



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 182 OF 2008

ETS PALUKU KATILIKO.....PLAINTIFF

VERSUS

1. SDV TRANSAMI (K) LIMITED

2. PIL (KENYA) LIMITED.....DEFENDANTS

J U D G M E N T

1. By a plaint dated 21/7/2008 and later amended on 23/7/2008, the plaintiff sought the recovery of the sum of USD 82,836 from the defendants jointly and severally on account of loss of a container No. PCIU 2598864 STC which was carried by the 2nd defendant's Principal and was due to be cleared and forwarded by the 1st defendant but was allegedly cleared by 1st 3rd parties and did not reach the plaintiff.

2. When served the 1st defendant filed a statement of defence in which the allegation that it was the only person mandated by the plaintiff to clear the cargo was denied. The 1st defendant equally denied that it received the release order as pleaded by the plaintiff together with the value of the cargo with an additional pleading that if the container was indeed cleared by the said third parties then the same was with the authority and full knowledge of the plaintiff and therefore the 1st defendant should bear no liability to the plaintiff. Even notice of intention to sue was denied and plaintiff invited to strict proof.

3. For the 2nd defendant a statement of defence was filed on the 13/8/2008 in which it was clarified that it was the shipping agent respecting the cargo laden in the suit container and that it did hand over the same to the 1st defendant by delivery order No. 051312 hence it became the duty of the 1st defendant to proceed and clear the container on behalf of the plaintiff but that it later established that the same container had been cleared from the port by Ms. Kisa Freighters Ltd with the aid of documents forged by the said Kisa Freighters Ltd or obtained by them from parties other than the 2nd defendant. The second defendant then shifted blame upon the said Kisa Freighters and Kenya Ports Authority for having colluded to have the cargo irregularly released. On that basis the 2nd defendant did seek leave and was allowed to issue and serve a third party notice upon the said Kisa Freighters Ltd.

4. In fact both defendant sought to join 3rd parties to the suit with both targeting one Kisa Freighters Ltd aka Kisa Freight Forwarders Ltd but by an order given on 25/10/2012, that confusion was dealt with it be ordered that the two cases were one and the same person and is properly known as Kisa Freighters Ltd. The matter thus proceeded on the basis of the plaintiff, two defendants and two third parties; Kisa Freighters Ltd & Kenya Ports Authority.

Evidence by the plaintiff

5. The evidence on plaintiff's behalf was led by one Ebale Kenbale, PW 1, who swore to be the director of the plaintiff. The plaintiff was described as a general merchant registered in the Democratic Republic of Congo and buys goods from abroad to sell in the Democratic Republic of Congo and the goods get shipped through the port of Mombasa then transported to the destination by SDV Transami, 1st Defendant. In the year 2008 the 1st defendant after having been contracted to do the clearing and forwarding, the goods were not so cleared and forwarded, as the 1st defendant reported the same to have been lost.

6. The 1st defendant however assured the witness by a letter that the 2nd defendant had committed to refund the value of the goods. In the course of this evidence the witness referred to the bundles of documents filed by the other parties and thus produced, by consent of the parties, the 2nd third party's bundle as well as that by the 1st defendant, which were produced as exhibits. The letter dated 8/7/2008 was produced to prove a promise that the 2nd defendant would issue a cheque for the value of the goods in the sum of 82,836 USD. The payment however did not come hence the suit. The witness said the 2nd defendant was the carrier of the goods from CHINA and who was to handover

the goods to the 1st Defendant once the goods landed in Mombasa. The witness produced the invoice showing the value of the goods as well as a receipt in settlement of the invoice. The receipt and invoice gave the same value the 1st defendant had assured would be paid by the 2nd defendant for the goods. The witness disowned an invoice shown to him of USD 35,100.

7. On cross examination on behalf of the 1st defendant, the defendant showed no document to show registration save for a letter to help with travelling. He said that 2nd defendant handed over to the 1st defendant the bill of lading for purposes of clearing the goods. He added that when the goods arrived the 1st defendant asked them to come but on arrival he got the news of the cargo having been cleared by 1st third party, not the 1st defendant, on the 18/5/2008.

8. He admitted having given authority to the 2nd defendant to hand over documents of title to the 1st defendant to facilitate clearing of the goods. The witness denied having reported the loss to the police, if the police carried any investigations and denied ever instructing the 1st third party to clear the goods and could not understand how the goods were cleared by Kisa on 18/5/2008. When showed the relevant documents, he confirmed that by the time the documents were given to the 1st defendant, the goods had been cleared and therefore the 1st defendant could not do the clearing. When cross examined by the 2nd defendant the witness reiterated that the goods were brought at USD 82836 and that on declaration of the value given as Kshs.1,112,094 was not by him.

9. On cross examination by 1st third party the witness denied any dealings with that third party. In answering questions by the 2nd, 3rd party the witness repeated having dealt with the 1st defendant for a long time and that defendant had communicated with the 2nd, 3rd party about the lost goods.

10. In re-examination, the witness said that he knows that to clear goods from the port one has to present the original bill of lading and delivery order and that an individual consignee cannot seek to do the clearing directly but has to engage a clearing agent. He confirmed that the entry used to clear the goods was prepared and lodged by Kisia Freight Ltd and that there is no document prepared and lodged by the 1st defendant. He also acknowledge a letter by the 1st, third party alleging that they had been instructed by a client without dis-closing the identity of the client but reiterated that he had never seen the letter prior to the case.

Evidence by the defense

11. The evidence by 1st defendant was given by one MEHBOOB H.C. VIRJI who worked for the 1st defendant as project manager at the material time but resigned on 22/6/2013 to go into self-employment. He said that he knew the plaintiff as a client of the 1st defendant for whom the 1st defendant would clear the goods then have the goods loaded into trucks for transport to the Democratic Republic of Congo. He confirmed knowledge that the suit was about a container due for clearance by the 1st defendant but was lost. He said the plaintiff would hand over the documents through a representation called Herman.

12. For the suit cargo, the witness said that they received the documents on 29/5/2008 from the said Mr. Harman. He said that since the goods were on transit, they only used copies because the original documents would be used by the country of delivery for clearance. He produced an invoice dated 9/4/2008 for USD 35,100 despite objection by the plaintiff.

13. He went on to state that while armed with the copies of the documents issued by the 2nd defendant, the 1st defendant sought release from the Port on 30/5/2008 after complying with the requisite requirements. The shipping line gave a delivery order. They tried to lodge the entry but the same was rejected by KRA under its Simba System. The system gave a message that allowing the entry would exceed the allowed weight for the manifest. To him that message connoted that the manifest lodged by the shipping line was either corrupted or had been used through another entry. On inquiry it was learnt that another Agent, the 1st, Third party had lodged the entry two weeks earlier on the 16/5/2008.

14. With that development, the 1st defendant wrote to the 1st Third party a letter dated 21/6/2008 and asked them to take full responsibility for removing the container out of the port. That letter was produced as Exhibit. D5 the 1st defendant also wrote to the 2nd defendant and notified them of their conduct of releasing the shipment to 1st, Third party while the 1st defendant held originate bill of lading.

15. He said that the 1st 3rd party responded to EXHD 5 and denied having committed any fraud but could not ascertain if the documents used were fraudulent because they were instructed by a client who was never disclosed. The response confirmed that the 1st Third party had indeed cleared the cargo.

16. An inquiry from the port revealed that the cargo had in fact left the port on the 28/5/2008 at 11.54 aboard truck No. KYA 366 through gate No. 18 before the 1st defendant lodged its entry.

17. The witness then said that when the plaintiff made demand for the loss, their letter suggested they know the goods had been cleared by the 1st 3rd party. He also said that they had declared the value of the goods to be 35,000 USD based on the invoice given to them by the plaintiffs representative and contested the value demanded in the sum of Kshs.82,836/=.

18. The witness went on to state that an investigation conducted by the 2nd Third party confirmed that the cargo was cleared by the 1st Third party and released on 28/5/2008 on the basis of a delivery order No. 48795 delivered by the 2nd defendant's employee, one Athman Hassan Almus and issued by another employee of 2nd defendant called Daniel Kairuiki who resigned after the incident. The report concluded that the documents used by the 1st Third party were forged. It also blamed the revenue authority for failure to detect apparent anomalies in the documents but assigned no blame upon 1st defendant. On that evidence the witness urged that the suit against the 1st defendant be dismissed.

with costs.

19. On cross examination by the 2nd defendant, the witness said that he had work experience spanning under 11 years and that there were important information to be contained in a delivery order including the container number, and seal number. When shown the two delivery orders issued to the 1st defendant and that to the 1st 3rd party, the witness noted that the delivery order given to 1st 3rd party did not reveal who prepared it while that given to the 1st defendant was prepared by Dorothy. The delivery to the 1st Third party also failed to show a serial number and the ultimate delivery destination hence should have sounded alarm bells to KRA.

20. On cross examination by the 1st 3rd party the witness said one would know a forged document and confirmed the 1st 3rd party wrote to deny knowledge of the fact of forgery. When cross examined by the 2nd 3rd party, the witness denied having worked to KPA. He said a delivery order is prepared in triplicate but the three are absolutely similar. He added that mere omission of destination of the cargo would not raise alarm bells provided the delivery order has a serial number, container number, seal number, cargo details and duly signed.

21. When cross-examined by the plaintiff's counsel, the witness reiterated having received the documents from an agent of the plaintiff called Herman who he had dealt with before but could not remember on how many previous occasions he had dealt with him. He said he only saw the invoice for USD 35,100 and not any other and said the letter written to the 2nd defendant was based on the earlier letter from the plaintiff.

22. The same sum was demanded from the two 3rd parties. He however retracted to say the letter to the 3rd parties and the 2nd defendant demanding USD 82 836 was before the plaintiff made its demand and that the letters talk of enclosing an invoice for the same sum. He said at times one takes the word of mouth from a consignee on the value of the goods, for transit cargo. He confirmed that invoices would be in KPA file and that the document produced by KPA had the figure 82,836 USD.

23. On re-examination, the witness repeated that Kisa Freighters Ltd denied knowledge of documents being forged and that a clearing agent lodges the documents as received. On the invoice he asserted they did not use it for entry and that what they had was from a different supplier.

24. He maintained that the 1st 3rd party cleared and took the cargo out of the port before the 1st defendant got the documents. At that juncture the matter was adjourned and it marked the change of Judges because the next time the matter was on court, Kasango J, was no longer in the station hence the matter was ordered to proceed from where it had reached. It then turned out that the 1st defendant closed its case with the evidence taken before Kasango J.

Evidence by the 2nd Defendant

25. On behalf of the 2nd defendant, one JIM MWANGI gave evidence based on his witness statement filed. He confirm that the 2nd defendant was the carrier of the cargo on behalf of the plaintiff from the point of origin to Mombasa. Upon discharge, the witness said it issued a delivery note to the 1st defendant dated 4/6/2008 but denied issuing any such document to the 1st interested party. The witness testified that when the 1st defendant attempted to enter the documents for purposes of clearance it discovered that the 1st third party had in fact effected the entry. From that discovery complaints were made to the said third party who gave a copy of the delivery note used for the entry which the witness termed a forgery. The 1st Defendant then lodged a complaint with the 2nd third party pointing out that a keener look at the delivery order would have revealed obvious inconsistencies and errors regarding forms T810 and T812 showing variant container numbers. The delivery order used had no seal number and place of delivery. The witness pointed out that were there occur such a discrepancy the clearing agent gets from the shipping line a letter to KPA explaining the omission. To the witness failure to disclose the place of delivery implied that the goods were destined for local market yet the manifest and the delivery note issued to the 1st defendant clearly showed the cargo was destined for Gowa, Democratic Republic of Congo. The witness further took issue with the delivery order used by the 1st third party for having not disclosed its author unlike the one prepared by 2nd defendant which revealed was prepared by one DOROTHY. He then denied any wrongdoing by the staff of the 2nd defendant as none had been charged with any criminal offence but blamed the Third Parties for the loss of the cargo. Even the gate pass was shown to have differed from T810 and T812 with regard to the container number.

26. On cross examination on behalf of the plaintiff, the witness confirmed being conversant with the procedure of clearing cargo from port and that one had to have a KRA approved entries, commercial invoice, parking list and bill of lading. He said that the parking list, commercial invoice and bill of lading come for the consignee while the delivery order come for the shipping line and that without all, the cargo cannot be allowed to leave the port. When shown the two delivery orders he admitted that the two were similar save for the author and place of delivery of the goods. He then confirmed that investigators interviewed some of the 2nd defendant's employee including one Athman Hussein Almas who told them that the handwriting one the delivery order used to clear the cargo resembled that of one Daniel Kariuki, an employee of the 2nd defendant who left the job soon thereafter. While confirming that the consignment did not reach the consignee, he insisted that they did deliver the delivery order to the correct clearing agent.

27. On cross examination by Mr. Oloo for the 1st defendant, the witness repeated that there was an entry by the 1st third party which was logged on the 16/5/2008 yet the delivery order issued to the 1st defendant was made on the 4/6/2008 by which time the goods had been released and not available at the port for clearance by the 1st defendant. He said they did all including giving to the 1st defendant the due charges which the 1st defendant paid on 3/6/2008 well after the goods had been released. He confirmed that the delivery order issued by the 2nd defendant was never used to clear the goods and because it was impossible as the good had long left the port. However he made a confession that the delivery order undoubtedly emanated from the 2nd defendant and did not blame the 1st defendant for any wrongdoing.

28. On cross examination by the advocate for the 1st third party, the witness said that the duty of the 2nd defendant was limited to delivery of

cargo to the port that they had dealt with KISA FREIGHTERS LTD before but not with respect to the suit goods. In answer to questions by the advocate for the 2nd, 3rd party, the witness said that it was the 2nd defendant who sought to bring the 2nd third party to the suit on the basis that the two third parties colluded to have the cargo released from the port using a forged delivery order which had a signature fairly imitating his. He admitted that the same was delivered to KPA by the 2nd defendant's employee called Athman Hussein Almas under cover of the note in the 3rd party's bundle of documents but denied that the delivery note originated from their offices.

29. Even then he asserted that their delivery orders are serialized and that he did not have record of serial no. 04-509996 but had not availed any record to show that it was not from them or that any delivery orders had been stolen. He said finally that on coming across the questioned delivery order, they checked their system and confirmed that they had not issued same. He stressed that it is the T812, that gives KPA authority for KRA to book the truck to load the cargo and that there was no congruence between the relevant T812 and the gate pass. According to him therefore there was no customs entry for the container that left the port with the gate pass presented by the 1st third party.

30. When re-examined by the 1st third party, the witness clarified that T810 assists KRA with the assessment of duty while T812 is to authorize the loading of the transport truck and that T812 exhibited could not have been used to pass another container. He repeated that the delivery order used by the 1st third party did not originate from the 2nd defendant and that by the letter dated 15/7/2008 the said 3rd party admitted being at fault. When asked questions by the court, the witness said that the list at page 6 of the 3rd party's documents represents how parties deal with KPA and that their delivery orders are serialized. He however conceded that he did not contest the genuineness of the document.

31. The next witness was one SAMUEL TOROITICH, an employee of the 2nd third party in the capacity of Senior Sales Officer. He relied on his witness statement dated 23/2/2012 as evidence in chief. In that witness statement the witness took the position that the 2nd third party committed no wrong in its handling of the cargo.

32. On cross examination on behalf of the plaintiff the witness said that the document given to them was marked non-negotiable meaning it had to be compared with the original and that in the instant case the delivery order was not delivered in isolation but in the Company of 8 Others. He added that if the original emanated from the 2nd defendant then it meant it was a command to release the cargo to the person intended by the 2nd defendant.

33. In cross examination by Mr. Oloo for the 1st Defendant, the witness said that there was a forwarding letter which clearly introduced the 1st third party as the clearing agent and that the non-negotiable delivery order could only be used by the 1st third party.

34. On cross examination by counsel for the 2nd defendant the witness asserted to have worked for the 2nd third party for over 20 years and confirmed that occasionally goods get lost from the port. He said that for one to be issued with a gate pass one needs to show, a delivery order Mombasa Port delivery order and customs entry and that in examining a delivery order one checks the signature of the shipping company, container number, description of the cargo, the carriage vessel and expected time of arrival as well as the particulars of the consignee. When referred to the list of documents by the 2nd, 3rd party and that by the 1st defendant he said the two referred to two different containers.

35. He then said that the destination of cargo is only important where the goods are destined outside Mombasa for purposes of showing place of collection. He then said that KPA is a custodian of the cargo landing at the port and has a duty to deliver same to the rightful owner and that the delivery order should agree with the manifest. For the suit cargo, the witness said that his officers compared, the delivery order and the non-negotiable delivery order and found the two to agree before releasing the cargo. When shown the gate pass used to exit goods in this suit, the witness said that the same does not show the seal number and to him the same was thus incomplete and that he had in the past rejected release of the cargo where there were incomplete documents like where the container number in the manifest differs from that in the delivery order. He was then referred to the investigation report in the 2nd third party's list of documents and confirmed the 2nd third party Revenue office should have detected the anomaly in the delivery order.

36. When cross examined by the counsel from the 1st third party the witness said that a delivery order is issued in exchange for the bill of lading and that in the instant case the 1st third party did forge the delivery order but the same was not discovered till the 1st defendant lodged a complaint.

37. On re-examination the witness said that the delivery order and the non-negotiable delivery order were identical but on the gatepass he said that his office does not issue the same. When shown T810 and T812, he said he did not deal with the same because they did not have KPA stamps.

38. The 2nd witness for KPA, who was the last witness in the entire matter was one RODGERS WAZERA who introduced himself as a security officer with the 2nd third party. He then relied on his witness statement which contended that he carried out investigation into the matter of the loss of the suit cargo and compiled a report. He said that the investigation entailed taking statements from people as well as oral interview. The two people from whom he recorded statements were Sammy W. Barasa, the marketing and operation manager of the 1st third party and one Athman Hussein Almas an employee of the 2nd defendant. Mr. Barasa recorded that the 1st third party had been involved in the clearance of the cargo but that the delivery order was given to him by one Moses Barasa on whose behalf he cleared the cargo.

39. Mr. Athman on his part confirmed having delivered the handwritten letter together with the delivery orders including the one used by Kisa Freighters to KPA on 26/5/2008. He however denied knowing that the delivery order was not genuine till the 14/6/2008 when he was informed by his bosses at the 2nd defendant. He denied having established any evidence of collusion involving a KPA Staff leading to the loss.

40. That evidence marked the close of production of evidence for all sides where-after parties sought to file and exchange written submission. The plaintiff's submissions are dated 15/12/2016 and filed on 15/12/2016, those by the 1st defendant were filed on 27/2/2017, and the 2nd defendant filed submissions on the 10/2/2017 while those by the 1st and 2nd third party were filed on 27/7/2017 and 23/3/2017 respectively.

41. I have had the benefit of reading the submissions in line with the pleadings filed and the evidence led and I have come to the opinion that the following issues isolate themselves for resolution by the court:-

- i. Whose fault led to the loss of the suit cargo?
- ii. Is the plaintiff entitled to the remedies sought?
- iii. What orders should be made as to costs.

42. In coming to these three issues I have taken note that the title of the plaintiff over the goods was not made an issue, the value of the goods was equally not contested just like the fact of the loss.

Whose fault led to the loss of the cargo?

43. The totality of the evidence led was to the effect that the goods indeed landed at the port and were discharged on the 4/5/2008 to the custody of the 2nd third party. From the scheme of how the cargo was to be handled at the port, the 1st defendant had been nominated as the clearing agent but was to get the documents from the 2nd defendant who was the agent of the shipping line to enable it clear and forward the cargo.

44. It is not in dispute that by the 26/5/2008, the 2nd defendant had released and delivered some six (6) delivery note to KRA and the 2nd third party. One of the delivery order No. 048795 was in favour of the 1st third party and related to container No. PCW 2598864. That document was used, admittedly by all the parties to have been used, to clear the cargo and have it released from the port through **gate pass No. 5400351872** on the 28/5/2008 through gate 18.

45. From that single happening, it cannot be debatable that when the nominated Clearing Agent was issued with a delivery order on the 4/6/2008, the cargo had left the port and was not thus available to be taken charge of and cleared by the 1st defendant. Infact in the entire evidence led including the evidence of Jim Mwangi for the 2nd defendant, nothing was put forth to suggest and prove wrongdoing on the part of 1st defendant. The evidence was that the 2nd 1st defendant contract and assignment to clear and take delivery of the cargo was frustrated by the fact that before they received the delivery order the cargo had long left the port.

46. For that reason I do find that there is no liability proved against the 1st defendant for which reason the suit against it is hereby dismissed with costs.

47. How about the 2nd defendant? It was a shipping agent, and the representative of the carrier, who had the custody and authority over the goods. Their authority over the goods and duty to facilitate the clearance and onward forwarding of the cargo is not denied but admitted in both the statement of defence filed and the evidence led.

48. The evidence led on its behalf by Mr. Jim Mwangi was to the effect that indeed they had the duty to facilitate the 1st defendant to have the goods cleared by issuance of delivery order which they indeed did on the 4/6/2008. To the witness the delivery order issue to KISA had a good limitation of his signature but was not originated from his officer. However he was unable to explain away that the said delivery order was delivered by the 2nd defendants our staff Mr. Athman Hussein Alsan, among five others to KPA. Infact the statement recorded from the said MR. ATHUMAN HUSSEIN by MR MAZERA was adamant that he indeed delivered the subject delivery order among others but did not know that it had been forged.

49. The question is why forged delivery order found itself among genuine orders intended for the 2nd 3rd third party and officially forwarded by the official channel. Infact it is not easy to understand why the 2nd defendant never took any meaningful legal or disciplinary step against its staff to establish how the document came to be among its official and authentic documents.

50. In this matter, I do find that it was the conduct of the 2nd defendant in submitting to the 2nd third party a non-negotiable release order whose negotiable copy found itself in the Hands of the 1st third party which led to the loss of the cargo and therefore the loss and damage to the plaintiff. I do find the 2nd defendant to be liable to the plaintiff for the loss occasioned.

51. Having so said, the suit proceeded pursuant to the court orders made by Mwera J on 25/10/2012, on the basis that there were only two 3rd parties, Kisa Freighters Ltd and Kenya Ports Authority it having been said by the advocate who had entered appearance for both 1st and 2nd third party that the first third party, Kisa Freight Forwarders Ltd did not exist. By the time that order was made after the court had on 8/7/2009 given third party discretions to the effect that the question of liability between the defendants and the third party be determined at the same with that between the plaintiff and the defendants.

52. Pursuant to such directions the Third Parties not only filed statements of defence but also bundles of documents and witness statements. The claim by the 2nd defendant as revealed in the Third Party Notice dated 19/12/2008 was for complete indemnity and contribution to the extent of any sum that would be awarded against the said 2nd defendant.

53. The defence filed by both third parties was total denial of any wrongdoing with the 2nd, 3rd party denying any negligence and asserting that it was the 2nd defendant who led it to release the suit cargo by presenting to it the forged delivery order. The 1st third party on its side however denied any privity or relationship with the defendants or taking part in the clearance and release of the cargo.

54. In evidence however, the 1st third party did not call any witness and opted to close its case without any evidence with the consequence that all it did assert in its defence stood as bare allegations with no proof and thus nothing major turns on that defence in rebutting the evidence led by the plaintiff and the defendants. However there were two witnesses called by the 2nd 3rd party. The totality of that evidence was that the cargo indeed landed and was cleared on the basis of an entry made by the 1st third party and forwarded on the delivery order issued and delivered to it by the 2nd defendant.

55. I do find that the evidence led by the plaintiff, the defendants and 2nd third party all agree and prove sufficiently that it was the 1st third party who had the container released from the port. That release would not have been possible without the documents apparently issued by the 2nd defendant and landed over to the 2nd third party. That the 1st Third party had the counterpart of the delivery order submitted to the 2nd 3rd party by the 2nd defendant gives the impression that the two acted in concert because it baffles how the 1st third party could unilaterally author the delivery order and have it supplanted among the 2nd defendants authentic documents of same effect without the aid of the 2nd defendant.

56. I do find that it was the concerted actions by the 2nd defendant and the 1st Third party which led to the loss of the cargo and thus the damage to the plaintiff. For that reason and directions having been issued as aforesaid, I do find that the extent of distinct role played by the two is not easy to isolate and can only be deemed joint and intricately intertwined. I therefore find that having entered judgment for the plaintiff against the 2nd defendant that defendant's claim for indemnity against the 1st third party was well founded and is accordingly acknowledged. I do direct that the 2nd defendant is entitled to full indemnity from the 1st Third party as prayed in the third party notice.

57. For the 2nd third party, I do find the evidence led to show that it acted upon the release order in the usual course and that it could not have so acted had there been no documents shown to come for the 2nd defendant. In addition his obligation was that of a warehouseman. The real stakeholders in the cargo were the 2nd defendant as the shipping agent with authority over the goods and the Kenya Revenue Authority who had lieu over the goods for purposes of collection of revenue.

58. Granted that there were discrepancies in the documents used in entering the cargo into the KRA System, the evidence by DW 2 Jim Mwangi when questioned by the court was that the list at page 6 of the 2nd 3rd party documents represented their communication with 2nd 3rd party and that the 2nd defendant did not contest the genuineness of the documents. I do find that there was nothing untoward that the 2nd third party did to show that it acted in conclusion with the 1st third party.

59. In addition the 2nd third party is joined into these proceedings out of its statutory duty as warehouseman under the Kenya Ports Authority Act. When that is the situation leading to loss, the law under Section 62 of the Act dictate that no suit lies against it. This in fact should have been taken before the court when the court gave third party directions. This equally should have been a defence by the 2nd third party but was never raised.

60. However, it is a matter that goes to the court's jurisdiction and being a statutory provision the court being aware of its existence cannot turn a blind eye to it. It is equally not an excuse that the parties did not raise it with the court. Even though this court may have its own views on their Section 62 sits with the constitutional right to access to justice, it is bound by the doctrine of stare decisis that it is bound to by decisions by the Court of Appeal.

61. What comes to mind readily is the decision in *Kenya Ports Authority vs Modern Holdings (E.A.) Ltd [2016] eKLR* in which the question of lack of jurisdiction was taken from the first time on appeal and was so upheld. In that decision the court said:-

“From its plain and unambiguous language, courts have consistently and unanimously construed Section 62 aforesaid, in along line of cases, to deny the court's jurisdiction, in the first instance to entertain any dispute arising from the breach of any of the appellants powers.... We, say finally, that where the constitution or statute confers jurisdiction upon court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with the constitution or statute. This has, time without number, been started by the courts”

62. I stand guided and bound by this now established position of the law and hold that the dispute between the 2nd defendant and the 2nd third party was improperly before the court and the court lacks jurisdiction to entertain or determine it. It is struck out on account of lack of jurisdiction, but on the basis that the said 2nd third party did not assist the court on what its own creating statute provides and stands for, I direct that it bears its own costs.

63. In the end, I do enter judgment for the plaintiff against the 2nd defendant in the sum of the USD 82,832 together with interests thereon at court rates from the date of the suit till payment in full. For that sum and upon payment, the said 2nd defendant is entitled to full indemnity against the 1st third party.

64. The suit against the 1st defendant is dismissed with costs while the claim against the 3rd party is struck out with not orders as to costs.

Dated and delivered at Mombasa this 18th day of October 2019.

P.J.O. OTIENO

JUDGE