



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 718 OF 2012**

**MURBAN MOVERS LIMITED.....PLAINTIFF**

**- VERSUS -**

**TORNADO CARRIERS LTD.....1<sup>ST</sup> DEFENDANT**

**JADE PETROLEUM LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiff, **MURBAN MOVERS LIMITED**, has sued the 1<sup>st</sup> defendant, **TORNADO CARRIERS LIMITED** for **USD 35,758.87**, being the value of the petroleum products which the defendant is alleged to have lost. The plaintiff also claimed interest at 12% per annum from 11<sup>th</sup> March 2011.
2. The claim is founded upon a contract between the two parties, pursuant to which the defendant was to transport petroleum products from Mombasa to Kampala.
3. It is the plaintiff's case that the goods were handed over to the 1<sup>st</sup> defendant, who, thereafter failed to deliver the same to the designated consignee in Kampala.
4. It is the assertion of the plaintiff that the 1<sup>st</sup> defendant's failure exposed the plaintiff to liability, as the plaintiff would be expected to compensate **JADE PETROLEUM LIMITED**, who were the owners of the lost petroleum products.
5. The plaintiff also contended that the 1<sup>st</sup> defendant's breach contract had prejudiced the long-standing business relationship between the plaintiff and the intended consignee in Kampala, who did not receive the goods he was expecting.
6. In its defence, Tornado Carriers Limited denied the existence of any contract with the plaintiff, pursuant to which the 1<sup>st</sup> defendant would transport petroleum products within Kenya and in the East African region.
7. The plaintiff had asserted that the contract was dated 11<sup>th</sup> March 2011.
8. In the understanding of the plaintiff, the following obligations were imposed upon the 1<sup>st</sup> defendant,

pursuant to the terms of the contract;

- a) Provision of fully insured vehicles; The insurance was to be comprehensive;**
- b) Provision of separate Goods-In-Transit insurance cover, for the products being transported;**
- c) Fitting each vehicle with anti-theft device;**
- d) Being entirely responsible for the products in transit, and thus assuming liability for losses or contamination during such transit.**

9. Having denied the existence of any such contract, the 1<sup>st</sup> defendant said that if the contract existed;

**“...the same did not have any binding terms and conditions either precedent and/or subsequent for which the defendant can be held accountable or at all and the plaintiff is put to strict proof”.**

10. The 1<sup>st</sup> defendant's further line of defence was that if it was given the goods to transport, it followed the plaintiff's instructions in offloading the said goods.

11. As regards the value of the goods which were allegedly lost, the 1<sup>st</sup> defendant said that the plaintiff was estopped from quoting a price which had not been ascertained in advance.

12. The 1<sup>st</sup> defendant further contended that it was the responsibility of the plaintiff to have the products insured. Therefore, if the products were uninsured, the 1<sup>st</sup> defendant said that it cannot be responsible for the loss which took place.

13. The plaintiff had disclosed that prior to the institution of this case, the 1<sup>st</sup> defendant had already filed two (2) cases against the plaintiff. Those 2 cases were filed at the Chief Magistrate's Court, Mombasa.

14. In the light of that disclosure, the 1<sup>st</sup> defendant contended that the High Court, sitting in Nairobi, lacked jurisdiction to hear and determine this case.

15. Thereafter, the plaintiff sought to have the 3 cases consolidated. On 6<sup>th</sup> February 2013, Havelock J. granted orders for the consolidation of the 3 cases, being;

**i) Hccc No. 718 of 2012, Murban Movers Limited Vs Tornado Carriers Limited.**

**ii) CMCC No. 2863 of 2011, Tornado Carriers Limited Vs Murban Movers Limited & Jade Petroleum Limited; and**

**iii) CMCC No. 2864 of 2011, Tornado Carriers Limited Vs Murban Movers Limited & Jade Petroleum Limited.**

16. In **CMCC No. 2863 of 2011**, Tornado Carriers Limited claimed Kshs. 200,138.98 in respect of the agreed transport charges for the transportation of petroleum products from Mombasa to Nairobi. That service was allegedly provided in March 2011.

17. In **CMCC No.2864 of 2011**, Tornado Carriers Limited claimed **US \$ 11,875.56**, being the agreed costs of transporting petroleum products from Mombasa to Kampala. The services were said to have been provided in March 2011.

18. Tornado Carriers claimed against both Jade Petroleum Limited and Murban Movers Limited, jointly and severally.

19. The position taken by Jade Petroleum is that there was no contract between it and Tornado Carriers. The contract, if any, was said to have been between Tornado Carriers and Murban Movers.

20. Meanwhile, Murban Movers acknowledged the existence of the contract between it and Tornado Carriers. However, as one consignment of petroleum products was not delivered to the proper recipient in Kampala, Murban Movers states that it is entitled to set-off the value of the lost petroleum products, against the claim by Tornado Carriers for the transport charges.

21. At the trial, 2 witnesses testified for Murban Movers, and 2 other witnesses testified for Tornado Carriers.

22. **PW1, KAMALJIT SINGH**, was the General Manager of Murban Movers. He produced a Transport Contract dated 11<sup>th</sup> March 2011, between Murban Movers Limited and Tornado Carriers Limited.

23. The contract was for transportation of petroleum products.

24. Under clause 3 of the contract, it was the obligation of Tornado Carriers to insure the vehicles as well as the Goods In Transit.

25. Under clause 8 (b) of the contract, it was the responsibility of the transporter, together with the representative of Murban Movers to “*witness and certify*” the quantities loaded and offloaded.

26. Clause 8 (c) provided that the transporter would be;

**“entirely responsible for products in transit and shall be liable for losses or contamination occurring during the transit period”.**

27. And as if there was a felt need to reiterate the issue as to the responsibility being borne by the transporter, clause 10 stipulated thus;

**“The Transporter shall be liable for loss or contamination as a result of delays, non-delivery, detention or unreasonable deviation of the products that were being transported or any loss being the fault of the Transporter that shall result during the transportation of the products, unless proved otherwise”.**

On its part, Murban Movers was required to settle the bills on the 15<sup>th</sup> day of the next month after the services had been rendered.

28. Clause 20 of the Transport Contract stipulated that Murban Movers was entitled to deduct from the payments due to Tornado Carriers;

**“i) Any such amounts incurred due to loss of products as set out in Clause 8 above and;**

**ii) Any other monies, which the Transporter may owe the Company”.**

29. During cross-examination Kamaljit Singh said that it was not the responsibility of Emmanuel Wangwe, who was an employee of Jade Petroleum, to give instructions to the Transporter’s drivers about the destination at which the petroleum products were to be off-loaded. He emphasized that it was only he, (*Kamaljit*), who had the authority and responsibility of giving instructions to the Transporter about the destination where the product was to be off-loaded.

30. In relation to the product transported in the truck registration **Number KBL 934 M/ZD 4094**, Kamaljit testified that the driver did not get his instructions concerning where to off-load the same. In other words, the plaintiff was saying that the product was off-loaded without its requisite authority. As a result, the plaintiff said that the whole product was lost, hence the claim for the value of the product.

31. **PW2, CHARLES KIPLAGAT MURGOR**, worked as a driver with Murban Movers Limited. At the material time, he drove a truck belonging to his employer. His said vehicle was in a convoy of 2 other vehicles.

32. On 18<sup>th</sup> March 2011, **PW2** testified that Kamaljit Singh phoned him, with instructions concerning where the petroleum products in his vehicle was to be off-loaded.

33. On 19<sup>th</sup> March 2011, Emmanuel phoned **PW2**, with further instructions, which required him to proceed to the “*Coca Cola Parking Area*”, and then wait for more instructions.

34. At that time, all the 3 trucks were still together, in one convoy.

35. Later, a person named **BRIAN** phoned **PW2**, indicating that it is he who had purchased the fuel. **PW2** did not know **BRIAN**, but he presumed that it is Emmanuel who had given his phone number to the said Brian.

36. Later, Brian instructed **PW2** to drive to **SAFARI PETROL STATION**, which is located near the Northern Bypass to Gulu. Whilst still at that Petrol Station, the second truck arrived. But the witness did not see the third truck, which belonged to Tornado Carriers.

37. During cross-examination, **PW2** said that when he drove from Mombasa, after his truck was loaded, he did not have the particulars of the person to whom the petroleum products were to be delivered.

38. Eventually, **PW2** off-loaded the product at **MAAJAB PETROL STATION**.

39. After Murgor testified, the plaintiff closed its case.

40. **DW1, MULI MWONGELA**, was a driver employed by Tornado Carriers. At the material time, he was the driver of the truck registration number **KBL 743M/ZD 4094**.

41. He testified that he left Mombasa with a load of petroleum products destined for Uganda. He as in a convoy of 3 trucks, which included the truck driven by Murgor (**PW2**).

42. On 19<sup>th</sup> March 2011, **DW1** followed instructions given to him by **PW2** and also by;

**“an Agent of Jade Petroleum Ltd”**

43. He followed the instructions, which led him to **EAGLE PETROL STATION** in Kampala Town.

44. Upon arrival at that petrol station, Muli phoned Emmanuel Wangwe of Jade Petroleum, who instructed him to off-load the product.

45. But as there was no space, **DW1** went to **KYANGERA** and later to **NAZARA** Suburbs of Kampala, in line with directions given to him by the owner of the Eagle Petrol Station.

46. Before off-loading the product, **DW1** says that he confirmed with Emmanuel Wangwe, who even linked him up with a Mr. **WACHIRA**. The said Mr. Wachira was described as the Agent for Jade Petroleum, and he was present when **DW1** was off-loading the product.

47. Therefore, as far as Muli was concerned, the product was off-loaded at the correct destination, as it was done on the instructions of Jade Petroleum.

48. The last witness to testify, as **DW2**, is **SHAKIL AHMEDKHAN**. He is a Director of Tornado Carriers Limited. He testified that the company was contracted by Murban Movers Limited, to transport petroleum products.

49. In effect, all the witnesses confirmed that the plaintiff had a contract, pursuant to which the defendant was to transport petroleum products.

50. At the material time, the petroleum products were being transported from Mombasa to Kampala.

51. According to Shakil, as soon as the lorry crossed the border, it was in the hands of the owner of the product or his clearing agent. Therefore, Shakil testified that it was upon Jade Petroleum to make all the arrangements about when and where the petroleum product was to be off-loaded.

52. In that regard, Shakil cited the practice in the industry, which allows the owner of the goods to hold onto the same whilst awaiting the best price obtainable.

53. Both the witnesses for the Transporter pointed out that Jade Petroleum had never lodged any complaint to them, about the alleged loss of the product.

54. Both of them also emphasized that it is Emmanuel Wangwe of Jade Petroleum, who was the right person to issue instructions to them regarding the destination at which the product was to be off-loaded.

55. Interestingly, Muli knew Emmanuel as the Managing Director of Jade Petroleum, whilst Shakil knew him to be the Distribution and Marketing Manager. In effect, the said witnesses were not that properly conversant with the role of Emmanuel Wangwe, at Jade Petroleum Limited.

56. And whilst Muli said that Kamaljit of Murban Movers Limited was a stranger to him, Shakil confirmed that it is Kamaljit who gave instructions when the lorry was being loaded with petroleum products in Mombasa.

57. Surely, if Kamaljit was present when the truck was being loaded, and if he did give instructions to Tornado Carriers, he cannot have been a stranger to the Transporter.

58. Whilst Tornado Carriers intimated that there was a contract which brought together Murban Movers Limited, Tornado Carriers Limited and Jade Petroleum Limited, no such contract was made available to the court. The only contract which was provided was between Murban Movers Limited and Tornado Carriers Limited.

59. I have already set out, earlier in this judgement, the pertinent clauses from that Transport Contract dated 11<sup>th</sup> March 2011.

60. The said contract imposed upon the Transporter, the responsibility of ensuring that the goods were delivered intact, and to the correct destination.

61. Murban Movers Limited did not take over the said responsibility from Tornado Carriers, as soon as the product crossed the border, into Uganda.

62. And whilst Muli insisted that it is Jade's Emmanuel who gave instructions to him about where to offload the product, Shakil said the following during cross-examination;

**“Kamaljit called us after 2 days complaining that my driver had offloaded at an unauthorized place. I told him that it was his people who told us where to offload. It is the same person who gave instructions in relation to all 3 trucks”.**

63. If, as Muli said, it is Emmanuel of Jade Petroleum who gave him instructions, then it is not clear why Shakil of Tornado Carriers would refer to Emmanuel as one of the people of Murban Movers Limited.

64. None of the witnesses who testified for the Transporter demonstrated that the plaintiff had authorized Muli to off-load the petroleum products at either Kyangera or at the Nazara suburbs of Kampala.

65. In those circumstances, I find that the Transporter failed to deliver the product in accordance with the terms of the contract which it had with Murban Movers Limited.

66. But it is also clear that all the 3 companies had had contractual relationships pre-dating the contract dated 11<sup>th</sup> March 2011. I so find because although in this case the contract in issue was between Murban Movers Limited and Tornado Carriers Limited, the witnesses acknowledged that Emmanuel Wangwe of Jade Petroleum Limited was involved.

67. Kamaljit (**PW1**) said that he gave to Emmanuel the phone numbers of the drivers and also the registration particulars of the vehicles.

68. According to Kamaljit, he was aware that Emmanuel talked to the driver, Muli, when the product in issue was enroute from Mombasa to Kampala.

69. Therefore, it appears that although Jade Petroleum Limited did not have a formal role during the transportation, their senior employee (*Emmanuel*) was actively involved during the transportation.

70. **CHARLES KIPLAGAT MURGOR (PW2)** testified that it is Emmanuel who connected him to Brian of Jade Petroleum, in Uganda.

71. **MULI MWONGELA (DW1)** also testified that he was given instructions by Emmanuel Wangwe. Indeed, after Muli completed offloading the petroleum products, he phoned Emmanuel, to inform him.

72. **DW2, SHAKIL AHMEDKHAH** also testified that Emmanuel was the “*contact*”, who monitored the trucks transporting the product.

73. It would therefore have been expected that if Jade Petroleum wanted to challenge any of those aspects of the evidence, they would have had Emmanuel Wangwe testify at the trial.

74. The said Emmanuel was supposed to a witness, and he signed a Witness Statement dated 12<sup>th</sup> March 2012. However, he did not testify either for Jade Petroleum Limited or for any of the other parties.

75. In the circumstances, his Witness Statement did not constitute evidence at the trial.

76. Kamaljit (**PW1**) had told the court that Emmanuel was expected to testify, but he ended up not giving evidence.

77. His failure to testify was never explained.

78. I find that Emmanuel Wangwe was actively involved in the whole transaction, starting from Mombasa, right up to Kampala.

79. I find that it is Emmanuel who gave instructions to the driver, Muli, about the final destination where the product was off-loaded.

80. Although Tornado Carriers did not comply strictly with the terms and conditions of the contract dated 11<sup>th</sup> March 2011, I also find that Murban Movers Limited did not adhere strictly to the terms of the contract. I so find because clause 8 (a) of the Transport Contract stipulated the “*Transporter’s Consignment Note*” was required to, inter alia, specify;

**“The full name and address of the Company and Consignee”.**

81. If the Consignment had contained those particulars, there would have been no need for either Kamaljit of Murban Movers or Emmanuel of Jade Petroleum giving instructions to the drivers of the trucks, about where the petroleum products were to be off-loaded.

82. The position therefore is that whereas the contract contained terms and conditions which were supposed to govern the relationship, the parties to the contract, together with Jade Petroleum conducted themselves in an informal manner. I therefore cannot fault only the Transporter. To some degree, each and every actor in this process did not adhere strictly to the terms of the contract. It is that failure to follow the terms specified in the contract that exposed all the parties to possible losses.

83. Ultimately, I find that Jade Petroleum has failed to lead evidence to prove that the petroleum products which were transported in the truck belonging to Tornado Carriers Limited was lost. If anything, I find, on a balance of probabilities, that the said product was delivered to the destination chosen by Jade Petroleum.

84. In the result, the claim by Jade Petroleum Limited against Murban Movers Limited is dismissed with costs.

85. The transporter, Tornado Carriers Limited is entitled to the full transport charges from Murban Movers.

86. And Murban Movers is entitled to payment from Jade Petroleum Limited.

87. The claim by Murban Movers against Tornado Carriers is dismissed with costs to Tornado Carriers.

88. Meanwhile, the claims by Tornado Carriers against Murban Movers and Jade Petroleum Limited, for U.S \$ 11,875.56 and Kshs. 200,138/98 are allowed.

89. I further find that Jade Petroleum is obliged to settle those two claims, as Murban Movers Limited only raised its claim against Tornado Carriers Limited because Jade Petroleum Limited had, erroneously, led Murban Movers to believe that Tornado Carriers had lost the petroleum products.

90. Jade petroleum shall therefore settle the claims which Tornado Carriers Limited had lodged against both Murban Movers Limited and Jade Petroleum Limited.

91. I also order Jade Petroleum Limited to pay to Tornado Carriers Limited, the costs of the suit, together with interest at Court Rates from 16<sup>th</sup> July 2012, until payment in full.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>th</sup> day of February 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*Otieno for Kanjama for the Plaintiff*

*Muhugu for the Defendant*

*Collins Odhiambo – Court clerk.*