Blooming Bliss Kenya Limited v Ocean Freight (E.A) Limited & another (Civil Suit 53 of 2018) [2023] KEHC 27319 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEHC 27319 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 53 OF 2018

DKN MAGARE, J

SEPTEMBER 20, 2023

BETWEEN

BLOOMING BLISS KENYA LIMITED ..... PLAINTIFF

AND

OCEAN FREIGHT (E.A) LIMITED ..... 1ST DEFENDANT

MEDITERRANEAN SHIPPING COMPANY SA ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on 5th July 2018 vide a Plaint of the same date and pleaded among others that:
    a. The Plaintiff engaged the 1st Defendant for shipping and transportation services.
    b. The Plaintiff and the Defendant entered into a contract sometimes in June 2017 to ship 23,040 Kg of Kenyan Avocados to one Adil Mohamed Salh Algohani Company in Saudi Arabia.
    c. The agreement between the parties stipulated that the Plaintiff would, inter alia, sort out all requisite compliance documents and the Defendant would provide proper storage facilities by proper refrigeration at 5 degree Celsius.
    d. The Defendants failed to keep the required temperature of 5 degrees Celsius and the goods perished due to bad due to poor refrigeration.
    e. The survey conducted revealed that the cause of damage was temperature malfunction in the Defendant's vessel.
    f. The Plaintiff claims USD 319,075 being the totsl financial losses incurred from the 2nd Defendant's breach.

2. The Plaintiff filed suit against the defendant for the loss of 23,040 Kg of Kenyan avocados which were exported to one Adil Mohamed Salh Al Gohani company in Jeddah, Saudi Arabia. The goods were sorted and a certificate of issue sanitary and export certificate from the Ministry of health by shoot.

3. The consignment was to be maintained at 5 degrees Celsius. According to the plaint, the said degrees were not maintained and as such the 23,040 Kg of avocado arrived rotten. They blame the defendant failure to maintain the optimum temperatures for cargo throughout the Voyage. The goods were arrived at King Abdullah port on 3/7/2017.

4. The question on how they became rotten is for determination by the court. It was common ground that the entire batch of avocados was rotten. The Plaintiff averred that they had to dispose of the damaged avocados at their cost.

5. The Plaintiff claimed a sum of USD 319, 075 being the loss they incurred made up as hereunder: -

    i. The value of goods..... USD 103,680

    ii. Penalties..... USD 123,450/-

    iii. Incidental expenses for disposal..... USD 55,295.

    iv. Legal costs in Saudi Arabia ..... USD 36,650

    Total..... 319,075

6. The Plaintiff's Final prayers were:-

    i. Special Damages of USD 319,075

    ii. General damages for breach of contract

    iii. Cost and Interest.

7. On 3/8/2018, the Defendants filed their Defence. They pleaded as follows:-

    i. The 1st Defendant was expressly identified as agent of the 2nd Defendant.

    ii. The carrier was the vessel provider as identified on the front of the Bill of Lading.

        i. The 1st Defendant as a disclosed principal cannot incur liability of the delivery of the Plaintiff's goods by carrier.

        ii. The 2nd Defendant was not liable for delays under the contract for carriage of goods by sea.

        iii. The goods were delivered at destination port on 3rd July 2017 following which they ceased to be in actual possession of the 2nd Defendant.

        iv. The Plaintiff packed the goods during the day when it was hot and this deteriorated their life, the refrigeration, notwithstanding.

8. Sometime after close of proceedings, the 1st Defendant applied vide their Application dated 24/8/2019 seeking its name to be struck out of the suit. The Plaintiff responded through the Replying Affidavit of Ismael Oguga. The Court declined to strike out the 1st Defendant as party and ordered the matter to proceed for hearing.

9. After various adjournments the matter was set for hearing before me. Parties testified and produced evidence. They were thoroughly cross examined.

Evidence

10. On the date of the hearing, the Plaintiff called one Mr. Mizan Irad from Advanced Irad For Commercial Services testified that he was a marine surveyor who produced the survey report sworn to the court signed on 24th July 2017. He has worked as a surveyor for 15 years.

11. He was instructed by Adil Mohamed Salh Algohani Company to value the rotten Avocados He stated that cargo arrived in Saudi Arabia on 3rd July 2017after its shelf life was over. THE report indicated that there were 5,760 cartons of 23,040 KG measuring $46M^{3.}$ On the face of the report, it involved container number CRSU6000724 /40R.

12. He indicated he had a certificate as a marine surveyor by the Saudi Arabian council of Engineering. He filed a report dated 24/7/2017 indicating that the cargo had been delayed. It was to arrive on 11/6/2017. He had been instructed by the consignee. The damage was already done by 3/7/2017. This was attributed to the end of the shelf life. The issue of transportation by the third party is not recorded in the report.

13. The bill of lading involved was no. MSCUOO061177. The remarks on the bill of lading was that the same contained fresh avocados. Maintain $+5^{0}$c during the voyage and offloading as per the shipper's instructions.

14. It indicated there were three surveys" –

    i. Initial /unilateral on 7th July 2017

    ii. 15/7/2017 second initial

    iii. 17/7/2017 Joint survey with carrier's surveyors

15. The report indicated that global environmental management services were contracted to transport the cargo to Rabigh and destroy the same. This was done on 24/7/2017. A certificate of waste disposal no. 159-17 dated 24/7/2017 was given to the consignee, Adil Mohammed Salh Algohani Company.

16. The plaintiff produced a demand letter asking for:

    i. Riyal 350,000/= as value penalty. The letter read in part: -

    so, we notify you by this letter to pay amount of 350,000 Saudi Riyals as value penalty.

    # ###### ##### #### 350,000 #### #### ####### #### ####17.####

    There was another notice to the Plaintiff issued by ALZHARI legal consultancy .17 ###### ######### ##########

18. They were demanding on behalf of the consignees for joint survey. The demand letter is not complete in the translated version, though the Arabic version is complete.

19. On cross-examination, he stated that the cargo was not inspected when it arrived as it had to be transported. It was his further case that the cargo took 7 days on very high temperatures.

20. PW2, one Ismael Oguga Ibrahim relied on his witness statement dated 28th June 2018. He also produced his list of documents dated 28th July 2018 containing 9 exhibits. It was his case that 14 days delay was a long period for perishable goods.

21. He also stated that the cargo was damaged on arrival and the consignee discovered damage on 3rd July 2017. It was also his case that he did not know when the seals were removed from the containers. He

stated that the defendants had a duty to keep the cargo under refrigeration at 5^0 C. He stated that the defendants failed in their duty of care and as a result he suffered damages. They had to incur penalty in Saudi Arabia and for disposal of the goods. – he prayed for Special Damages of USD 319,075 and General Damages for Breach of Contract.

22. Defendants called DW1, one Cecilia Ndeti. She relied on the witness statement dated 6th October 2020 and list of documents of same date. She stated that they are not to blame. According to her statement the plaintiff did have any other duty as their duty ended at the port of destination.

23. The witness stated that in any case their liability cannot exceed GBP 100 or USD 500. They were not liable for loss of profits and consequential losses. Her evidence was that they are only liable as per the bill of lading dated 23/6/2017. She Denied that the defendants were privy to packaging. They relied on clause 12.2 of the bill of lading, which states as doth: -

> " 2. The Merchant must take note that refrigerated Containers are not designed:
> (a) to cool or freeze Goods which have been loaded into a Container at a temperature higher than their designated carrying temperature. The Carrier shall not be responsible for the consequences of the Goods being loaded at a higher temperature than that required for the carriage.
>
> b) to monitor and control humidity levels, even if a setting facility exists, and because humidity is influenced by many external factors the Carrier does not guarantee and is not responsible for the maintenance of any intended level of humidity inside any Container."

24. She stated that the value of the goods was not disclosed to the carriers. It was their case that the plaintiff did not prove any damage. They stated that the bill of lading being a non-negotiable instrument, the shipper has no property in the cargo.

25. On cross examination it was her case that she could not ascertain the condition of the goods at the port of destination on 3/7/2017. She stated that the refrigeration container was in good working condition. They ascertained of such before leaving. She stated that there is a test conducted on the freezer before transportation and it is the agents of the Plaintiff who tested.

26. In re-examination, she stated that it was container number CRSSU 600724 that was used.

27. The parties filed extremely detailed submissions. In order to have economy of space, the court shall intertwine them with analysis. It is not for lack of content that they are not expressly mentioned. For that I thank counsel for their industry. I have set a summarized version hereunder

The Plaintiff's written Submissions

28. The Plaintiff filed submissions dated 7th July 2023 in support of the suit. It was the submission of the Plaintiff that the bill of lading and receipt produced in evidence constituted an agreement between the parties and referred to Marine Shipping (Maritime Service Providers) Regulations 2011 where a bill of lading is defined as follows: a document signed by an ocean carrier or his representative and issued to a shipper that evidences the receipt of goods for shipment contract of carriage and ownership or title of goods.

29. Counsel also submitted that indeed the Defendant breached the contract as the damage was caused due to negligence in packaging the avocados.

> " Reliance was placed on the case of Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) where the court stated thus: -

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

30. Further, it was submitted that Defendant's breach of contract lead to total loss of USD 142,007 suffered by the Plaintiff and submitted that the Plaintiff was thus entitled to recover the market value of the destroyed avocados. Reliance was placed on the case of Express Transport Co. Ltd. vs B.A.T Tanzania Ltd (1968) eKLR.

31. Counsel also relied on the case of Hydro Water Well (K) Ltd vs Nelson Mukara Sechere (2021) eKLR to submit that the courts function was to enforce the primary obligation to perform the contract or the contract breaker's secondary obligation to pay the damages as a substitute for performance.

32. On jurisdiction, it was submitted that the Defendants subjected to the jurisdiction of the court and waived any objection on jurisdiction by failing to raise a Preliminary Objection. Counsel relied on the case of Universal Pharmacy K Ltd vs Pacific International Lines Limited 2015 eKLR.

33. Counsel further relied on the case of United India Assurance Co. Ltd vs E.A Underwriters Ltd (1985) KLR to submit that Kenyan courts have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause conferring jurisdiction to a foreign court.

Defendants' Written Submissions

34. The Defendant filed submissions dated 13th July 2023. It was submitted that the Court had no Jurisdiction as the suit ought to have been filed within one year of the delivery of the goods on 2nd July 2018. Reliance was placed on Section 2 of the *Carriage of Goods by Sea Act*.

35. Counsel also relied on Macharia & Another vs Kenya Commercial Bank & 2 Others Civil Application No.2 of 2011 to submit that jurisdiction flows from either *the Constitution* or the law and this court lacked jurisdiction.

36. Further, it was submitted that the 1st Defendant was not suited and was not privy to the contract as the contract referred to Ocean freight EA Ltd, the 1st Defendant. Reliance was placed on the case of Saving and Loan K Ltd vs Kanyenje Karangaita & another (2015) eKLR support the absence of privity of contract between the Plaintiff and the 1st Defendant.

37. On the merits of the Plaintiff's case, it was the submission of the Defendant that the court cannot rewrite a contract and notice of damage of the goods was not given as required under clause 10.1 of the Bill of Lading and the suit was as such in contravention of the terms of the contract.

38. Counsel further submitted that the Plaintiff did not prove its case under Section 10 of the *Evidence Act* on a balance of probabilities and that special damages as claimed ought to have been pleaded and strictly proofed.

39. On General Damages, it was submitted that the court has no discretion to award general damages in breach of contract. Reliance was placed on the case of Kenya Tourism Development Corporation versus Sundowner Lodge Limited (2018) eKLR to also assert that general damages were not available for breach of contract claims. The court in that matter stated as doth: -

> " with the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule

general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshivs. Karsan[1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also Securicor(K) vs. Benson David Onyango& Anor[2008] eKLR.

Analysis

40. The claim is over damaged goods while in freight. It is stated that the voyage delayed and as a result the goods were destroyed and their natural life expired. It is further stated that it is the condition of refrigeration that caused the rotting.

41. The bill of lading indicates that the goods were an apparent good order when they were received. It is the plaintiff's case that the goods arrived in a state that was not good. The defendant stated that there could have been a problem with packaging. Indeed, particulars of negligence were Pleaded in paragraph 20.

42. The fact that the goods were not in good order was not contested. The cause was. the defendant attempted to make a very compelling case or possibility and a real one that the goods could have spoilt when in transit from the port of destination to Northern Jedda not when they were being transported to the port of destination. This is not however borne out of pleadings. In paragraph 17 of the defence, they set out to demonstrate that the container was functional and the damage could not be foreseen.

43. The second aspect was that only the consignee could lodge a claim. The other aspect of the defence was the time bar under section 2 of the *carriage of goods by sea Act*, cap 392. Nowhere was blame laid on the third parties or transporters.

44. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth; -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

45. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings ... for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

46. Further the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

47. The last defence was that damage to cargo was consequential loss hence not payable. The court will neither consider nor have regard to evidence that is not supporting pleadings. This opens up pleadings to hyperbole, surmises and conjecture. The two issues that arise from pleadings are: -

    i. Who is liable for damage of the goods in issue

    ii. The quantum of damages and costs.

48. It was established that the delivery was directed to the consignee. The report by the experts showed that the defendant appointed a surveyor to carry out a joint survey on 15th July 2017. There was no issue taken on the joint report or the defendant's report on the issue. Consequently, there was only one expert report to rely on.

49. The defendant had their report or a version of it. They chose not to tender it in evidence. They did not question the report by Advanced Rad Commercial Services or the expertise of the marine engineer who made the report and testified. In Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, the court, Justice G V Odunga J, as he then was, stated as doth: -

> " 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
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> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
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> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

50. It is therefore my holding that had the report by the experts appointed by the defendants testified or produced their reports, such reports could have been adverse to the defendants.

51. The court will treat the expert report as part of the evidence and analyst its soundness. The court of appeal, quoted with approval a high court decision on expert evidence in the case of

> " Also taken into consideration among numerous others is the case of Stephen Kinini Wang'ondu vs. The Ark Limited [2016] eKLR from which the Judge drew out four tests to be applied by a court when considering admission and acting on expert evidence as more particularly set out in the ruling and which we also find prudent not to rehash and expressed himself thereon, inter alia, as follows: -
>
> "In my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence." An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based."

52. The Court in the above matter continued as doth: -

> "In Shah and Another vs. Shah and Others [2003] 1 EA 290, wherein Ombija, J. expressed himself on this issue, inter alia, as follows:
>
> "One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law, science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

53. I was shown the expert's qualification. No issue arose as to his qualification as a Marine Engineer. Secondly, I have considered the evidence available. The evidence is consistent to a largest possible extent to both parties' evidence. His conclusion is also consistence with other facts including, strangely to the defence filed.

54. The Court was notes that capital was made out of container numbers. I have seen the report and note it is consistent. Part of it referred to a different number. The expert was consistent that it was a typographical error but the container and bill of lading are consistent.

55. I note the small typographical issues is part of what the courts have called de minimis non curat lex, the law is not concerned with insignificant matters. I will have been surprised, with the amount of translations being carried out from Arabic to English to miss such typos.

56. There is no remedy for small things. Noting that part of the report was as a result of a joint survey exercise up to disposal of the said avocado, I find and hold that there is no dispute on the subject container. The report is consistent on the details, where correct shipping line and container number CRSU6000724/40HR bill of lading number MCSUOOO 061177.

57. The bill of lading is specific and did not change the tenor of the report. The bill of lading number MCSUOOO 061177 cannot apply to TR8960340. The report is indicated to be for one container only. I am satisfied that the survey was carried on the subject container with goods conveyed under the bill of lading no. MSCU OOO 061177 000. It is important to recall that the subject matter was 5,760 cartons of avocados.

58. Both unilateral and joint survey were carried out. One thing that stood out was that the plaintiff was not involved in the Survey. It was done jointly with the consignee, none of whom had a reason to exaggerate losses made by the plaintiff. In this context, the document cannot be disowned by the defendant who was involved in its preparation though the joint survey held on 17/7/2017 before the subject cargo was destroyed and a certificate of waste disposal given.

59. The survey was carried out with Mr Mohammed representing the consignee, Adil Mohammed Salh algohani company together with Mr. Mizan Irad for Advanced Irad for Commercial Services and Mr. Farooq of Universal Surveyors Company representing the defendants. The report prepared by Mr. Farooq for the defendant was not produced.

60. There was no evidence of change of containers or cargo during the period under review. The defendant did not then or even now raise any issue on the container numbers. Tests were carried out involving shipping line and their agents. They did not produce a contrasting report. There was no adverse report produced to counter the facts set out in the report by Advanced Rad commercial services. We have nothing to contrast the facts they are setting out with the technical report.

61. The defendant testified that there was a test of the container before the voyage. They must be having a report, which report was equally not produced. There must have also been a way of verifying the status of the refrigeration container during the voyage. This are matters within the exclusive knowledge of the defendant. Under Section 112 of the *Evidence Act*, the burden related to special knowledge rests with the person with such special knowledge. The said Section provides as doth: -

> " 112. Proof of special knowledge in civil proceedings:
>
> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

62. There was a request that the court finds some other parties, who ought to have been sued. These include the consignee and the transporter post the voyage. This cannot be so. Under order 1 rule 15, a party who wishes that we so find, must join to the suit the said parties as defendant or third parties. The court cannot find other parties liable without hearing them. The said rule provides as doth: -

> " 15. Notice to third and subsequent parties [Order 1, rule 15.]
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> (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
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> (a) that he is entitled to contribution or indemnity; or
>
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
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> (c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a Third Party Notice) to that effect, and such leave shall be applied for

by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons."

63. Further, Order 1 Rule 10 provides for addition of defendants on application of either party. The said rule states as doth: -

" 10. Substitution and addition of parties [Order 1, rule 10.]

1. Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

2. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

64. Without having the third parties and co-defendants, the claim that some other parties were to blame is untenable. The said third parties were not brought into the suit as parties. Consequently, this court cannot apportion liability between a party and non-party. The only parties the court can safely apportion liability to are parties to the suit. In this case, the Plaintiff and defendant. It is part of the old common law rule of audi laterum paterm, hear the other side. In the case of Mbiti v Maingi & another (Civil Appeal E77 of 2022) [2023] KEHC 20833 (KLR) (10 July 2023) (Judgment), I stated as doth: -

" The attribution of negligence to a non party, like the rider was completely unhelpful in the case EN v Hussein Dairy Limited & 3 others [2020] eKLR, the Court stated as doth:

"I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows,

"The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability. [Emphasis mine].

65. This was also the position in the decision by my brother, P J O Otieno in the case of EN v Hussein Dairy Limited & 3 others [2020] eKLR, where he stated as doth: -

> " 16. This excerpt is the residence of the answer to my first issue for determination. It cannot be denied that in deed that was the accurate capture of what Dw1 had said in his examination in chief. However, that is the furthest a court could go. It was not open to the court to consider how negligent a party not before it could be. The law confines a court to determining only the rights of the partied before it and upon the evidence availed by and against such parties. In fact, I doubt whether it was admissible to receive evidence against anon-party and consider same without affording him a right to be heard. I take the view that the legal thing for the 2nd respondent to have done was to seek the joinder of the owner and driver of the bus, either as a third party of co-defendant before seeking to push a burden in the case against them.
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> 17) I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows,
>
> [T]he defendant did not deem it necessary to issue a Third Party Notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability."

66. The Defendant was non-suited as regards the liability of parties within Saudi Arabia who are not used in this case. The court is enjoined to apportion liability only between parties or if it finds on evidence that lability of the defendant was not proved, dismiss the case.

67. Turning on contribution by the plaintiff, the Defendant had pleaded that the Plaintiff packed badly resulting in the loss. No evidence was tendered to the effect that packing had anything to do with the goods getting damaged. As earlier stated only the defendant could have tendered such evidence. In absence of such evidence, the inevitable conclusion is that, either no report is available and if it is available, then it is adverse to the Defendants.

68. No evidence was led against the Plaintiff at all. THE EVIDENCE was in respect of all the other issues except liability of the Plaintiff. In Shaneebal Limited vs County Government of Machakos [2018] eKLR, Odunga J while quoting with approval various court decisions held as follows (in relation to failure to tender evidence in support of averments in a defence:

> "…….According to Edward Muriga through Stanley Muriga vs Nathaniel D. Shulter Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd vs Cruisair Ltd (No. 1) [1978] KLR 103; [1976-80] 1KLR 835, Madan J (as he then was) expressed himself as hereunder:

Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth...."

69. However, it is not automatic that when no evident is tendered that the court must state that the evidence is unrebutted. The plaintiff must have tendered some credible evidence to the effect that, prima facie, the defendant is to blame in negligence of breach of contract. In the case of Netah Njoki Kamau & another v Eliud Mburu Mwaniki [2021] eKLR, justice Mary Kasango, stated as doth: -

> " 18. The Appellants faulted the trial court for dismissing their claim in the light of the respondent not calling any evidence. What the appellant did in laying the failure of their case on the trial court was that they failed to appreciate that they bore the burden of proof to prove the allegations in their pleadings. The Court of Appeal in the case Charterhouse Bank Limited (Under Statutory Management Vs. Frank N. Kamau (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case: -
>
> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

70. The evidence is already tendered giving an inference of negligence of the defendant and breach of the duty to keep the cargo refrigerated at $+5^0$ C. The evidence was not contradicted. The evidence by Cecilia Ndeti was so silence on the status of the refrigeration machine. This was crucial evidence but the defendants chose not to tender the same. In the case of Rentco East Africa Limited v Dominic Mutua Ngonzi [2021] eKLR, justice G V Odunga, as then he was, stated as doth: -

> " It was similarly held in Chao vs. Dhanjal Brothers Ltd & 4 Others [1990] KLR 482 that:
>
> "Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence. Where the defendant relies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred in spite of the defendant

having taken all reasonable care to prevent it. The defendant is not required to prove how and why the accident occurred, but in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point out such cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that the defendant was not negligent, the plaintiff's case must fail."

71. There was no evidence tendered to show how the rotting occurred independent of the defendant's negligence. It was incumbent upon the defendant to proof that the damage occurred independent of their negligence or breach of duty of care or breach of contract.

72. The cause was shown to be temperatures which were higher than 5^0C agreed upon by parties. The report by Irad Advanced Irad For Commercial Services report confirms. The defendants were under duty to testify on the Particulars of negligence set out in the defence. As a fact from cross examination the witness who filed a lengthy 5-page, 16 paragraph statement was in Kenya. She did not witness what happened nor does she have expertise to know. The best evidence was held by Mr. Farooq, who surveyed the loss. He could have rebutted the evidence of Mizan Irad. Consequently, the evidence by Mizan Irad remained unrebutted.

73. The defence evidence was on the technical nature of the defence. There was an issue of there being a time bar. The time bar related to one year set out in the bill of lading. Carriage of goods by sea does not rule out any limitation period set out in statute. Further the loss occurred when the goods were destroyed on 24/7/2017.It is less than one year.

74. I do not find it necessary to find out the legality of the clause. It is of doubtful legality and tenuous. Section 2 of the *carriage of goods by sea act* does not gives a one-year time bar. There can be no contracting away from the statute.

75. I do not find the defence of limitation to have been tenable. If there were other statutes that support limiting of the limitation under the *Limitation of Actions Act*, then, they must be expressly pleaded. Under order 4 of the Civil Procedure Rules, certain matters must be specifically pleaded. The rule provides as doth: -

> "(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.
>
> (2) Without prejudice to sub rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient. (emphasis mine)

Jurisdiction

76. Jurisdiction of a court is crucial to be able to determine a case. In this matter the Defendant raised jurisdiction in two aspects. The fist one was on English law and that the case was to be filed in London. It is true that the law in this country was settled way back by the court of Appeal in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR by Nyarangi JA, as then he was when he stated as doth: -

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order t

77. The contract was entered in this country for supply of this country's products into Saudi Arabia. The 1st defendant is a Kenyan incorporated company. The plaintiff is a Kenyan company with measly 23,040 Kg of avocado. By being asked to sue in London, he is being asked not to sue. Where a forum is chosen in a way that it keeps parties away from access to justice, that forum is otiose and does not bind the conscience of the court. In the case of Uber Technologies Inc. v. Heller, 2020 SCC 16, [2020] 2 S.C.R. 118, the Canadian supreme court held as doth: -

> " The *Arbitration Act* generally mandates a stay of proceedings when a court action relates to a matter governed by an arbitration agreement (s. 7(1)). Of the few exceptions to this general rule, this appeal requires consideration only of whether Mr. Heller's action should proceed because "[t]he arbitration agreement is invalid" (s. 7(2)). Answering that question is really this simple. As a matter of public policy, courts will not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law. This obviates any need to resort to, and distort, the doctrine of unconscionability.
>
> [106] While the parties did not argue this appeal on the basis of public policy, we are of course not bound by the framing of their legal arguments. The central question to be answered in this appeal is not whether Uber's arbitration agreement is unconscionable, but whether it is invalid as contemplated by the *Arbitration Act* (i.e., unenforceable as a matter of contract law). Whether that question is viewed through the lens of unconscionability or public policy, the basis for reaching a conclusion on enforceability is substantially the same:

the issues raised by the parties remain the focus (R. v. Mian, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 30; see also 1196303 Ontario Inc. v. Glen Grove Suites Inc., 2015 ONCA 580, 337 O.A.C. 85, at para. 87). Further, this Court has said that courts may consider issues of public policy on their own motion, and for a good reason that (by happy coincidence) touches on the very basis for my objection to the putative "arbitration agreement" in this case: "public policy and respect for the rule of law go hand in hand" (Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 59).

78. There is no connection of the subject matter to the high court in London except the colonial hand on that the court presided over by Africans are likely to give inferior justice that is not according to the "civilized nations" of legal standards. It is not the province of the persons trading in Kenya to drive business to a former colonial power craving for recognition. This court has jurisdiction both ratione personae and ratione materiae. The objection on jurisdiction is thus misplaced.

79. Immediately the ships sail to these shores, they need to know that we shall exercise jurisdiction over them and shall not cede an inch of our sovereign equality with other states.

80. The second aspect of jurisdiction is the acceptance of jurisdiction. A person contesting jurisdiction cannot appear and file defence. Once a defence is filed, that marks the end of matters foreign jurisdiction. The London court ceases to have jurisdiction immediately. In the case of Skoda Export Limited V Tamoil East Africa Limited [2008] eKLR, the court, M. A. WARSAME, as then he was, while addressing exclusion of jurisdiction in an arbitration agreement, stated as doth: -

> " That is why section 2 of the *arbitration Act* No.4/95 is crucial to the question of jurisdiction. Section, 2 does not give an absolute jurisdiction but it says;
>
> "except as otherwise provided in particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration".
>
> Section 2 does not say that our *Arbitration Act* shall apply to all or any arbitration whether domestic or international. The exclusion given supports the intention of the parties to have their disputes determined in Kenya whether the arbitration contract is entered in Kenya or outside. The option and/or election to choose the relevant jurisdiction and the relevant applicable laws is reserved for the parties. In this case the parties provide that their legal relations shall be governed by the laws of England and Wales. I pose to ask whether Parliament intended that the power to grant an interim relief should be exercised in respect of an arbitration to be conducted abroad under a law which is not the laws of Kenya. The answer to that question is plain and obvious for two reasons;
>
> (1) Parliament cannot have intended section 7 to apply to a foreign arbitration because the chosen mechanism was to make those provisions into implied terms of the arbitration agreement and such terms could not be sensibly be incorporated into an agreement governed by a foreign arbitration law.
>
> (2) I can see no justification why parliament should have had the least concern to regulate the conduct of an arbitration process carried on abroad pursuant to a foreign arbitral law.
>
> By saying so, I am not excluding an ordinary citizen or a person who resides or an entity that ordinarily carries on business in this jurisdiction but a well known and reputed company incorporated under the laws of Czech Republic and owned by a foreign sovereign state. The applicant must have been in

possession of a proper and sound legal opinion when it allowed the inclusion of clauses No.12 and 13 in the agreement dated 22nd March, 2007. In my humble view that underscores an important message to this court that the parties intended to resolve their dispute/difference as per the agreement. They knew substantial part of the main agreement was to be performed in Kenya and Uganda. However they opted to limit and restrict the jurisdiction of courts in these two states, therefore the parties must confine themselves to their bargain.

81. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, the court of Appeal, Tunoi, Shah & Keiwua JJ A, stated as doth: -

> " Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
>
> As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):
>
> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

82. Can it be said that this was a bad bargain. It was not a bargain. This are standard documents flaunted when parties are exporting. The choice of the high court in London was neither consciously made nor in support of public policy. I decline invitation to invalidate jurisdiction. This court thus has jurisdiction.

83. In the case of United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] KLR 898 Madan, JA (as he then was) observed as follows:-

> " The Courts of this country have a 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. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely 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 their agreement.
>
> 'Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. There must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure. (per Cairns, LJ, in the Makefjell [1976] 2 Lloyds Reports 29).' "

84. In Universal Pharmacy (K) Limited v Pacific International Lines (PTE) Limited & another [2015] eKLR, justice Mary Kasango stated as doth: -

> " Another important reason why the application must fail is because the Defendants entered unconditional appearance. This court dealt with the issue of jurisdiction where the Defendant entered an unconditional appearance in the case of Petra Development Services

Limited v Evergreen Marine (singapore) PTE Ltd & Another [2014] eKLR. This court stated as follows:

"The summons in this case required Defendants to enter an appearance within 15 days. The appearance was due on or before 12th June 2014. Defendants filed an Appearance on 20th June 2014. That Appearance was in the following terms-

"'----------

As it will be seen that was an unconditional Appearance. The Court of Appeal in the case Kanti & Co. Limited (supra) held that once such an Appearance is filed a party has then submitted itself to the jurisdiction of the Court. Black's Law Dictionary defines Appearance as-

"A Defendant's act of taking part in a Law suit, whether formally participating in it or by answering, demurrer, or motion ..."

In that definition the dictionary in attempting to give further explanation of Appearance stated –

"... appearance, which is not mere presence in court, but some act by which a person who is sued submits himself to the authority and jurisdiction of the Court."

It therefore follows that as at 20th June 2014 Defendants submit themselves to the authority of this Court. That means the Defendants as at that date submit to this Court to have authority over the Plaintiff's claim for the release of Bills of Lading and for damages incurred. It is important to remember that the Jurisdiction Clause reproduced above provided the carrier who is the Defendants had the option to unilaterally waive the jurisdiction of England. For our remembrance of the Clause it stated-

"This Law and Jurisdiction Clause is intended solely for the Carrier's (Defendants) benefit and may be unilaterally waived by the carrier, in whole or in part before or after proceedings are commenced."

It follows that by filing an unconditional Memorandum of Appearance on 20th June 2014 the Carrier (the Defendants) waived that jurisdiction of England and wholly submitted to this jurisdiction."

85. In this matter, though the defendants entered appearance under protest, they did not make an application related to jurisdiction. In fact, the prosecuted an application to be struck out. When they filed their defence they lost the right to raise issues with foreign jurisdiction. Further the defence is also taken as a memorandum of appearance as seen in order 6 rule 2, which provides as doth; -

" Mode of appearance [Order 6, rule 2.]

(1) Appearance shall be effected by delivering or sending by post to the proper officer a memorandum of appearance in triplicate in Form No. 12 Appendix A with such variation as the circumstances require, signed by the advocate by whom the defendant appears or, if the defendant appears in person, by the defendant or his recognized agent.

(2) On receipt of the memorandum of appearance as required under sub rule (1) the proper officer shall stamp and file the original and stamp the copies thereof with the court stamp showing the date on which they were received and—

(a) if they were delivered to the proper officer, he shall return the stamped copies to the person appearing, or

(b) if they were sent by post, he shall send one copy by post to the plaintiff's address for service and one copy by post to the defendant's address for service.

(3) Where the defendant appears by delivering the memorandum of appearance as required under subrule (1) he shall within seven days from the date on which he appears serve a copy of the memorandum of appearance upon the plaintiff and file an affidavit of service.

(4) Where a defence contains the information required by rule 3 it shall where necessary be treated as an appearance.

86. Other than appearing, the parties proceeded fully to hearing. The matter of jurisdiction is thus moot, the defendants having submitted themselves to the jurisdiction of the court. This court is and was entitled to assume jurisdiction and proceed.

Special damages

87. In Ordinary matters, there should be an easy way of ascertaining losses. In international trade, the trade is impersonal and getting necessary documents occur when everything is going well. Nevertheless, it is incumbent upon parties to plead their case specifically and particularize the same before proceeding to proof. The court of Appeal, was of the view that, evidence without proof is useless. In the case of David Bagine VS Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it

88. The losses were particularized as stated above. The goods had been acquired and freight was paid for. The were destroyed while in transit. The damage itself was proved. The question was the extent of the damage. The Plaintiff proceeded in the most cavalier manner when having a claim of this magnitude. They have left the question on how much damage was proved open.

89. Goods are usually sold at cost, freight and insurance. This is the value of the goods. However, there was no formula for reaching the exact loss. Without such a formula, then someone can and will bear a disproportionate amount of damages. These are general and special damages for breach of contract.

90. Special damages must not only be particularized but must be specifically pleaded. The problem arises where the loss is nebulous and a moving target. In a situation where it is a farmer or a purchaser of local produce, for export, what is the loss? Is it their value as farm gate or at the foreign market. In

international trade, what constitutes proof. Is it the purchase price or the selling price. These are not idle questions. The loss in this matter occurred in the Kingdom of Saudi Arabia.

91. The bill of lading was filed by the Defendant through a further list of documents dated 14/10/21. The bill of lading indicating that there were 23,040 kg of Avocado occupying 46.M^3 of space. Temperature $+5^0$C.

92. I note that clause 12.3 provides as doth: -

> " The Carrier shall not be liable for any loss or damage to the Goods arising from latent defects, breakdown, defrosting, stoppage of the refrigerating or any other specialized machinery, plant, insulation and/or apparatus of the Container and any other facilities, provided that the Carrier exercised due diligence before releasing the empty Container to the Ship."

93. The cargo was received in an apparent good order, from the plaintiff. This is another way of saying, that only latent defects could be unknown. The cargo was to be transported upon arrival in Saudi Arabia to the consignee, Adil Mohamed Salalah Algohani Company of Yaubu Albahar, Sandia. The contract of carriage terms are said to be standard but ineligible. Clause 7 covered compensation and liability carrier's responsibility for carriage is said to be part to port carriage that is commences by the port of loading and ends when the goods are discharged.

94. The compensation is to be calculated at the normal value of the goods of the same kind and or quality. The current market price is to be invoice value plus freight and insurance if paid. If there is no invoice, or the invoice is not bonafide, then the market value is calculated by reference to the market value of such goods at the place and time they are delivered or should have been delivered.

95. In other words, the contracted parties outside the general rules relating to special damages are not strictly applicable in Kenya. Where COGSA applies, or the damage shall not exceed USD 500 per package. The avocado were in 5,760 cartons even, 18 G applies the compensation could have been 2,880,000/=. However, under clause 6, it applies to the US trade. For purpose of that section, a package a shall mean any palleted and unitized assemblage of cartons which has been palleted and or unitized for the convenience of the merchant., regardless whether, said pallet is disclosed on the front hereof.

96. The bill of lading itself sets out that the price is to be calculated on: -

    i. Market value of such goods at the price and time they were to be delivered. Or should have been delivered

    ii. The value should be fixed in accordance with the current market price, by reference to normal value of goods of the same kind and /or quality.

    iii. If Hague Visby Rules are compulsory to this bill of lading, the maximum limit is GBP 100 per package. This works out to GBP 576,000/=

    iv. If COGSA applies then it is USD 500 PER package, which works as USD 2,880,000/=

97. The Defendant raised 3 issues in their submissions.: -

    i. What were terms of the contract of carriage by Sea contained in the bill of lading.

    ii. Whether the terms are binding.

    iii. Whether the plaintiff is entitled to the reliefs sought.

98. The Defendant raised 4 other issues: -

i. Whether the terms of contract of carriage by sea were breached.

ii. Whether and to what extent the plaintiff suffered loss.

iii. Liability for loss of the defendant to the plaintiff.

iv. Reliefs sought.

99. The plaintiff raised 9 issues, which are due to repetition, I shall not reproduce.

100. The court notes that the issues herein are: -

a. Liability

b. The extent of loss suffered by the plaintiff

c. Relief to be granted including costs.

Documents

101. Shipping order No. 074177290 dated 2/6/2022 were sought by Ziglet Express Ltd. with the plaintiff as the shipper. Ocean Freighter were the ships Agent. The carriage was form Mombasa to Salalh. Carrying 23040 kg of Avocado, at +5o C vent open 15%, its code.

102. The cargo was received in the ship in good order and condition. There was an amended shipping order and voyage No. XA 722R. Though the delivery was said to be at the port of King Abdullah City, aboard MSC Manya, this shipping order indicated Salalah as the port of discharge. The defendant state that the goods were taken to the port of destination and the cargo discharged hence discharging the Defendants. They stated that under Hague Visby Rules, the carriage cannot exceed 500 of GBP 100. They defendant stated that USD 319,075/= is inapplicable.

103. They deny that value of cargo, penalties, includes legal expenses and legal fees are unmaintainable. The only issue with his kind of submission, is that the rules apply to pallets. the bill of lading indicates 5,760 packages. There is no basis for combining all the 5,760 packages as one pallet.

104. The Defendants evidence is that market value of the goods was never disclosed hence they cannot claim the same. They state that the container was functional and mechanically sound. They state that no loss was incurred. They state that the shipper has no property in the cargo. According to the survey report the cargo was already damaged. There was no temperature reader. The report agrees that temperature was the cause of the destruction.

105. The addendum to Universal surveyor's company reports. They are dated 10/10/2017 and 20/10/2017. This was months after event. It is of no probative value. The surveyor, Syed Farooq did not attend to defend the report. We also do not know his qualification. There is an email dated 6/11/2017 finding the reason as unjustified and excessive delay at the port of loading and re extension of MSC Manya due to operational reasons. They refrigeration is said to have been unplugged for 19 pours and the Terminal placed of on notice as the liable, party.

106. The difficulty the court has with that kind of is that the Terminal is not a party. The defendants were blaming the third party transporter. The party that unplugged Terminal was conventionality left out. From the correspondence there is no doubt that the cargo was spoilt at the port of departure, that is Mombasa. Liability is therefore squarely with the 1st and 2nd defendants.

107. The 1st and second are held liable as the principles and agents. As a special contract for carriage, the former are the local representatives of the 2nd defendant. They are no ordinary agent and principal.

They are liable jointly and severally. However, after paying the agent is entitled to indemnity from the principal. I therefore find that the defendant is 100% liable for the loss of 23,040 kg of avocado.

The Losses

108. The damages were found to have been total losses. The bill is of lading has 3 ways of arriving at a current position of the damage. The first one is using Hague – Visby Rules, 1924. It is said that a sum of USD 500 of F100 are to be paid per package. This was not one package but 5,670 (containing 23,040 kg of avocados, 4 kg each. This translates to USD 2,880,000 as loss. The package of a carton not the entire shipment of refrigeration.

109. The second one is the use of invoice. However, there is no bonafide invoice. In that case a manifest value is used. The other method is to use the prices in Kenya, in 2018, that is USD 1.65 per kilo, in 23040x1.65=38,016.

110. The last method is to apply the figures given by the consignee. The consignee gave a figure of Saudi Riyali 3,500,000., which is USD 933,308.44) at the exchange rate of 3.7501 Out of which they were claiming 10% loss, that is USD 93,330.844 The survey reports show that there were 20 pallets containing 288 cardboard cartons of 4 kg each 10 – 20 piece.

111. The damaged goods were destroyed and a certificate issued on 24/7/2017. The figure of R350,000/= (USD 93,330.844) was to be said to be 10% of the amount value of the contract.

112. This figure does not help us it does not relate to the particular consignment. 350,0000 Saudi Riyali is said to be a penalty. They penalty related to the contract between USD 93,330.844 and the plaintiff. It does not give us the cost of the actual loss for the export to Adil Mohamed Salh Algohani Company.

General damages

113. The Plaintiff also claimed general damages for breach of contract. General damages. It is important to note from the outset that the issue of general damages will not be discussed in this matter. It is already settled that they are not awardable in addition to quantified damages for breach of contract.

114. This is buttressed by several decisions of the court of Appeal and this court. The case of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR, referred by the defendants comes in handy, where the court stated as follows: -

> "Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages. The claim was one under a contract to lend money, an executory contract the remedies for which available to the borrower are rendered by the learned authors of Chitty On Contractors 37th Edition Vol. II, Specific Contracts par 36-208 (p609) as follows;
>
> "If a person contracts to lend money, and then, in breach of contract, refuses or fails to advance the money, the borrower cannot sue for the money agreed to be loaned as a debt, for this would be tantamount to an order of specific enforcement, and such an order will not normally be granted for a contract of loan. But the borrower can claim damages for the failure to advance the money. The damages will very often be merely nominal, but if expense has been reasonably incurred in procuring the loan elsewhere, that expense is recoverable as special damage provided it was caused by the breach and was within the contemplation of the parties. If the borrower can only procure the loan from other sources at a higher rate of interest than that agreed under the contract, and this was reasonably foreseeable at the

time when the contract was made, it seems that the borrower can recover the additional interest he will have to pay as damages from the lender. If the borrower is unable to raise the money from other sources at all, and he is consequently unable to enter into or complete some transaction for which the money is required, the lender may be liable for loss of profit on such a transaction or other consequential loss."

115. There are also claims for consequential losses, which were prohibited under the Bill of lading and Saudi Law. The said SR 350,000/= are not thus payable. Azhan Legal consultancy issued notice claiming for the lost avocado. No amount was attached. The waste disposal was also carried out. No amount related to it was shown to be paid or invoiced.

116. As much as I may want to sympathize with the monologues loss of the huge amounts of money, there is no evidence of payment. I have no doubt it was paid for. However, the plaintiff just threw the figures to the court. The demand by Azhari legal consultancy indicated that the damage exceeded USD 300,000. The origin of the 300,000 USD is still a mystery.

117. Faced with difficulties of this nature the court cannot use the Hague Visby Rules as the same were not provided for as a way of fixing prices. It is the market price at the time of loss that is provided for. The parties did not suggest an agreement on the international prices of Avocado. The court is entitled under section 60(1); and (o)to take judicial notice of matters of local notoriety and the rule of the road on land or at sea or in the air; The court will apply and world statistics available was that the price of Avocado in Saudi was USD 1.65 per Kg in 2017 and USD1.87 per kilo in 2023 and USD 1.60 in 2018.

118. It the matter had been without the bill of lading, the suit ought to have been dismissed. However, the bill of lading provides for using the current market price. It does not however, provide for the method of ascertaining the current market price.

119. The Defendant had offered compensation of USD 15,000/= and not USD 48,194.6 that he had offered earlier.

Penalties

120. The loss occurred in the Kingdom of Saudi Arabia. Though, contracted here, in this country there is a limit of loss to be recovered. Under the Article 1 of the Basic Law of Governance, Saudi Arabia's constitution, provides that The Holy Qur'an and the traditions of Prophet Muhammad, sallallahu 'alayhi wa sallam, meaning Peace be upon him are part of the Saudia Basic Law. Though this claim is based on Kenyan law, I am aware that, any such loss could only have been compensated to the extent dealt with under the Saudi constitution. The rest of the claim, the loss fell on the purchaser or consignee. Such loss is irrecoverable.

121. The court is entitled to notice foreign law that has an effect on this claim in particular the Islamic jurisprudence (fiqh) as understood by the dominant Hanbali school of thought, which is the law of that country. The principles governing damages in the kingdom of Saudi Arabia are anchored on the fault, harm and causation. The later 2 determine the extent of loss. fiqh does not allow any los other than tangible loss. That is the los of the res. This is determined by the actual loss by the creditor.

122. Why am I dealing with Saudi Arabian law? This loss occurred there. It limited the amount of damages payable to the consignee. Consequently, the Plaintiff can only recover to the extent he was to be liable to the other side.

123. In other words, though under the Kenyan law he could be entitled to recover, profits and such other losses, he will be unduly enriching himself, when the customer socked the rest of the loss.

124. I am aware that payment of penalty, under Saudi Arabian law is mandatory. Issuance of receipt is another ball game. Consequential, profit, economic loss, moral loss are not payable. Only certain loss is payable. In this case there was a total loss of 23,040 Kg of avocadoes for export. Article 62 of the general contract law provides for 20 penalty for delay.

125. Another key limitation on the recovery of damages under Saudi law is the prohibition of interest. Interest is equated with usury (riba) and is therefore strictly prohibited in any form as a matter of Saudi public policy. Consequently, Saudi courts will not award interest irrespective of any agreement to the contrary or the provisions of an applicable foreign law.

126. This was via an email given on 6/11/2017. This was not accepted already at USD 15,000 that was offered. Clause 7 of the bill of lading, provides for use of actual market value of avocados. The parties did not give market values for the 23,040 Kg exported to Saudi Arabia in 2017. The court is entitled, under section 60(1) l and o to take judicial notice of the market values in the international markets. This was USD 1.65 per Kg in 2017 when the cause of action occurred. Freight is already admitted at USD 2,435, Penalties in Saudi Law for delay is 20% of the value. This therefore adds up to USD 48,451, made up as hereunder: -

    i. 23,040 x1.65 = 38, 016

    ii. Freight =2,435

    iii. Penalty = 8090

    Total = 48,541

127. I therefore enter judgment for the plaintiff for a sum of USD 48,541, Costs of USD 2,347.

Determination

128. I therefore make the following orders: -

    i. I enter judgment as follows: -

    ii. Judgment be entered on liability at 100% liability for breach of contract

    iii. On quantum judgment is entered as follows: -

    iv. The value of the goods -cost and freight USD 40,451

    v. Penalty being 20% of (i) under Saudi law article 72 –under the General Control Law – USD 8090

    vi. Incidental costs NIL

    vii. Legal costs NIL

    viii. General damages nil

    ix. The rest of the claim is dismissed.

        a. The award therefore is for 48,541

        b. Costs, 2,347.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF SEPTEMBER 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ahmed Luqmanu for the Plaintiff

Osewe for the defendant