



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO.E058 OF 2021

APLIENA SAU PLAINTIFF

VERSUS

ANDREA DONATO (alias)..... 1ST DEFENDANT

VENICE AGENCIES..... 2ND DEFENDANT

STEWARD POPE (alias)..... 3RD DEFENDANT

AKOKI INVESTMENTS AGENCY LIMITED.....4TH DEFENDANT

IVAN SSENTONGO (alias).....5TH DEFENDANT

JUDGMENT

1. This is a Judgment in this suit which was instituted by the Plaintiff, **APLIENA SAU** against the Defendant's **ANDREA DONATO alias VENICE AGENCIES, STEWARD POPE (alias), AKOKI INVESTMENTS AGENCY LIMITED, and IVAN SSENTONGO (alias)** vide a **Plaint** dated 9th June, 2021 seeking for:-

a) A declaration that the consignment that was shipped in container No.CAIU7824143 under Bill of Lading No.MEDUCI1223446 is the property of the Plaintiff and the Defendants have no right to it.

b) An injunction to prevent the Defendants from taking possession of the consignment that was shipped in container No.CAIU7824143 under Bill of Lading No.MEDUCI1223446.

c) An order directing Mediterranean Shipping company, S.A to release the consignment that was shipped in container No.CAIU7824143 under Bill of Lading No.MEDUCI1223446 to the Plaintiff and the consignment be repatriated back to the country of origin or such other destination of the Plaintiff's choice.

d) Costs of the suit together with interest at court rates.

e) Such further or other orders as the court may deem fit to grant.

2. On **17th June, 2021** the Defendants were served with Summons to enter Appearance together with all other pleadings filed in the suit via their email address as per the orders issued by this court on **14th June, 2021** as confirmed by the **Affidavit of Service** of **MUGAMBI MUTUA** filed on **17th June, 2021**.

3. The Defendants neither entered appearance nor filed a defence despite having been so served. And on **23rd June, 2021**, the court allowed the application dated **9th June, 2021** in terms of prayer **No.(a)-(e)** since the same was not challenged, that:-

a) Spent;

b) Spent;

- c) *Spent;*
- d) *Costs of the suit together with interest at court rates.*
- e) *Such further or other orders as the court may deem fit to grant.*

4. On the same date, the Plaintiff's counsel requested and the court allowed the suit to proceed for hearing by way of case stated for determination of the prayers sought in the **Plaint** dated **9th June, 2021**.

5. The Plaintiff proceeded to adopt the **Affidavit of FRANCISCO JAVIEL GARCIA ALVAREZ** sworn on **9th June, 2021** as its evidence in chief and all the documents attached thereto and filed therewith as Exhibits in line with the provisions of **Section 22(c)** of the **Civil Procedure Act** and **Order 19 Rule 1** of the **Civil Procedure Rules, 2010**.

6. The brief facts of this case are that the Plaintiff is a corporation established and carrying on business in Spain whereas the 1st Defendant is supposedly a National of Botswana and a representative of the 2nd Defendant which is a corporation purporting to carry on business in Gaborone, Botswana. The 3rd and 5th Defendants are "supposedly" Uganda Nationals and representatives of the 4th Defendant which is a corporation purporting to carry on business in Kampala, Uganda.

7. It is the Plaintiff's testimony that on **10th March, 2021**, it received an email from the 1st Defendant representing himself as an official of the 2nd Defendant, who he introduced as a sourcing house and logistic company that links several potential buyers to manufacturers and exporters worldwide.

8. Upon responding to the email from the 1st Defendant, communication opened up between them and the 1st Defendant introduced **PX Manufacturing Ltd of 40 Thorby Avenue, March, Cambridge Shire, PE15 O AZ UK** as their client. It produced the correspondence marked as A2 as **Exhibit A1**. The Plaintiff went on to state that on **11th March, 2021**, it received an email from the 3rd Defendant who represented himself as the Managing Director of **PX Manufacturing Ltd of Cambridge shire UK** and indicated that the Company needed to purchase from it Butyl Acetate 99% and other products.

9. That, believing the 3rd Defendant was a representative of **PX Manufacturing Ltd of Cambridge shire, UK**, the Plaintiff entered further correspondence vide an email (**Exhibit P3**) towards finalizing the sale and the 3rd Defendant proposed that the terms of payment be 100% upon account payable after 60 days after Bill of Lading date with insurance credit cover. The Plaintiff then consulted its insurance company and did due diligence on **PX Manufacturing Ltd of Cambridge shire, UK** and agreed to the terms proposed by the 3rd Defendant. The Plaintiff received a purchase order **No.00009593** for **8050 Kgs of Art 999 Apli Bread Improver** at 57,960 Euros and **8050 Kgs of Art 999 Frying Bread Improver** at 41,860 Euros under the letter head of **PX Manufacturing Ltd of Cambridge shire, UK** showing that it had been approved by the 3rd Defendant (**Exhibit P4**) on **23rd March, 2021**. And still believing that **PX Manufacturing Ltd of Cambridge shire, UK** was responsible for payments of the merchandise approved the purchase order.

10. Further testimony was to the effect that on **28th April, 2021**, the 3rd Defendant emailed the Plaintiff asking them to share the shipping documents for renewal. That he also asked the Plaintiff to send the original documents to the consignee being *3 original Bills of Lading and 3 non-negotiable copies packing list, certificate of analysis, certificate of conformity, certificate of origin and certificate of insurance*. The address details he provided were **Akoki Investment Agency Limited** (The 4th Defendant), **Bombo Road, Gathani, Wandegeya Kampala, Uganda**; **Email address** akokiinvestmentsagency@gmail.com; **Telephone: +256 784 732 103**; **contact person; Ivan SSentongo** (The 5th Defendant) (**Exhibit P5**).

11. The Plaintiff packaged the goods ordered and delivered the consignment to **Mediterranean Shipping Company, S.A**, which packed the goods in container **No.CAIU7824143** for shipment to the 4th and 5th Defendants. The said **Shipping Company** issued original **Bills of Lading No.Meduci1223446** which it released to the Plaintiff alongside other documents of title as had been requested by the 3rd Defendant (**Exhibit P6**).

12. It then turned out that while the consignment was in transit to the Port of Mombasa, the Plaintiff learnt from **PX Manufacturing Ltd of Cambridge shire, UK** that they had no affiliation with the 3rd Defendant and that he was a fraudster (**Exhibit P7**). The Plaintiff took immediate steps to stop delivery of the consignment to the 4th Defendant by first reporting the matter to the Spanish **Police (Exhibit P8)**. The Plaintiff also wrote to the **Mediterranean Shipping Company, S.A** on **2nd June, 2021** asking them not to deliver the consignment to the 4th Defendant. This Company replied the letter on **3rd June, 2021** and advised that the Bill of Lading to the consignment was not a negotiable document and that their obligation was to deliver the goods to the named consignee only upon presentation of the **original Bill of Lading (Exhibit P9)**. The vessel carrying the consignment arrived at the Port of Mombasa on **4th June, 2021**. On learning that the suit consignment was in this courts' jurisdiction, the Plaintiff filed this suit.

13. According to the Plaintiff, this was not the first case of this nature and demonstrated this by citing similar cases where it has been a victim of a fraud perpetrated against them by the Defendant in similar fashion being;

a) **RUTEM KIMYEV MADDEL SANAYI VE TICHARET AS V. SUNCAND CHEMICAL UGANDA LIMITED [2019] eKLR.**

b) **GINEGAR PLASTIC PRODUCTS LTD V VICTREX LTD & ANOTHER [2021]eKLR.**

c) **JUNCA GELATINES S. L. V HILTON INGREDIENTS (U) LTD [2021] eKLR.**

14. The issue here is whether the Plaintiff has proved its case as against the Defendants to warrant the court make the declarations sought in the **Plaint**.

15. The Defendants neither entered appearance nor filed defence(s) to challenge the Plaintiff's case. The Plaintiff has tendered evidence vide an Affidavit sworn by **FRANSISCO JAVIA GARCIA ALVAREZ** on **9th June, 2021** and produced documents filed therewith as **Exhibits P1 to P9**.

16. The evidence has not been challenged in any way by either Defendants. And as submitted by the Plaintiff, failure to respond to affidavit evidence is a clear indication that the Plaintiffs evidence is the only truth available in this case.

17. In the circumstances, I find that the Plaintiff has demonstrated that the alleged affiliation between the 3rd Defendant and **PX Manufacturing Ltd of Cambridge shire, UK** is non-existent. The Plaintiff has also shown that the contract with the 3rd Defendant is dubious from the email correspondence, purchase order, invoice and Bill of Lading. The Defendants have also been shown to be fraudster and faceless entities since they have not shown up to confirm interest in acquiring the consignment lawfully or title to it. In the circumstances of this case as presented by the Plaintiff, the title in the consignment cannot pass to the Defendants and hence the Plaintiff remains the rightful owner thereof.

18. The Plaintiff has thus discharged its burden of proof on a balance of probability and Judgment is therefore entered in its favour as against the Defendants with costs.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS4TH DAY OF ...NOVEMBER., 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Lelu counsel for the Plaintiff

No appearance for and by the Defendants

Court Assistant - Gitonga