



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIV CASE 455 OF 98

GENERAL TYRES SALES PLAINTIFF

- VERSUS -

H. YOUNG & CO. E.A. LTD. DEFENDANT

J U D G E M E N T

The plaintiff General Tyres Sales Ltd. (General Tyres) had entered into a contractual relationship with the Defendant H. Young & Co. E.A. Ltd (H. Young) for the sale of goods. H. Young would place an order by issuing a local purchase order (L.P.O.) against which General Tyres would deliver and issue invoices. This relationship went on well between January and October 1998 when H. Young failed to pay a sum of Kshs.1,070,003.75 which lead to the filing of the suit herein by General Tyres on 9th November, 1998. H. Young filed a Defence admitting an amount of Kshs.265,092.50 which they paid leaving a disputed balance of Kshs.804,911.20 on the basis that there had been an attempt to defraud them and the matter reported to the police. The issue for determination between the parties as I understand them are as follows:-

1. Were the goods valued at Kshs.804,911.20 sold and Delivered to the Defendants?
2. Was there an agreed system of procurement and Delivery of goods established as between the parties?
3. Was there any fraud committed related to the claim herein?
4. Can the Defendant be held liable for the fraudulent acts of their own employee acting in his private capacity?

The amounts in dispute amounting to Kshs.804,911.20 are in respect of L.P.O.s numbered 26548 dated 10.7.98 issued against invoice No.5653 for Kshs.126,602.40 and L.P.O. No.27100 dated 1.8.98 issued against invoice No.137251 for Kshs.678,308.85 according to Samuel Makande Jaok the plaintiff's sales Manager. He said the goods were collected by vehicle Registration KAK575E driven by one Francis Barasa on behalf of H. Young and that it was he Francis Barasa who had delivered the L.P.O.s to General Tyres. Trouble started when General Tyres demanded for payment only to be told by the H. Young that they neither ordered for nor collected the said goods. In cross examination by Mr. Obonyo for H. Young he said the vehicle KAK 575E had the same colours and logo as those of the H. Young Company and that it was not always that General Tyres would physically confirm the vehicle collecting goods and registration number was as given by driver. The Defendant denied the said vehicle belongs to them and

produced a certificate of an official search by Registrar of motor vehicles showing it belonged to Anthony Kinundo Mariga.

The Defence through Michael Wamburu Kimani said in the period in question he was employed by H. Young in it's purchasing Department. In the period in question, that is 7th July, 1998. H. Young had placed orders for 2 tyres and 2 tubes but an error had occurred while allowing for a discount in the L.P.O. No.265481. On this being realized a second L.P.O. was prepared being No.26572 for a similar order but showing the discount as 20% but General tyres supplied only 1 tyre and one 1 tube. According to Michael Kimani, H. Young did also received an amendment from General Tyres confirming that L.P.O. No.26548 had been cancelled and replaced with L.P.O. 26572 by letter dated 27.8.98. The second invoice disputed according to Mr. Michael Kimani did not originate from them. He says the signature was not that of the authorized personnel and specimen signatures had been submitted to General Tyres which however they deny. However no further evidence was adduced by defence to give strength to the issue. On cross scrutiny of L.P.O's Exhibited, it is evidence that they carried a warning on liability clearly printed at the bottom. This even assuming H. Young had forgotten or failed to supply the specimen signatures, was so visibly printed and General Tyres had been put on the alert. It is interesting to note that even H. Young did not attempt to show to the court a copy of the so called specimen signatures sent or on explanation offered as to why none was available from their records. This however in my opinion does not excuse the plaintiff not to follow clearly printed instructions on the L.P.O.'s and especially so when it touched on liability for payments.

After the police completed their investigations the parties were informed that the fraud was perpetrated by an employee of H. Young one Mr. Burino who even at the time of hearing of this matter was still at large. Can the Defendant in the circumstances be held liable? The first L.P.O. No. 26548 is said to have been a replacement by L.P.O. No. 26572. General Tyres then corrected their records and advised H. Young to amend the invoice accordingly. Their letter reads as follows:-

“General Tyre Sales Ltd.

The Accountant,

H. Young & Co. (E.A.) Ltd.,

Mombasa.

Dear Sir,

RE: AMENDMENT OF L.P.O. NUMBER ON INVOICE NO. 5653

Reference is made to our above invoice dated 21/7/81. Please amend the L.P.O. number quoted on the above to read as 26572 and not 26548. Any inconvenience caused is regretted.

Thanking you.

Yours sincerely,

Masoud Y. Noorani”

From the contents of the letter herein, it is difficult for one to say on the face of it that the amendment had anything to do with the withdrawal of L.P.O. number 26548. The Defence did not produce their letter adducing the plaintiff of the withdrawal of invoice 26548 and replacing it with invoice 26572. In the absence of clear evidence it is difficult to find that General Tyres did indeed have notice of the withdrawal of the said invoice. As regards invoice 27100, the parties are in agreement that at the time of filing the suit police were investigating the same and all parties had a confirmation by the police that the L.P.O. was indeed stolen by the Defendant's employee. The question is whether H. Young can be held liable for the fraudulent act of it's employee in the circumstances. The Defence in their evidence did state

that they had supplied Specimen signatures to the plaintiff. Mr. ADREY ARTENSTEIN who was the project manager at the time said he was the only one so authorized save for a period of 2 weeks when he was away and had delegated another employee Mr. David Gallery and not Mr. Mr. Burino to sign the L.P.O.'s. In cross examination he said that at no time did the plaintiff say they didn't have the specimen signatures. The L.P.O.s produced by both sides show that they all carry an exemption clause on liability which is also printed on the stolen one which reads as follows:-

“Liability for order only ACCEPTED IF SIGNED BY AN AUTHORISED PERSON. The Company will not accept liability or effect payment against any order unless it is signed by a person authorized in writing. A list of persons so authorized with their specimen signatures is circulated to suppliers and copies will be provided on request.”

Assuming the plaintiff did not indeed receive any specimen signatures, would they be excused for accepting the Defendants L.P.O. in light of the clearly printed exemption clause liability.

In cross-examination Mr. Adrey Artenstein, the project Manager was emphatic that Mr. Burino whom the police pointed as the person behind the fraud had no authority to sign the L.P.O.s. General Tyres has not shown that it had taken all necessary precautions to guard itself in light of the exemption clause at the bottom of the two disputed L.P.O.'s. Infact, the only plaintiff witness Samuel Makande Jaok did not say whether he was the person who handled the sale and delivery of goods in respect of the two L.P.O.'s. Neither does he say he indeed saw the person and the motor vehicle that collected the goods. Mr. Obonyo went further to ask him if they did not find the order for 20 truck tyres rather alarming keeping in mind the largest quantity supplied at once before this incident was 6 in number and he said it was not.

No plausible explanation has been offered by the plaintiff as to why they choose to ignore the exempting clause even when dealing with goods of such a high value. They had an opportunity to ask for the list of specimen signatures but this was not done. It would be hard on the plaintiff if their just claim is defeated by exempting clauses conditions of which they knew nothing but in this case it was clearly spelt out in the disputed L.P.O.'s. Willies J. in *BARWICK V ENGLISH JOINT STOCK BANK* (1867) L.R 2 Ex.265 said,

“The general rule, is that the master is answerable for very such wrong of the servant or agent as is committed in the course of the service and for the masters benefit, though no express command or privity of master is provided.”

In the current case, can it be said Mr. Burino had acted for the master's benefit? I would answer that in the negative. This point was clearly considered in the case of *REUBEN VS. GRENT ENGALL CONSOLIDATED* (1906) AC 439 in which the decision in the *BARWICK* case was considered Lord Davey at Page 446 said:-

“Where, therefore (as in the present case) the Secretary is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers, and in my opinion it would be a matter of reproach if the law were otherwise. The reason for the qualification is that a representation made under such circumstances, whether express as impinged is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master.”

The same conclusion is found in *Halsburys Laws of England 4th Edition Vol.1* at page 492 at Paragraph 820.

“Where an act done by an agent is not within the scope of agents express or implied authority or falls outside the apparent scope of his authority the principal is not bound by or liable for that act, even if the opportunity to do it arose out of the agency and it was purported to be done on his behalf, unless he expressly adopted it by taking the benefit of it or otherwise:

Accordingly I find H. Young cannot be held liable for the acts of Mr. Burino in this case as regards the payment for Kshs.678,508.85. But I am unable to say the same as regards the amounts arising out of

L.P.O. 26548 for an amount of Kshs.126,602.40. This L.P.O. had been signed by the authorized signatory but there is no evidence that General Tyres were indeed informed of it's cancellation. In the circumstances I give judgement for the plaintiff in the sum of Kshs.126,602.40 plus costs and interest.

Dated at Mombasa this 3rd day of October, 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE