freight charges seeing that the plaintiff has chosen to sue the agent only he has made election to discharge the principal and I see no reason why the Defendant cannot be held liable personally. Not only did the defendant undertake to return but guaranteed the return as per “B02”. The Plaintiff now seeks summary judgment in terms of Order 35 Civil Procedure Rules. From the pleadings I find that the requirements of the order of procedure are complied with. The claim is liquidated and there is no defence to the claim shown by the defendant in fact the defendant does admit that he never returned the container. The provisions of the contract then must be applied. I find that the plaintiff is entitled to judgment as prayed.

In the cause of hearing this application the defendant did raise a point that the affidavit in support is defective in that the facts stated are not within the knowledge of the deponent and the source of information not disclosed, therefore is contrary to provisions of Order 18 Civil Procedure Rules, and should be expunged. On this issue I find that the deponent being a credit controller in the plaintiff company would be in a position to know and have information about this case and in view of the provisions of Order 18 Civil Procedure Code and on authority of *Zola & Another v. Ralli Brothers Ltd 1969 EA 691* it is in the discretion of the court to admit an affidavit. In this case I find the affidavit may be said to be defective but it is not said to be a nullity. See rule .....

On the issue of inconsistent of the amount claimed and the amount of invoices namely \$8077.17 and \$9378 total of invoices the position is that a party can only be awarded what it has prayed for in the plaint in which case here is less than the amount of invoice. That is not an issue that warrants sending the case to trial.

The defendant has also raised the issue of Third party notice which he has filed. In this Notice the Defendant wholly blames the third party and claims full indemnity against the Plaintiffs claim of US\$8,077.9. I therefore dismiss the Defendant’s statement of defence as a sham and allow the application with costs. The defendant is at liberty to pursue third party proceedings.

**Dated at Mombasa this 19th Day of June, 2002.**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

**In presence of Mr. Mabea**

**And Mr. Omondi**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

**Mr. Mabea – I apply for leave to appeal and certified copies.**

**Mr. Omondi – No objectionU**

**Court – Orders granted as requested.**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**