



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.18 OF 2011

MOMBASA SHIPPING AGENT CO. LTD.....PLAINTIFF

VERSUS

PIL KENYA LTD.....DEFENDANT

JUDGMENT

1. By an ammended plaint dated the 4.9.2013, the plaint claims from the defendant the sum of US\$81,194 on account of the value of frozen crabs handed over to the defendant for delivery to **Ms.Best Sea Foods Import Inc. in DURBAN**,but which the defendant released to the consignee country to the plaintiffs instructions.
2. The defendant aid not file a statement of defence to the said ammended plaint and is deemed to rely on the statement of defense dated 22.8.2011 and filed on the same day in which it is pleaded that the consignment was safely delivered at the port of delivery and handled in accordance with the plaintiffs instructions; that the plaintiff was paid full value the goods; that the plaintiff had filed a suit on the same matter in South Africa hence this court lacks jurisdiction and that there was failure to comply with order 4 Rule 1(4) Civil Procedure Rules for which the defendant would raise an objection preliminarily to the suit.
3. The suit was adjourned on several occasions to enable the parties negotiate but it appears no settlement was reached, prompting the plaintiff to attend the registry on the 17.9.2015 and fix the suit for hearing on the 21.10.2015. A hearing notice was served upon the firm of Omondi Waweru & Co. Advocates 13.10.2015 and an affidavit of service duly sworn and filed. However come the hearing date there was no representation on behalf of the defendant and on proof of due service it was ordered that the matter proceeds.
4. The plaintiff tendered evidence by Pw1 KIM JONG KYU it's Managing Director. His evidence was to the effect that in the year 2010 he had two containers to be shipped to DURBAN, SOUTH AFRICA through the defendants whom he had death with before. The containers were sent under two separate bills of lading. He added that the defendant contrary to instructions released the two containers and the cargo therein without instructions in that the original bills of lading for one of the containers had not been released to the consignee as to entitle them to take the delivery. He went on to say that when he inquired from the defendant why the container had been released without authority he was told that the consignee had alleged payment hence the released. The witness then adopted the witness statement filed in court and produced documents in the list of documents dated 13.4.2011 as exhibit P1.
5. The witness said that the cargo was worth US\$238,194 out of what the plaintiff received payment in the sum of Khs.157,000 leaving a balance of kshs.81,194 being claimed in the suit.

Analysis:

6. The pleadings filed do agree that the defendant was contracted to ship from Mombasa to DURBAN, SOUTH AFRICA, the suit counters in which were 1169 cartons of frozen crabs. The document produced show that the plaintiff sold the cargo at a price and consideration of US\$238,149 to paid as agreed in the agreement dated 12.4.2010. Even this value of the cargo is not contested. What the defendant alleges is that the consignee alleged to have paid for the goods. There is however no allegation by the defendant that it released the cargo on the production of the original bill of lading. There was further no denial by the defendant to the pleading in the plaint that the contract of affreightment bound the defendant to only release the good on the production of the original bill of lading.
7. There having been an amended plaint to which no defence was filed, it is deemed by the operation of order 2 Rule 12(3) as read with order 8 Rule 1(6) Civil Procedure Rules that the defendant admitted the assertion that there was an obligation not to release the cargo in the absence of the original bill of lading. I am guided by the decision in PIL KENYA LIMIED -VS- JOSEPH OPPONG [200]eKLR where Nyamu JA, said:

“A bill of lading in law is contract between a shipper and ship-owner. It constituted the title to the goods and shows where the property in the goods is at any time”

8. As abailor for the plaintiff the defendant was bound by the plaintiffs instructions and the convention and known practice in the Industry that goods can only be released as against the original bill of lading. In this case it has been demonstrated that the defendant acted in the contrary.
9. That fact coupled with the fact that the plaintiffs evidence in court and the documents produced have not been challenged by either cross examination or evidence in rebuttal, I find that the plaintiff has proved his case to the requisite balance of probabilities.
10. I therefore enter judgment for the plaintiff as prayed in the plaint in the sum of US\$81,194 with interests thereon at court rates from the date of filing the suit till payment in full.
11. I also award to the plaintiff the costs of this suit.

Dated, signed and delivered at Mombasa this 4th day of March 2016.

In the presence of:-

No appearance for Plaintiff/Applicant

No appearance for Defendant/Respondent.

P.J.O. OTIENO

JUDGE