REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 2966 OF 1995

FRIENDSHIP CONTAINER

MANUFACTURERS LIMITED ……..……. PLAINTIFF

VERSUS

MITCHELL COTTS KENYA LIMITED ……..……. DEFENDANT

RULING

The plaintiff is a limited liability company engaged in the manufacture of containers and cans. In December, 1992, it purchased in India one New "AMBA" Hydraulic Cylindrical Grinding Machine, Model No. U/127/500 with parts and accessories. For the purposes of shipping the machinery to the Port of Mombasa it contracted with a carrier known as UNICORN/CMBT Line whose local agents at Mombasa are the defendants.

According to the averments in the plaint, it was an express and or implied term of the agreement between the plaintiff and the defendant that the defendant would deliver and release the machinery from the port of Mombasa to the plaintiff's appointed agent namely Mechanised Clearing & Forwarding Company Ltd. The plaintiff claims that the defendant in breach of the agreement and/or its duty thereunder failed to properly and carefully handle, carry, keep and/or care for and discharge the machinery or to deliver and/or release it to the said clearing and forwarding company but instead permitted and/or allowed the machinery to be wrongly and illegally transported and delivered by Transami Kenya Limited to a company in Kampala called Casement Africa Limited. The plaintiff further alleges that while at Uganda, the machinery was unpacked into an old container number 268198-3 and when eventually returned to Kenya it was found to be in poor shape and condition with parts and accessories pilfered and/or missing. The plaintiff further claims that due to negligence on the part of the defendant, it failed to deliver the said machinery to the appointed destination within the agreed and/or reasonable time.

By reason of that alleged negligence the plaintiff says that it suffered loss and damage by being deprived of the use and enjoyment of the machinery. It therefore claims the sum of Shs.3,940,000/= against the defendant for loss of production and profit and another sum of Shs.525,722.75 being damage to the machinery through rusting and pilferage. General damages for breach of contract and what the plaintiff refers to as good will are also claimed.

In an amended defence dated 18.12.1996, the defendant denied having been the carrier of the subject cargo. It also avers that, even if it was the carrier, the suit would be time barred under the provisions of Article 3 paragraph 6 of The Hague Visby Rules as provided in the Bills of Lading, the suit not having been filed within 1 year from the date of delivery of the cargo to the plaintiff.

On the basis of the pleadings as briefly summarised above, the defendant has lodged an application for the dismissal of the suit on the grounds that:-

(i) the suit, having been instituted against an disclosed agent does not disclose any cause of action and is therefore bad in law;

(ii) the suit is time barred under Article III paragraph 6 of the International Convention for the Unification of Certain Rules relating to Bills of Landing 1924, as amended by the Brussels Protocal of 1968 (The Haque Visby Rules) the suit having been brought more than a year after the consignment was delivered on 22.4.1994; and

(iii) this court does not have jurisdiction to entertain the suit as the Bill of Lading provides that all disputes are to be exclusively determined by the law and jurisdiction of the court where the carrier has its registered offices which, in the instant case, is the Republic of South Africa.

A perusal of the plaint reveals that the plaintiff recognises that at the material time the defendant acted as an agent of UNICORN/CMBT which is a shipping line registered in the Republic of South Africa, according to the affidavit sworn in support of the application by Mr. Andrew Ndegwa, a director of the defendant. That fact is not denied. It is common ground that the machinery was shipped on board vessel MV Sondershausen. The relevant Bill of Lading which is annexed to Mr. Ndegwa's affidavit as Exh. 1 shows UNICORN-CMBT service as the shipper and the plaintiff as the consignee. No document has been availed to this court in this matter which discloses how and in what manner the defendant would be liable to the plaintiff other than as an agent of the defendant. That being the case, the question arises whether the defendant, being not only a disclosed but also acknowledged agent of UNICORN/CMBT is liable for the alleged negligence in the delivery of the machinery.

In the case of Tota Ram V. Mistry Waryam Singh (1933) 5 ULR 76, it was held that *'a person who acts as another's agents in a transaction with the knowledge of the plaintiff is not liable to the plaintiff in respect of that particular transaction'*. Accordingly, there is no basis for finding the defendant liable to the plaintiff.

Moreover, the Hague Visby Rules to which the contract giving rise to the claim clearly applies requires in Article III 6 that:-

> ***"Subject to paragraph 6 the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen."***

Although in his replying affidavit, the plaintiff's Production and Factory Manager depones that the Hague Visby Rules do not apply to the contract, he does not explain why given the explicit statement in the Bill of Lading (see clause 5 of Terms and Conditions) unequivocally applying the Rules, he takes that position. In my view, the Rules apply and Mr. Patel's contention is untenable. According to the defendant the consignment was delivered to the plaintiff on 22.4.1994. That position is not controverted by the plaintiff and I accept it as a fact. That being the case, I find that the plaintiff's suit is time barred.

The final point regards jurisdiction. The applicant claims that this court has no jurisdiction to entertain the matter. That contention springs from a provision in the Bill of Lading that all disputes relating to the contract are to be exclusively determined by the law and the jurisdiction of the court where the carrier has its registered office i.e. the Republic of South Africa. By virtue of that provision, the applicant submits that the suit should have been filed in the courts of South Africa and not in Kenya. A similar position arose in the case of United India Insurance Co. Ltd. and Another v. East African Underwriters Kenya Ltd. & Another, (1982-88) 1KLR in which there was an exclusive jurisdiction clause, just like we have in this suit in the following terms:-

> *"All suits and other legal proceedings and all arbitration in connection with this agreement and*

touching the rights of the parties herein shall be governed by the law prevailing in the Domain of India to the exclusion of all other laws and courts of Bombay alone shall have the jurisdiction to entertain any disputes between the part ies."

The Court of Appeal held that "all the decided authorities showed that the parties should be held to their agreement as regards a jurisdiction clause" and that "a heavy burden of showing strong cause … for departing from the exclusive jurisdiction clause lay on the "party wishing to do so." In my opinion, the plaintiff has not established any case for departing from the exclusive jurisdiction clause.

The upshot of the matter is that on the three legal points raised by the defendant namely (a) non-liability of a disclosed agent, (b) limitation under the Hague Visby Rules and (e) the exclusive jurisdiction clause, I agree with the defendant. Accordingly, my finding is that the plaintiff's suit cannot be maintained and consequently it must be dismissed with costs.

It is so ordered.

Dated at Nairobi this 23rd day of November, 2001.

T. MBALUTO

JUDGE