



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NUMBER 828 OF 2009

SURGIPHARM LIMITED.....PLAINTIFF

Versus

EXPRESS KENYA LIMITED.....DEFENDANT

AND

KENYA AIRWAYS LIMITED.....THIRD PARTY

JUDGMENT

Introduction

[1] When PW1 finished testifying, it emerged that this case should be decided solely on the documents filed and submissions by the parties. Consequently, by consent of the parties recorded on 2/2/2015 and 9/2/2015, it was agreed that the suit shall be determined on the evidence, agreed issues and submissions filed in court. Issues were agreed and filed on 9/2/2015. Submissions were filed too. I will, therefore, proceed to determine the case on that basis.

Agreed issues

[2] In a nutshell, these are the agreed issues:

- a) **Whether there was a contract of bailment between the Plaintiff and Defendant for transportation of 78 and 128 cartons of medical supplies to Khartoum, Sudan. And what are the terms (implied and or express) of the said contract?**
- b) **Was the contract breached by the Defendant?**
- c) **Did the Defendant's obligations under the contract end when it handed over the goods to Kenya Airways for delivery to Sudan? And, is the loss suffered by the Plaintiff attributable to the Defendant?**
- d) **Has the Plaintiff specifically pleaded special damages particularized in the plaint?**
- e) **Is the Defendant entitled to indemnity from the third party?**
- f) **Whether the carriage of the above goods by the third party was subject to the**

conditions of carriage stated in the airway bill.

g) Whether the third party is a Bailee or carrier within the meaning of the Carriage by Air Act, and

h) Who pays the costs of the suit?

[3] According to the plaintiff, on 15th July 2008, the Defendant collected from the Plaintiff a consignment of 78 cartons weighing 380 Kgs for delivery to Khartoum, Sudan. But, only 75 out of the 78 cartons were delivered to the consignee. The weight is as shown in the fresh bill which corrected the earlier one and which appears at page 3 of the Plaintiff's bundle of documents. On 16th July 2008, the Plaintiff raised a debit note to the Defendant (at page 8 of their documents) claiming for Kshs. 555,906 being the value of the three cartons which were not delivered. When the Plaintiff enquired from the Defendant about the undelivered cartons, the Defendant wrote to the third party requiring them to establish the whereabouts of the undelivered cartons. Correspondences were exchanged on the matter between the Defendant and the third party. Meanwhile, on 25th November 2008, the Defendant collected 128 cartons of medical supplies from the Plaintiff for airfreight to Khartoum, Sudan. And out of the 128 only 12 cartons were delivered to the consignee. The Plaintiff again lodged complaint and claim. On 10th December 2008, it raised a debit note against the Defendant in the sum of Kshs. 2,682,108 being the value of the cartons which were not delivered. Delivery note to Khartoum is No 112029 at page 12. Again correspondences were exchanged between the Defendant and the third party over the matter. The Plaintiff then made demand for the sum of Kshs. 3,238,014 being the value of the cartons which were not delivered. The Defendant offered the Plaintiff a sum of \$ 300 as compensation but the Plaintiff turned down the offer in their letter dated 15th May, 2009 on the basis that the value of the goods lost was much higher.

[4] The third party passed over the matter to their insurer who requested for time for further consideration of the claim. The Defendant had attempted to get absolution of negligence by the Plaintiff but the Plaintiff refused to grant the request because, according to the Plaintiff, the Defendant was liable for the loss. Up to now, the Defendant has not paid the plaintiff's claim.

[5] The Defendant conceded that it received the 78 and 128 cartons from the Plaintiff on the date stated by the Plaintiff except the goods were collected at the request of the Plaintiff for the Defendant to arrange/organize for the third party to airlift the goods to their destination. The Defendant stated that it carried out its obligations and handed over the goods to the third party. It further argued that none of the goods was lost in their possession or management. The Defendant, therefore, denied any contract between them and the Plaintiff or breach thereof. Instead, it contended that the claim should be directed to the third party. On that basis, they joined the third party.

[6] The third party contended that the two carriages herein were governed by the Carriage by Air Act, conditions of carriage as well as the Warsaw Convention which limits liability for lost cargo to US \$ 20.00 per kilogram. It, however, denied knowledge of the weight and value of the lost consignment carried pursuant to the Air Bill No 70620924606 and No 706209605564 from Nairobi to Khartoum, Sudan. They also denied all the particulars of negligence attributed to it by the Defendant. In any event, it stated that there has been no suit against it as the carrier from the flight date, i.e. on 16th July 2008 which is over 4 years now. Therefore, by operation of the law on limitation, all rights herein have been extinguished. Time limit is two years.

Plaintiff's submissions

[7] The Plaintiff filed submissions dated 25th day of February 2015 and 2nd April 2015. The gist of their submissions is that the Plaintiff's claim against the Defendant as bailee and/or carriers for reward. They cited *Chitty on Contracts*, that:-

“...any person is to be considered a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an understanding with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person. (Chitty on Contracts, Volume II para 33 – 003)

To constitute a contract of bailment, the actual or constructive possession of a specific chattel must be transferred by its owner or his agent duly authorised for that purpose to another person (the bailee) in order that the latter may keep the same or perform some act in connection therewith for which such actual or constructive possession of the chattel is necessary.

[8] According to the Plaintiff, it transferred possession of the cartons of medical supplies to the Defendant with specific instructions that they were to be delivered to its customer in Sudan. The Defendant was therefore a bailee under a contract of carriage. Issue 1 is therefore answered in the affirmative. See also **Coggs v Bernard (1558 -1774) All E. R. 1** where Gould J stated that any man who undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost or come to any damage. The rationale behind the common carrier’s liability was given in the same case by John Holt, CJ as:-

“For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he (the common carrier) is chargeable. This is a politic establishment, contrived by the policy of the law for the safety of all persons, that they may be safe in their dealings, for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. This is the reason the law is founded upon that point.”

[9] On issue 2, the Defendant received the cartons to be transported and confirmed receipt of the delivery by signing the delivery notes produced at page 2 and 12 of the Plaintiff’s bundle. There was no contract signed between the parties and as such the terms implied in a contract of carriage and/or bailment governed this contract herein. Given the fundamental terms implied in a contract of bailment, the Defendant had to prove that it had excluded the strict liability by agreement between the parties. There was no evidence placed before the Court to show that there was an agreement to exclude liability. This would have been by way of either a written contract, or an agreement through correspondence. As a bailee, the Defendant could not in fact exclude liability but could by agreement limit it. It was not the case here. The assertion that there was no guarantee of safe storage is immaterial given the nature of the contract of bailment. They reiterated the decision in Coggs set out above.

[10] They answered issue 3 in the affirmative and stated that the Defendant was in breach of the said contract of bailment, for it was under a duty to carry and deliver the goods entrusted to it safely and to answer for any loss of or damage to those goods. The Defendant’s witness confirmed that not all the cartons handed over to it were delivered to the Plaintiff’s Customer in Sudan. See also further confirmation of this fact by the correspondence the Defendant had with the third party, making demand for the value of the lost cartons. And on balance of probabilities, the missing cartons were lost while in the custody of the Defendant. The consignments were delivered intact to them and that fact was confirmed by the defendant who took possession of the goods, verified and tallied them with the manifest.

[11] Therefore, as for issue 4, the Defendant’s obligation under the contract of bailment did not end with its handing over the goods to Kenya Airways for delivery to Sudan. The Plaintiff submitted that the contract with the Defendant was for the delivery of the medical supplies to the Plaintiff’s customer in Sudan. Whereas the Defendant could have chosen any airline for the performance of the contract, it did not consult the Plaintiff over the choice of airline to use. In any case, the Plaintiff was not privy to the arrangements made by the Defendant for the completion of its contract. It paid the Defendant to deliver its goods to a specific destination. Had the contract been

intended to terminate at the airport, it is submitted that there would have been no point in engaging the Defendant merely to act as a 'delivery boy'. See **Halsbury's Laws of England, vol. 7 page 16 paragraph 11** which states that the liabilities of a common carrier extends beyond as well as precedes the actual period of transit: first, there is usually an interval between the receipt of the goods and their departure; next, there is the time which in most cases must necessarily intervene between the arrival of the goods at the place of destination and the delivery to the consignee. His absolute liability ends only where there has been delivery, actual or constructive. The liability of the Defendant began once it accepted the two consignments from the Plaintiff, and once it had accepted such goods, it assumed a duty, not only to carry safely, but also to deliver safely to the plaintiff's consignee in Khartoum and its liability only ends upon delivery. In realization of this liability, the Defendant wrote the letters at page 6 and 10 of the Plaintiff's bundle indicating that it was holding the third party liable for the loss and requesting for a cheque for the value of the lost items.

[11] Issue 5; Has the Plaintiff specifically pleaded its special damages as particularized in the Plaintiff? They submitted that the Plaintiff has pleaded its losses. At paragraph 6 of its plaint, the Plaintiff states that 3 out of the 78 cartons handed over to the Defendant were not delivered. At paragraph 9, it states that 6 out of the 128 cartons were not delivered. The Plaintiff has asserted the value of the cartons. See Order 2 rule 3(1) of the Civil Procedure Rules which stipulates in mandatory terms that;

'...every pleading shall contain, and contain only a statement in summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.'

[12] They also submitted that, contrary to the submissions by the Defendant dated 30th March 2015, the Plaintiff in its Plaintiff has set out a specific sum of the loss it had suffered. The only defence that the Defendant asserted was that it handed the consignment over to the third party and cannot be held liable for the loss. There is no single denial as to the values stated in the plaint and as such the only issue arising for determination was as to liability. The Defendant cannot seek to challenge the value of the claim at this late stage in the day. They complied with Order 4 Rule 2 of the Civil Procedure Rules which provides that

"...where a plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed..."

See also Order 2 Rule 11(1) of the Civil Procedure Rules which provides that :-

'...subject to sub-rule (4) every allegation of fact made in a plaint or counter-claim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counter-claim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a traverse of them.'

The Plaintiff also referred the Court to pages 8 and 13 of its bundle of documents and paragraphs, 12 and 16 of the Plaintiff's witness statement. The debit notes at page 8 and 13 clearly indicated the quantities and unit price for the contents of the cartons. This was communicated to the Defendant before suit was commenced and was adduced in evidence. At page 8 of the Plaintiff's bundle, the Debit note identifies the product and shows the cost of 165 packs (3 packages of 55 each) and indicates the Airway Bill referred to. At page 13, there is a similar description of the product, quantity and unit price. There is enough material before the Court to establish the value of the goods that were not delivered. They have processed their case against the Defendant.

[13] Based on the above facts and submissions, the Plaintiff answered issue 6 that the loss suffered by the Plaintiff is attributed to the Defendant. The Defendant acknowledged that it received two consignments on 16th July 2008 and 26th November 2008 comprising of 78 and 128 cartons of medical supplies respectively from the Plaintiff for delivery by air from Nairobi to the Plaintiff's

consignee in Khartoum. It has further acknowledged that all the cartons, on two different occasions did not reach their destination. The cartons were the property of the Plaintiff and their non-delivery or non-return resulted in a loss for the value of the missing cartons.

[14] With regard to the following issues, namely:-

- a) ***Is the Defendant entitled to indemnity from the Third Party?***
- b) ***Whether the carriage by the Third Party of the goods received on 16th July and 28th November 2008 was subject to the conditions of carriage on the Airway Bill.***
- c) ***Whether the Third Party is a bailee or carrier within the meaning of the Carriage by Air Act.***

These three issues are for determination as between the Defendant and the Third Party. Suffice it to say that the Plaintiff has proved its claim against the Defendant. The Plaintiff did not seek out the services of the Third Party and had no knowledge of the terms on which the Defendant procured its services. The Plaintiff looks to the Defendant for restitution. In sum, as the Plaintiff has proved its case on a balance of probabilities, and having made demand prior to commencing the proceedings herein, they submitted that they are entitled to costs of the suit.

Defendant's submissions

[15] The Defendant filed submissions. It relied on the defence, witness statement and its documents it filed in court. They responded to each issue framed as follows.

Issue 1: on contract of bailment

[16] It is not in dispute that the Defendant received 78 and 128 cartons of Medical supplies from the Plaintiff for transportation to Khartoum, Sudan, as averred to in paragraph 3 of the Plaintiff. The Defence however submitted that it was an implied term of the contract that the Defendant was required to arrange and/or organize for the said goods to be airlifted to Khartoum, Sudan. The holding in the case of ***Coggs v Bernard (1558-1774) All E.R 1*** is that liability will ***only*** attach where the goods are lost through the bailee's negligence. None was proved against the Defendant.

Issue 2: the terms (implied and/or express) of the said contract

[17] The Defendant asserted that, it came out clear during cross examination that the Plaintiff had no written contract with the Defendant. The question here therefore is whether there were any implied terms and if so, what were they. Upon receipt of the consignment in question, the Defendant engaged the Third Party to airlift the goods to its destination. It will be noted that the Airway Bill produced on page one of the Defendant's documents bears no value declared for carriage and/or customs. In neglecting to declare the value for carriage and/or customs, and putting to mind the fact that the Defendant had made aware to the Plaintiff that the services provided were done at the owner's risk, it then becomes clear that the Defendant had done everything to ensure the safety on the consignment. Liability therefore would not attach to the Defendant as had the value for carriage and/or customs been declared then the Plaintiff would have been obliged to take out insurance for the said consignment to take care of any eventualities. Further without declaring value, the Plaintiff is not able to determine the exact value to institute his claim. The Defendant has thus by dint of paragraph 3 of the Defence showed an implied term which term the Defendant submits, excludes the Defendant from liability for the lost consignment while in the Third Party's possession.

Alleged breach by the Defendant

[18] According to the Defendant, the Plaintiff in his testimony attested to the fact that the

goods that were at the Defendants warehouse were intact with no missing cartons, and that the missing cartons were discovered at the final destination in Khartoum, Sudan. It will also be noted that as per the witness statements filed by the Defendant and adopted as evidence herein both witness statements clearly state that before any cargo can be airlifted the manifest is checked to verify that the good as described in the Airway bill is the exact same as what is loaded onto the airplane. There is no record of the Third Party inquiring and/or advising the Defendant as to any missing cartons before the consignment was delivered. Also, there is no way that the said consignment would have been airlifted to Khartoum, Sudan if it was not intact. Therefore, the Defendant submitted that it was not in breach of the contract, and that the said consignment was lost while in the custody of the Third Party who should therefore shoulder the loss.

Whether the Defendant's obligation ended on handing over the goods to Kenya Airways

[19] As averred to at paragraph 3 of the Defence, the Defendant was required to arrange/organize for the consignment to be delivered to the Plaintiff's client in Sudan. Thus, as an implied term of the contract, the Defendant's obligation ended when it handed over the goods to the third party. The Plaintiff in his cross examination stated, he was well aware that the Defendant did not own an aircraft and thus it would only be logical for the Defendant to outsource the delivery of the consignment to Sudan.

Plaintiff specifically pleaded special damages in the Plaintiff

[20] The special damages of Kshs. 3, 238, 108/= is unsupported as no value for customs and/or carriage was declared by the Plaintiff in the Airway Bill dated 16th July 2008. The value of the cartons lost is not shown except only it shows the number of cartons to be delivered in Sudan. It is therefore the Defendant's humble submission that for the Plaintiff to be successful in claiming for special damages, then at least this court must have the benefit of knowing how much one carton costs to enable this court determine the value of the missing cartons. There is no proof of the value of the goods as claimed by the Plaintiff and as such the Plaintiff has not specifically proved the same.

Whether loss suffered by the Plaintiff attributed to the Defendant

[21] They submitted that they are not culpable for any loss the Plaintiff may have suffered. The third party is the one liable after the Defendant handed over the consignment safely and intact to them. The Defendant no longer had control of the handling of the consignment by the Third Party. The Third Party had offered to compensate the Plaintiff, which compensation the Plaintiff rejected as it was too little. The Defendant wishes to submit that the offer by the Third Party to compensate the Plaintiff is the act of a guilty party and the same must not be ignored by this court.

Defendant entitlement to indemnity from the Third Party

[22] The Defendant submitted that the Third Party does not deny receipt of the consignment in intact status. In fact at paragraphs 2 and 4 of the Third Party's statement of Defence admits to receiving the consignment intact with no missing cartons. Both statements of Mr. Kulundu and S.K. Ndenga (who was the appointed investigator by the Defendant to write his findings which was produced as a report and attached to the Defendant's list of documents at pages 14-20) allude to the fact that there was no way that the consignment would have been flown to Sudan had the description and quantity of the consignment as described in the manifest not have matched what was on the ground. Further there is no communication from the Third Party to the effect that there was a short on the consignment delivered to them by the Defendant. The short was discovered upon delivery meaning that the loss happened while the consignment was in the Third Party's possession. Page 11 (Article 11.2) of the Third Party's list of documents is quite clear that the carrier will be liable for any loss of consignment. The Defendant submits that the Third Party herein is liable for the loss as the loss was caused by the negligence and willful default of the carrier. The Third Party has shown no contributory negligence on the part of the Defendant. The

Defendant refers this court to pages 16-17 of the Defendant's list of documents paragraph 3.0.1, and 3.0.2 where it clearly is shown that the Third Party had not been able to ascertain where the loss occurred clearly showing negligence and willful default on the part of the Third Party.

Whether the carriage of the goods was subject to the conditions of carriage on the Airway Bill

[23] The Defendant submitted that the Third Party was subject to the conditions of carriage except Article 12.3 which places limitation of two years within which a claim against the carrier may be brought. The suit is not time barred as demand was sent to the Third Party and offered to compensate the Plaintiff. They only claim that compensation was limited under the Warsaw Convention. In essence therefore a claim had already been made as against the Third Party vide the demand for compensation within the two year limitation period. The Third Party cannot therefore be seen to say that the claim was made over the two year time limit.

Whether the Third Party is a bailee or carrier within the meaning of the Carriage by Air Act

[24] The Defendant submits that the Third Party herein is a Carrier within the meaning of the Carriage by Air Act. Thus, in the circumstances of the case, the Third Party ought to bear the costs of the suit. The loss was as a result of the Third Party's willful default and negligence. The Plaintiff has not proved its case on a balance of probabilities against the Defendant and should be dismissed with costs to the Defendant. In the alternative, should this court be convinced by the submissions of the Plaintiff, the Defendant prays that the Third Party be held liable for the loss suffered by the Plaintiff and that the Third Party do indemnify the Defendant accordingly for the said loss.

Third party's submissions

[25] The third party responded to the issues which were relevant to it as below;

Whether the carriage by the Third Party of the goods was subject to the conditions of carriage in the Airway Bill

[26] On 16th July 2008 the Plaintiff through the 1st Defendant booked cargo consisting of medical supplies on the Third Party's flight from Nairobi to Khartoum and issued an Airway bill Number **70620924606**. From the airlift, 3 pieces out of the 78 could not be traced despite all efforts to find them in Nairobi and in Khartoum.

On the 28th November 2008 the Plaintiff (through the Defendant) booked cargo consisting of medical supplies through the Third Party's flight from Nairobi to Khartoum and issued Airway Bill Number **70620960564**.

According to the Third Party, the Conditions of Carriage are applicable to this suit and govern the carriage of the cargo on the two material dates. See Article 1.2 of the Conditions which states that an *Air Waybill* as

“AIR WAYBILL” means the document entitled “Air Waybill” made out by or on behalf of the shipper which evidences the contract between the shipper and Carrier for carriage of cargo over routes of Carrier.”

Article 1.6 of the Conditions define a carrier as follows:

“CARRIER” includes the air carrier issuing the air waybill or preserving the shipment record and all carriers that carry or undertake to carry the cargo or to perform any other services related to such air carriage.” (Emphasis added)

[27] See Article 2.1 of the Conditions of Carriage which states that;

“These Conditions shall apply to all carriage of cargo, including all services incidental thereto, performed by or on behalf of Carrier, provided that if such carriage is “international carriage” as defined in the applicable Convention (see Article 1.3) such carriage shall be subject to the provisions of the applicable Convention and to these Conditions to the extent that these Conditions are not inconsistent with the provisions of such Convention.”

[28] Therefore, under the Conditions, the liability for lost cargo is limited to US\$ 20.00 per Kilogram (a sum of two hundred and fifty francs as per the Convention.) See Article 22(2) (a) on Carriers liability. The Third Party submitted that they have had no knowledge of and do not admit the weight and value of each piece of the lost consignments carried pursuant to the said air waybills. And in the absence of proof of weight and value of each of the individual consignments missing, the liability of the Third Party is still limited as per Articles 11.7 and 11.8 of the conditions.

Is the Defendant entitled to indemnity from the Third Party?

[29] Based on the above, the third party submitted that the Defendant has no claim against the Third Party as it is well over two years since the flight date of 16th July 2008 and all rights are extinguished. By dint of Article 2 clause 5 of the Constitution and section 3 of the Carriage by Air Act (herein referred to as “*the Act*”), the provisions of the Warsaw Convention are part of our domestic law. It follows that the Convention for the Unification of Certain Rules Relating to International Carriage By Air as Amended by The Hague Protocol Of 1955 (herein referred to as the amended Warsaw Convention) forms part of the law of Kenya. The amended Warsaw Convention provides at Article 29 that the right to damages is extinguished if an action is not brought within two years of the date of arrival at destination of the consignments. Article 29(1) states that;

“The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”(Emphasis mine)

In addition, the Third Party’s Cargo Conditions of Carriage (herein referred to as the Conditions) provides for limitations on claims and actions. A copy of the conditions was produced by the Third Party in its list of documents filed herein. Article 12.3 of the Conditions provides that;

“12.3

Any right to damages against Carrier shall be extinguished unless an action is brought within two years after the occurrence of the events giving rise to the claim.”

See the Case of **E.M.S (Suing as next friend of J.M.I, a Minor) Versus Emirates Airlines ,Civil Suit 603 of 2010** citing **Alitalia Airlines Vs. Skylink Air Services Limited Nairobi (Milimani) HCCC No. 303 of 2001** **Mbaluto, J (as he then was)** stated that under the Convention for the Unification of Certain Rules Relating to International Carriage by Air as Amended by the Hague Protocol of 1955, claims lodged after more than 2 years are extinguished. The matter went to the Court of Appeal and that part of the decision was not interfered with as in **Alitalia Airlines vs. Assegai Civil Appeal No. 29 of 1989 [1989] KLR 548**. Following in the footsteps of the said decisions as well as **Sitati J’s** decision in **Farida Abdullahi Ibrahim & 2 Others vs. Gulf Air Limited Nairobi HCCA No. 95 of 2002**, held that this suit should have been brought within 2 years as provided under Article 29(1) of the Convention. In this case, the claims herein expired during July and November 2010 respectively if the claims were made directly against the Third Party. Furthermore, whilst the suit was commenced within the two year period, the Third Party proceedings were not commenced until July 2012. The Defendant therefore has no right to be indemnified by the Third Party. No justification has been made in the delay in taking out the Third Party proceedings as the Defendant had in July and December 2008 engaged in correspondence seeking negotiations. Therefore, the Third Party is a Carrier within the meaning of the Carriage by

Air Act and the carriage herein is governed exclusively by the provisions of the Act and the amended Warsaw Convention. Article 18(1) of the amended Warsaw Convention states that;

“(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.”

[30] The Third Party stated that both Airway Bills produced by the Plaintiff did not indicate the value of the goods and only gave the weight. During the cross examination of the Plaintiff by the Third Party he confirmed that the Airway Bills made reference to the Conditions of Carriage. The third party is no liable. But even if it were, the any indemnity to the Defendant is limited to the lost cargo which is calculated as follows:

- a. Cargo received on 16th July 2008

The total weight of this cargo was 427 kilograms. The 3 pieces can be prorated to weigh 16.41 kilograms as follows:

$$427/78 * 3 = 16.41 \text{ Kgs}$$

- b. Cargo received November 2008

There were 128 cartons with a total weight of 827 kgs, and the weight of 6 cartons will be prorated as follows;

$$827/128 * 6 = 38.76 \text{ Kgs}$$

The total weight of the lost pieces is 55.17. Compensation at 20 dollars per kg is **US\$ 1,103.40.**

Whether the Third Party is a bailee or Carrier

[31] The Third Party submitted that it is a carrier and not a bailee. In the premises, the Third Party exercised due diligence in airlifting the cargo. No negligence can be attributed to the Third Party or its servants as all efforts to trace the cargo were unsuccessful. In addition, the Third Party's Security works together with the Kenya Airports Authority and Sudanese Airport Security. The Third Party offered settlement in terms of the limitation under the Conditions of Carriage and the Act which was declined by the Defendant and is not liable for the costs of this suit. They prayed for this Honourable Court to dismiss the claim by the Defendant against it with costs.

DETERMINATION

Issues

[32] Issues were agreed upon and filed in court. I will consider all matters in the case and eventually answers to all the issues will be given. I will start with the easier one on who is the bailee and who is the carrier. I will borrow from ***Chitty on Contracts***, on who bailee is, that:-

“...any person is to be considered a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an understanding with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person. (Chitty on Contracts, Volume II para 33 – 003)

Actual possession of the specific goods i.e. 78 and 128 cartons of medical supplies was transferred by the Plaintiff to the Defendant with specific directions that they were to be delivered to its customer in Sudan. By all standards and measure, there is no doubt that the Defendant was a

bailee under a contract of carriage. Issue 1 is therefore answered in the affirmative.

[33] On the other hand, the third party is the carrier. See Article 1.6 of the Conditions that define a carrier as follows:

“CARRIER” includes the air carrier issuing the air waybill or preserving the shipment record and all carriers that carry or undertake to carry the cargo or to perform any other services related to such air carriage.” (Emphasis added)

[34] Therefore, there were two contracts. One is for bailment between the Plaintiff and the Defendant, and the other is for carriage between the Defendant and the third party. The Plaintiff was not privy to the contract between the Defendant and the third party. He will not have a say on it. I will, thus, determine liability between the third party and the Defendant separately and after I have determined liability between the Plaintiff and the Defendant.

Liability between Plaintiff and Defendant

[35] The Defendant undertook to have the goods belonging to the Plaintiff delivered to Sudan. It engaged the services of the third party as such bailee. Therefore, the Defendant entered into a contract with the third party for the actual carriage which is a matter between them to the exclusion of the Plaintiff. And whether the Plaintiff had knowledge or confirmed that the Defendant did not have a plane of its own will not absolve them from liability to the Plaintiff. The third party proceedings were based on legal reality so that the defendant is not left without a remedy. The bailee was under an obligation to take all reasonable steps to ensure the bailor does not suffer loss of his goods. That is why I find the following argument by the Defendant to be counter-productive: that had the Plaintiff disclosed or declared the value of the consignment, it would have taken steps to insure the goods in the event of any loss. As a bailee it was upon them to seek the information they are saying they were denied. They did not ask for it and so they were negligent. In deed business for carriage as the one the Defendant is involved in should always have an appropriate insurance cover on the goods received on bailment. As explained by John Holt, CJ in the case of **Coggs v Bernard (1558 -1774) All E. R. 1** the law has placed this kind of duty on the bailee is to stifle even the slightest temptation by the bailee to rob the bailor off his property; and ensure safety of dealings in the nature of bailment. See the eloquently put phrase by John Holt, CJ on the policy underpinnings I have just explained that:-

“For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he (the common carrier) is chargeable. This is a politic establishment, contrived by the policy of the law for the safety of all persons, that they may be safe in their dealings, for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. This is the reason the law is founded upon that point.”

See also Gould J in the said case of **Coggs v Bernard** that any man who undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost or come to any damage. See also **Halsbury’s Laws of England, vol. 7 page 16 paragraph 11** that liability of the bailee ends only where there has been delivery, actual or constructive, to the destination agreed with the bailor. Therefore, the obligation of the bailee does not end on handing over the consignment to the carrier appointed by the bailee. The bailee was aware of the first loss that had not been compensated and knew too well of the conditions of their contract with the third party to which he subjected the goods of the bailor. They should have acted more diligently to provide for cover or special declaration of value. They failed in all these. Accordingly the Defendant is liable for the loss suffered by the Plaintiff. What about the quantum?

[36] Contrary to the submissions by the Defendant, the Plaintiff has pleaded the special damages they suffered. Failure to indicate it in the airway bills was a mistake committed by the Defendant as

bailee. If they thought the details were necessary especially when they entered into a contract of carriage with the third party, they ought to have taken all necessary steps to ensure the property or its worth is not lost. They knew the terms of carriage which, as you will learn later, governed the contract of carriage between the third party and the Defendant. The Plaintiff supplied details to the court on the actual cost of the first 3 cartons which were not delivered to be Kshs. 555,906 and he provided the debit note on the said amount. The Plaintiff also provided another debit note for the other 6 cartons which were not delivered on the second incident and is for Kshs. 2,682,108. Each of the debit notes provided in detail the number of the packages, the cost of each pack in the lost package, and the nature of the contents in the lost packages. These are useful details in support of the special damages claimed. All these documents were with the Defendant before the suit was filed and were also filed in court with the suit. In addition, the said documents are part of record having been admitted in evidence. From the record and evidence in court, the total loss of Kshs. 3,238,104 as pleaded in the plaint is fully supported and proved as special damages. The Plaintiff proved its case on balance of probabilities against the Defendant. I, therefore, enter judgment in favour of the Plaintiff in the sum of Kshs. 3,238,104 with interest at court rates of 12% from the date of judgment. It is so ordered. What about indemnity to the Defendant from the third party?

Indemnity from third party

[37] A matter which I should determine first and foremost is on limitation. Limitation of time is of the essence in civil litigation and adjudication. It is statutory defence which is available to a party. However, when it comes to addition of parties through amendments or joinder of third parties under the regime of third parties provided in the civil procedure, to a suit which was filed on time, I do not think that the defence of limitation is available. Therefore, despite Article 29 of the amended Warsaw Convention and Article 12.3 of the Conditions of Carriage, the primary suit was file on time and therefore, I do not think the limitation of actions provided in the two instruments will decimate this suit. I reject the argument and proceed to consider the other substantive claims herein.

[38] As I have stated, the contract between the Defendant and the third party was governed by the conditions of the carriage, the enabling law and Convention. See Article 2.1 of the Conditions of Carriage which states that;

“These Conditions shall apply to all carriage of cargo, including all services incidental thereto, performed by or on behalf of Carrier, provided that if such carriage is “international carriage” as defined in the applicable Convention (see Article 1.3) such carriage shall be subject to the provisions of the applicable Convention and to these Conditions to the extent that these Conditions are not inconsistent with the provisions of such Convention.”

[39] Is the third party is liable to indemnify the Defendant? The evidence before the court show that the Defendant delivered to the third party two consignments of 78 and 128 cartons for delivery to Khartoum, Sudan. It issued airway bills which constitutes a contract between the carrier and the shipper for carriage of cargo. According to the evidence availed to court, the goods were intact and there is nothing to show there was any shortage at the time of delivery by the Defendant to the third party. The shortage was discovered by the customer who brought it to the attention of the Plaintiff and in turn the Plaintiff to the attention of the Defendant and the defendant to the attention of the third party. The Defendant has shown that the shortage of cargo delivered to Sudan occurred when the cargo was in possession of the third party. There is no evidence to the contrary from the third party. Therefore, the third party failed on its duty to ensure the cargo it received was safe and reached the destination intact. They are, therefore, negligent and are liable. However, there is limitation on the extent of liability under the Convention which I should determine.

[40] I have held already held that the Third Party is a Carrier within the meaning of the Carriage by Air Act. I have also held that the contract between the defendant and the third party is governed by the Carriage Act and the Convention for the Unification of Certain Rules Relating to

International Carriage by Air as Amended by The Hague Protocol of 1955. This is what many refer to the amended Warsaw Convention which, by dint of article 2 and 3 of the Constitution forms part of the law of Kenya. As a carrier, the Third Party's liability is limited to the Convention limit. See Articles 11.7 and 11.8 of the conditions which state;

“11.7

Unless the shipper has made a special declaration of value for carriage and has paid the supplementary sum applicable, liability of Carrier shall not exceed the applicable Convention limit or, if no Convention applies, 17 Special Drawing Rights per kilogram of cargo destroyed, lost, damaged or delayed. If the shipper has made a special declaration of value for carriage, it is agreed that any liability shall in no event exceed such declared value for carriage stated on the face of the air waybill or included in the shipment record. All claims shall be subject to proof of value.” (Underlining mine)

“11.8

In the case of loss, damage or delay of part of the shipment, or of any object contained therein, the weight to be taken into consideration in determining the amount to which Carrier's liability is limited shall only be the weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of part of the shipment, or of an object contained therein, affects the value of other packages covered by the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability. In the absence of proof to the contrary, the value of any such part of the shipment lost, damaged or delayed as the case may be shall be determined by reducing the total value of the shipment in the proportion that the weight of that part of the shipment lost, damaged or delayed has to the total weight of the shipment.” [Underlining mine]

[41] The Convention limit is provided for in in Article 22(2) (a) to be a sum of two hundred and fifty francs which translates into US\$ 20.00 per Kilogram. See Article 22(2) (a) on Carriers liability that;

“(2) (a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.” (Underlining mine)

[42] The Third Party did not make a special declaration of value for carriage as for liability to be pegged on the declared value for carriage stated on the face of the air waybill or included in the shipment record. I held that the Defendant as the bailee knew or ought to have known the conditions applicable to his contract and ought to have taken all steps to ensure that these conditions do not derogate from or diminish the property of the bailor. He ought to have asked for the information as critical as declaration of value. I have seen the bailee attempting to use lack of declared value against the bailor- the Plaintiff. In the capacity of a bailee, the Defendant cannot be allowed to use its failure against the bailor-the plaintiff. He was aware that all claims shall be subject to proof of value. I have held the third party is liable to indemnify the Defendant. But, in trepidation, I will hold that the indemnity will be limited to the weight shown on the airway bills and apply the rate of compensation provided for in the Convention. The calculations provided by the third party as follows make sense and are in accordance with the Convention:-

a. Cargo received on 16th July 2008

The total weight of this cargo was 427 kilograms. The 3 pieces can be prorated to weigh 16.41

kilograms as follows:

$$427/78 * 3 = 16.41 \text{ Kgs}$$

b. Cargo received November 2008

There were 128 cartons with a total weight of 827 kgs, and the weight of 6 cartons will be prorated as follows;

$$827/128 * 6 = 38.76 \text{ Kgs}$$

The total weight of the lost cartons is 55.17. Compensation at 20 dollars per kg is US\$ 1,103.40.

[43] Accordingly, I order indemnity by the third party to the Defendant shall be in the sum of US\$ 1,103.40, or its equivalent in Kenya Shillings at the current official exchange rate. It is so ordered.

Costs

[44] Given my findings and judgment above, the Defendant shall bear the costs of the suit between them and the Plaintiff. And, the third party shall bear the costs of the claim of indemnity to the extent expressly granted in this decision. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 7th day of July 2015

F. GIKONYO

JUDGE