



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 106 OF 2015

CHINA WU YI CO. LIMITED.....PLAINTIFF

VERSUS

CHINA AFRICA TOTAL LOGISTICS CO. LIMITED.....DEFENDANT

JUDGMENT

1. As the Defence by China Africa Total Logistics Company Limited (China Africa or The Defendant) is that the Claim herein by China Wu Yi Company Limited (China Wu Yi or the Plaintiff) does not lie because of breach of a Trade Usage or Custom, the success or failure of that Claim may turn on whether China Africa has satisfactorily proved the existence of such Trade Usage or Custom.
2. China Wu Yi is a construction and engineering company carrying out civil engineering and road construction projects in the Country. On the other hand China Africa is engaged in the business of clearing and forwarding. On diverse dates between the years 2012 and 2013, China Wu Yi contracted China Africa to clear and forward some consolidated consignments consisting of eleven (11) containers from the port of Mombasa to the inland City of Nairobi.
3. Upon the offloading of the containers, the empty containers were expected to be returned to the Shipping Line or Lines which imported the consignments. To secure their return, a security deposit would be made by China Wu Yi to China Africa for onward payment to the shipping line or lines. This is accepted by both sides as common ground and non controversial.
4. In respect to the dispute at hand, China Wu Yi paid a sum of Ksh.11,904,129/= to China Africa. The grievance by China Wu Yi is that despite the delivery and return of the eleven (11) containers, China Africa neglected to repay the said deposit. China Wu Yi claims that amount together with costs and interest.
5. The Defence of China Africa is reproduced as follows:-

“5. The Defendant states that it was an express and or term implied by the trade usage or custom into contracts for clearing and forwarding services that,

- a. The Defendant and its agent Aan(sic) Clearing and Forwarding Limited would clear and forward the consolidated consignments in containers from port of Mombasa.
- b. The Defendant would by itself and or its said agent issue a Container Deposit bond (bond) to secure the return of the Containers.
- c. The Defendant by itself and or its agent would issue a customs security bond to the Customs binding itself to ensure that the duty free consignment is delivered to the tax-exempt Consignee.
- d. In respect of the Container Deposit, the Plaintiff was obliged to return the 11 Containers to the Shipping Line and deliver the relevant documents to the Defendant to enable the Defendant claim the Container Deposit.
- e. In respect of the customs bond, the Plaintiff was to deliver to the Defendant the following documents to enable the Defendant and its agents cancel the customs bond and to show that the Plaintiff had paid customs taxes or had been exempted from paying.

- i. Duly completed form CD 16.

- ii. Duly completed form CD 18.
- iii. Letter of exempting the Plaintiff's consignment from taxes.
- iv. In the alternative to the letter exempting the consignment from tax, pay the taxes due.
- f. The Container deposit would be paid only upon the Plaintiff,
 - i. Returning the Containers.
 - ii. Delivering all the documents in 5 (e) above within three months (3) of delivery of the consignment to the Plaintiff and or his agent.

6. In breach of the foresaid terms of the agreement, the Plaintiff failed to deliver the following documents to the Defendant,

- a. Return the foresaid CD 16 and CD 18 forms dully approved by the customs.
- b. Letter from KRA exempting the Plaintiff's consignment from taxes.
- c. In the alternative, pay the due taxes on the consignment.
- d. Deliver tax payment receipts to the Defendant."

6. China Africa pleads that because of the aforesaid breach, its Clearing and Forward Agency Licence has been cancelled and it has lost its right to engage in that Trade. It has therefore lost, and continues, to lose income.

7. At the hearing two witnesses testified, Yu Youyunjie for China Wu Yi and Jackson Ngua for China Africa. From that evidence, some facts are common ground. The sum of Kshs.11,904,129 was paid for security of 11 containers and the 11 containers were returned to the shipping line. In respect to the latter, Jackson Ngua (*speaking for China Africa*) testified,

"The Shipping Line received the Containers".

8. What was not admitted by China Wu Yi was that, in addition to the return of containers, the Deposit would only be paid upon the principal delivering the following documents being CD 16, CD 18, letter of Exemption of Tax or evidence of payment of Tax to its agent. On the other hand the case for China Africa is that the delivery of these documents was a matter of Trade Usage and Custom.

9. For that reason the only issue for determination would have to be whether the alleged Trade Usage or Custom was proved so as to disentitle China Wu Yi from its claim.

10. A Trade usage or custom is defined as,

"A practice or method of dealing having such regular observance in a region, vocation, or trade that it justifies an expectation that it will be observed in a given transaction; a customary practice or set of practices relied on by persons conversant in, or connected with, a trade or business". (Black's Law Dictionary (10th Edition)

11. Save where Trade Usage or Custom is of such general or local notoriety as to require no proof (and for which the Court shall take judicial notice), Trade Usage and Custom must not only be pleaded but also proved to the satisfaction of the Court. In the decision in Harilal & Co. vs. The Standard Bank Ltd [1967] EA 512, the Court had this to say on the manner of proving Trade Usage and Custom,

"A Trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the Usage exists as a fact and is well-known and has been acted on generally by persons affected by it. A Usage is not proved merely by the evidence of persons who benefit from it unsupported by other evidence. Where a particular usage has acquired sufficient general or local notoriety judicial notice may be taken of it under S.60 of the Evidence Act. Where a Trade Usage is proved to exist then, unless expressly or impliedly excluded, it is presumed to have been incorporated into the contract between the parties and this is so even though one of the parties may in fact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it". (my emphasis)

12. In the matter before this Court, the only witness who was called to prove the alleged Trade Usage or Custom was Jackson Ngua who testified on behalf of China Africa who attempt to draw a benefit from it. No independent evidence was called and even the evidence of Jackson Ngua was not backed by any documentary evidence that established that such Custom or Usage not only existed but was well known and acted on generally by persons affected by the Trade.

13. China Africa failed to prove the existence of that Trade Custom or Usage and having failed to establish its Defence, the Claim by the China Wu Yi must succeed. And if the intention of China Africa was to withhold payment because it had any Claim against the China Wu Yi, then it should have set up either a Counterclaim or setoff. It did neither!

14. The upshot is that the Plaintiff's Claim succeeds. Judgment is entered for the Plaintiff against the Defendant for the sum of Khs.11,904,129 and costs of this suit. The Plaintiff shall also be entitled to costs on the principal sum at Court rate from the date of filing suit.

Dated, Signed and Delivered in Court at Nairobi this 18th day of January, 2019.

F. TUIYOTT

JUDGE

PRESENT:

Muchiri for Ondego for Defendant

N/a for Plaintiff

Nixon – Court Assistant