



**Vlarisco Limited v CMA – CGM SA & another (Commercial Case  
E016 of 2023) [2024] KEHC 11080 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11080 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E016 OF 2023  
JK NG'ARNG'AR, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**VLARISCO LIMITED ..... PLAINTIFF**

**AND**

**CMA – CGM SA ..... 1<sup>ST</sup> DEFENDANT**

**CMA – CGM KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant/Applicant filed a Notice of Motion application dated 31<sup>st</sup> October 2023 under Certificate of Urgency pursuant to Section 3A of the *Civil Procedure Act* seeking for stay of the suit herein as against the 1<sup>st</sup> Defendant on the ground that the claim on which it is founded is only justifiable before the Tribunal de Commerce de Marseille, and that costs of this application be provided for.
2. The application is premised on grounds on its face and the affidavit in support sworn on 30<sup>th</sup> October 2023 by Besnard Mathias, the Deputy Vice President – Maritime Affairs of the 1<sup>st</sup> Defendant, that the contract of carriage as evidenced by bills of lading Nos. MOBO126802A, MOBO126802B and MOBO126802C, on which this suit as against the 1<sup>st</sup> Defendant is founded contains an express clause in the terms that

“All claims and actions arising between the carrier and the merchant in relation with the contract of carriage evidenced by this Bill of Lading shall exclusively be brought before the Tribunal de Commerce de Marseille and no other court shall have jurisdiction with regards to any such claim or action.”

That these proceedings as against the 1<sup>st</sup> Defendant have been instituted in breach of the contract of carriage and this court therefore has no jurisdiction to hear and determine the suit as against the 1<sup>st</sup> Defendant.



3. The Plaintiff/Respondent in their Replying Affidavit sworn on 8<sup>th</sup> November 2023 by Shlomi Golan, the Director of the Plaintiff, in opposition to the application averred that the Plaintiff's suit against both defendants relate to the handling and storage of the Plaintiff's goods while at the Port of Klang, including fraud and deceptive business practices. That the storage and handling of the goods were contracted and invoiced separately and which is the basis of the Plaintiff's suit against the Defendants. That pursuant to the storage invoices which constituted separate contracts between the parties, payments and all communication for the services were made in Kenya. That the Bills of Lading were contracts for shipping of the goods only and not for storage.
4. The Plaintiff/Respondent stated that the suit is about a serious criminal fraud that occurred and not about a common loss or damage of goods that can be solved by a tribunal of commerce. That the Bill of Lading that the 1<sup>st</sup> Defendant seeks to rely on in challenging the jurisdiction of this court lacks merit and should be disregarded. That the Tribunal de Commerce would not have jurisdiction over the 2<sup>nd</sup> Defendant, a crucial party to the dispute relating to the storage of the Plaintiff's goods. That the Tribunal de Commerce de Marseille would not have jurisdiction to hear the dispute since it has been more than 12 months since the event occurred. That the Plaintiff notified the Defendants when they discovered the event to try reach an amicable solution but negotiations never advanced. That the application herein is therefore bad in law, an abuse of the court process and should be struck out.
5. The application was canvassed by way of written submissions. The 1<sup>st</sup> Defendant/Applicant in their submissions dated 29<sup>th</sup> November 2023 argued that the law in relation to the operation and effectiveness of foreign jurisdiction is well settled in Kenya. That there was nothing to prevent the Plaintiff from bringing its action before the Tribunal within the 12 months period and that there is nothing exceptional about one year time-bar under Kenyan law and under French law which militate against the grant of stay. That the Plaintiff has not discharged the burden of demonstrating strong reasons why this court should assert its jurisdiction over the dispute notwithstanding the exclusive jurisdiction clause.
6. The 1<sup>st</sup> Defendant/Applicant submitted that contrary to the Plaintiff's assertion that the claim against the 1<sup>st</sup> Defendant is in relation to the contract for storage and handling of the cargo, the plaint filed in court expressly refers to the contract of carriage as evidenced by the said bills of lading. That the storage and handling of cargo at the Port of Kalang arises out of the said contract of carriage and the invoice raised by the 2<sup>nd</sup> Defendant for and on behalf of the 1<sup>st</sup> Defendant were under the said contract of carriage and not under separate contracts by way of the said invoices. That the claim pleaded by the Plaintiff as against the 1<sup>st</sup> Defendant is for loss or damage to the said cargo under the said bills of lading and not under the three invoices annexed to Mr. Golan's affidavit as Exhibit 'SG1'.
7. The 1<sup>st</sup> Defendant/Applicant further submitted that the contract of carriage were signed by the 2<sup>nd</sup> Defendant as agents for the 1<sup>st</sup> Defendant and therefore the 2<sup>nd</sup> Defendant ought not to have been joined in this suit. That it is trite law that an agent cannot be sued on a contract signed by the agent on behalf of a disclosed principal. The 1<sup>st</sup> Defendant/Applicant relied on the decisions in the case of *Anthony Francis Wareham T/A AF Wareham & 2 Others v Kenya Post Office Savings Bank*, Nairobi Court of Appeal Civil Appeals Nos 5 and 48 of 2002 (Consolidated) (2004) eKLR and *City Council of Nairobi v Wilfred Kamau Gitbua T/A Gitbua Associates & Another*, Nairobi Court of Appeal, Civil Appeal No. 206 of 2008 (2016) eKLR. The 1<sup>st</sup> Defendant/Applicant prayed that the reliefs sought be granted.
8. The Plaintiff in their submissions dated 18<sup>th</sup> January 2024 on whether the Plaintiff's suit against the Defendant relate to the handling and storage of the Plaintiff's suit at the Port of Klang relied on the *Carriage of Goods by Sea Act*, Cap 392 which defines the Contract of Carriage. That a bill of lading



therefore is a document of title and regulates the relationship between the carrier and the holder of the bill of lading. That the distinction between the contract of carriage and that of shipping and storage would revolve around the interpretation of the conditions contained within the bill of lading and any collateral contracts or agreements. That from paragraphs 13 to 16 of the Plaintiff's plaint dated 10<sup>th</sup> August 2023, it is undisputed that the storage and handling of goods while at the Port of Klang were contracted and invoiced separately which is the basis of the Plaintiff's suit. That the bill of lading imposes an obligation on a shipper to deliver goods to a consignee.

9. On whether the Plaintiff's suit against the 1<sup>st</sup> Defendant should be stayed, the Plaintiff submitted that this court has jurisdiction to hear and determine the Plaintiff's suit against the Defendants. The Plaintiff relied on Section 15 of the Civil Procedure Act in stating that the contract for handling and storage of the goods was made in Mombasa, Kenya within the jurisdiction of this court and that storage costs were paid to the 2<sup>nd</sup> Defendant within the jurisdiction of this court. The Plaintiff relied on the case of United India Insurance Co. Ltd & Kenindia Insurance Co. Ltd v East African Underwriters Kenya Ltd (1982-88) 1 KAR 639 and Friendship Container Manufacturers Limited v Mitchell Cotts (K) Ltd that courts are bound by jurisdictional clause and this court should uphold the jurisdictional clause in the bills of lading. The Plaintiff therefore prayed that the application be dismissed with costs to them. The Plaintiff also filed further submissions dated 12<sup>th</sup> March 2024 where they relied on the case of Donobue v Armco Inc. and Others (2001) UKHL 64 on the issue of jurisdiction.
10. I have considered the Notice of Motion application dated 31<sup>st</sup> October 2023, the Replying Affidavit sworn on 8<sup>th</sup> November 2023 and submissions by both parties. The issue for determination is whether the suit herein should be struck out for lack of jurisdiction because the terms of carriage in the bill of lading conferred exclusive jurisdiction to Tribunal de Commerce de Marseille.
11. It is not in dispute that the contract of carriage as evidenced by bills of lading Nos. MOBO126802A, MOBO126802B and MOBO126802C contains an exclusive jurisdiction clause for all claims and actions arising between the carrier and the merchant in relation with the contract.
12. Madan J. A. in United India Insurance Company Ltd v East African Underwriters (Kenya) Ltd (1985) KLR held that: -

“The Courts of this country have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country. This exclusive jurisdiction clause however should normally be respected because the parties themselves fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by the agreement.”
13. The 1<sup>st</sup> Defendant/Applicant argues that the Plaint expressly refers to the contract of carriage as evidenced by the bills of lading and that storage and handling of the cargo at the Port of Klang arises out of the contract of carriage. However, according to the Plaintiff/Respondent, storage and handling of goods while at the Port of Klang was contracted and invoiced separately, and that payments and all communication for the services were made in Kenya. That the bills of lading were contracts for shipping of the goods only and not for storage.



14. The test of whether there was a legally binding contractual relationship between the parties was held in *RTS Flexible Systems Ltd v Moikerei Alois Miller GMBH & Co. KG UK (production)* (2010) 3 ALL ER 1 that: -

“Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them, or conduct whether that leads, objectively to a conclusion that they intend to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economics or other significance to the parties have not been finalized, an objective appraisal of their words lead to the conclusion, that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement. The essential terms of an agreement must at all times be present and must be clear and unequivocal. The court cannot impose a binding contract on the parties upon which they had not agreed. It cannot read into an agreement terms and conditions which in effect would support its validity and enforceability.”

15. This court finds that there was no meeting of minds between the 1<sup>st</sup> Defendant/Applicant and the Plaintiff/Respondent that the invoices and payment for storage and handling of goods constituted a binding contract. This court is therefore made to believe that the storage and handling of cargo arises out of the contract of carriage as evidenced by the bills of lading. Additionally, the obligation of the carrier remains unfulfilled until the cargo is delivered. The court in *4MB Mining Limited v Misnak International (UK) Limited & 2 others* (2021) eKLR cited with authority the following cases to that effect: -

“81. The Court in *Barber v Meyerstein* (1870) LR 4HL 317 held that the bill of lading remains a “living testament” only so long as the carrier’s obligation remains unfulfilled. That obligation would be current until delivery of the cargo was made against the bill of lading.

82. In the case of *Barclays Bank Ltd v Commissioner of Customs and Excise* [1963] 1 Lloyd’s Report 81, it was held that the bill of lading may remain a living instrument even if the goods have been deposited in the warehouse by the carrier, for in such a case the carrier retains constructive possession of the cargo and that if the warehouse issues a delivery warrant, which the carrier will instruct it not to do until the freight has been paid, the bill of lading will then become exhausted.”

16. The Plaintiff/Respondent’s position that the Tribunal de Commerce would not have jurisdiction over the 2<sup>nd</sup> Defendant, a crucial party to the dispute and that the Tribunal de Commerce de Marseille would not have jurisdiction to hear the dispute since it has been more than 12 months since the event occurred, according to this court is not something exceptional to justify departure from the contract that the parties had freely and voluntarily agreed upon.
17. Accordingly, the Notice of Motion application dated 31<sup>st</sup> October 2023 is allowed. The 1<sup>st</sup> Defendant/Applicant is awarded costs of this application.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> SEPTEMBER 2024**

**J.K. NG’ARNG’AR, HSC**



**JUDGE**

In the presence of: -

Katonya Advocate for the Plaintiff

No appearance Advocate for the Defendants

Court Assistant – Mr. Samuel Shitemi

