



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. E001 OF 2021

JUNCA GELATINES S.L.....PLAINTIFF

VERSUS

HILTON INGREDIENTS (U) LTD.....DEFENDANT

JUDGMENT

1. On 14th January, 2021 the plaintiff filed a plaint dated 29th December, 2020. It averred that on 23rd September, 2020 it received a purchase order for the supply of Gelatine Bovine Hides origin 200 Bloom 50 Mesh Halal from the defendant, a corporation which purported to carry on business in Kampala, Uganda.
2. The plaintiff further averred that it believed that the request was from Hilton Food Group PLC of Cambridgeshire, United Kingdom for the supply to the defendant in Uganda. That there followed further correspondence by email with what the plaintiff believed to be Hilton Food Group PLC, United Kingdom.
3. It was stated in the plaint that the plaintiff obtained a credit approval for Hilton Food Group PLC, United Kingdom on 8th October, 2020 and issued an invoice to the said company for the consignment in the sum of Euros 147, 000. That on 4th November, 2020 the plaintiff delivered the consignment to the Evergreen Line for shipment to the defendant through Mombasa and released the bill of lading, among other documents. That the goods arrived at the Port of Mombasa on 22nd December, 2020.
4. The plaintiff stated in the plaint that Hilton Food PLC, United Kingdom later informed them that it had not placed the order, but criminals were trying to impersonate them. That the plaintiff then established that they were dealing with fraudsters and the matter was reported to the Spanish police as the defendants had obtained the documents of title to the consignment of goods by fraud.
5. It was stated that the said consignment is still in the hands of the Evergreen Line and that it is necessary to stop the release of the goods which are in Mombasa, so as to prevent them from being delivered to the defendant.
6. The plaint was filed contemporaneously with an application under certificate of urgency which sought *inter alia*, an order restraining the Evergreen Line as well as the Kenya Ports Authority whether by themselves, their employees, servants or agents from parting with possession of the plaintiff's consignment shipped to the Port of Mombasa under the bill of lading No. 571000057631, in container No. BEAU5202017 to the defendant or its agents.
7. The said application was supported by the affidavit of Ferran Junca Riuro, the plaintiff's Managing Director, sworn on 29th December, 2020. The said application was not opposed by the defendant, which did not file a replying affidavit. This court therefore confirmed the interim orders which had been issued against the defendant restraining it from taking possession of the subject consignment.
8. For the sake of expediency, Mr. Mugambi, Learned Counsel for the plaintiff urged this court to proceed on with the hearing of this case on the basis of the evidence deposed to, in the affidavit of Ferran Junca Riuro. The plaintiff's Counsel filed a list of authorities outlining recently decided cases in which fraudulent persons and entities had tried to defraud unsuspecting companies, by impersonating purchasers of various products. He relied on decisions in Nairobi High Court (Commercial & Admiralty Division) Case No. E552 of 2020, **SMS Kopuz Gida v Robert Mugaga (Alias) & 8 Others and Rotem Kimyevi Maddeler Sanayi ve Ticaret A.S v Sunland Chemicals Uganda Limited** [2019] eKLR.
9. He also relied on Nairobi High Court (Commercial & Admiralty Division) Case No. E551 of 2020 **SMS Kopuz Gida v Erycom Desire (Alias) & 8 Others**, in which similar tactics were used by fraudulent parties to order for goods which were shipped to the Port of Mombasa but were never paid for, requiring reshipment of the goods at the shipper's cost. The plaintiff's Counsel urged this court to order for the release of the consignment of cargo to the plaintiff for re-shipment to Spain. It was submitted that the defendant did not enter appearance and file a statement of defence to controvert the issues raised by the plaintiff. It was thus stated that the plaintiff had proved its case on a balance

of probability.

ANALYSIS AND DETERMINATION

The issue for determination is if the plaintiff still has good title to the consignment of goods in issue, as against the defendant.

10. The plaintiff's Counsel urged this court to pay heed to the depositions in the affidavit sworn by the plaintiff's deponent on 29th December, 2020 and regard the same as the plaintiff's evidence in this case, under the provisions of Order 19 Rule 1 of the Civil Procedure Rules. The said provisions state as follows-

“Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fides desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.” (emphasis added).

11. Firstly, this court relies on the above provisions in the determination of this case by way of affidavit evidence as the defendant neither entered appearance nor filed a statement of defence. Secondly, the consignment of goods stacked in container No. BEAU202017 is accruing demurrage at the Port of Mombasa on a daily basis, which cost will befall the plaintiff. Thirdly, courts are under an obligation to expeditiously deal with cases of this nature where goods have been ordered for through fraudulent means and costs have been incurred for shipment, which ultimately will be paid for by the plaintiff as the shipper of the goods. Fourthly, the plaintiff stands to suffer the blow of paying the costs which will be incurred for re-shipment.

12. The Civil Procedure Act in Section 1A provides the overriding objectives of the Civil Procedure Act. It states as follows-

“(1) The overriding objective of this act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court.”

13. Section 1B places an obligation on courts to purposively work towards achievement of the objective specified in [Section 1A](#) of the Civil Procedure Act. Section 1B states that the Court:-

“Shall handle all matters presented before it for the purpose of attaining the following aims –

a. The just determination of the proceedings;

b. The efficient disposal of the business of the Court;

c. The efficient use of the available judicial and administrative resources;

. The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

e. The use of suitable technology”. (emphasis added).

14. When determining a case whose circumstances are almost similar to this one, Judge J.A Makau in **Rotem Kimyevi Maddeler Sanayi ve Ticaret A.S v Sunland Chemicals Uganda Limited** (supra), proceeded to hear the said case based on affidavit evidence under the provisions of Order 19 Rule 1 of the Civil Procedure Rules.

15. This court is therefore not treading on uncharted waters by relying on the depositions in the affidavit of Ferran Junca Riuro as the plaintiff's evidence in this case. The annexures thereto include a purchase order dated 23rd September, 2020. The plaintiff was described thereon as the seller and Hilton Food Group PLC, as the buyer. The goods were to be shipped by the plaintiffs to the defendants herein. An invoice was issued on 8th October, 2020 by the plaintiff to Hilton Food Group PLC of 2-8 the Interchange Lathan Road Huntingdon, Cambridgeshire PE 29 6 YE, United Kingdom. A packing list was duly prepared on 13th October, 2020 and a bill of lading No. 571000057631 was issued in the name of the defendant. The said bill of lading was for container No. BEAU5202017, with a consignment of goods valued at Euros 147,000.

16. On 20th November, 2020 one Magda Drozd of the plaintiff company sent an email to one Neil George of Hilton Food Group PLC informing him that the defendant was using their name to perpetrate fraud. She sought a written declaration that the purchase order the

plaintiff had received purportedly from Hilton Food Group PLC had not originated from them, as it would help in stopping the delivery of the consignment of goods to Mombasa.

17. On 20th November, 2020 Neil George, the Company Secretary of the Hilton Food Group PLC, responded to Magda Drozd of the plaintiff company and informed her that the purchase order they had received was not from Hilton Food Group PLC and that criminals were trying to impersonate the Hilton. They further stated that they became aware of the issue in early October (sic) and they immediately ensured that the domain name was suspended.

18. The statement recorded from Ferran Junca Riuro at the command Headquarters of the Civil Guard Girona, Spain indicated that when he was speaking to an Imam who provides Halal certificates for their company 3 days prior to 29th September, 2020, he warned them to be cautious as he knew of a case of a scam involving another manufacturer of gelatin.

19. It is thus apparent that had it not been for the word of caution from the Imam, the consignment of goods would have landed into the waiting hands of the faceless fraudsters.

20. In considering if the plaintiff still has good title to the consignment of goods after issuing a bill of lading in the name of the defendant, it is necessary to look into the value attached to the said document. **Lexis Navigator Dictionary** states as follows in regard to bills of lading-

“A Bill of lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of the contract of carriage under which the goods have been delivered to and received by the ship. The signed bill of lading is handed over to the shipper, who may either hold onto it or transfer it to a third person. During the voyage and transit, the bill of lading under the law merchant is considered the symbol of the goods described in it, and the endorsement and delivery of the bill of lading operates as a symbolic delivery of the goods. This person named in the Bill of lading as the person to whom the delivery of goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of lading, he is usually known as the holder or endorsee of the Bill of lading. The holder of the bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner’s lien for freight. A bill of lading issued by the ship owner’s agent in the absence of any contract of carriage is a nullity.” (emphasis added).

21. In instances like the present one where the plaintiff has proved that the consignment of goods was obtained fraudulently, it is evident that the bill of lading cannot pass good title to the defendant for the said consignment. I am in agreement with Mr. Mugambi that the plaintiff has established the existence of a dubious contract with the defendant which was initiated through fraudulent emails. The purchase order, invoice and the bill of lading attached to the affidavit of the plaintiff proves the plaintiff’s case. Communication received by the plaintiff from the Hilton Food Group PLC proves that the defendant was a fraudster who set out to make a quick buck by obtaining goods fraudulently. Had the plaintiff not taken quick action, the said consignment of goods would have been cleared by the defendant at the Port of Mombasa as it had a 60 days’ credit period before payment could be made.

22. Since the order for the consignment of goods was made fraudulently the title in the goods did not pass to the defendant. It is my finding that the plaintiff has discharged its burden of proof on a balance of probability. I therefore hold that the title to the consignment of goods remains with the plaintiff who is the rightful owner of the same.

23. I therefore enter Judgment in favour of the plaintiff as against the defendant in the following terms-

i. It is hereby declared that the defendant has no right to the consignment of the subject bill of lading No. 571000057631 and that the consignment is lawfully the property of the plaintiff;

ii. An injunction is hereby granted to the plaintiff to prevent the defendant from taking possession of the consignment the subject of the bill of lading No. 571000057631; and

iii. Costs of the suit awarded to the plaintiff. Interest is also awarded to the plaintiff at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 5th day of February, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of -

Mr. Mugambi for the plaintiff

No appearance for the defendant

Mr. Oliver Musundi - Court Assistant