



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA AT NYERI
CIVIL APPEAL NO 114 OF 1998

HEMS GROUP TRADING COMPANY LIMITEDAPPELLANT
AND
COTECNA INSPECTION S.A.RESPONDENT

(Appeal from a Ruling and Order of the High Court of Kenya at Eldoret, (Lady Justice R. Nambuye) dated 3rd April, 1998 in

H.C.C.C. NO. 126 OF 1997)
JUDGMENT OF THE COURT

Hems Group Trading Company Limited, the appellant, (*hereinafter called "the plaintiff"*) filed a suit in the superior court on 22nd April, 1997 against Cotecna Inspection SA, the respondent, (*hereinafter called "the defendant"*) claiming damages, special and general, for alleged breach of contractual and statutory duty. The plaintiff was subsequently amended on 29th May, 1997.

The plaintiff's case as pleaded in the amended plaintiff is briefly that the defendant operates in Kenya and elsewhere a comprehensive import supervision scheme intended, inter alia, to ensure that goods imported into Kenya comply in quality and quantity with contractual specifications, which duty includes preshipment physical inspection of goods for quality and quantity and inspection thereof at destination. It was the responsibility of the defendant, among other things, to ensure that the quality and quantity of the goods was in conformity with the stipulations of the Import Declaration Form (IDF) and to ensure that the cargo was not substituted.

On 23rd August, 1994, the plaintiff duly completed IDF No. AB 026870 in which the plaintiff stipulated the specifications of soya beans it was importing from Trade International Inc, an American company which deals in the commodity. The plaintiff submitted the IDF to the defendant to facilitate the inspection of the soya beans by the defendant at both ports of exit and entry to ensure compliance with specifications. It is further alleged that in breach of its duty to the plaintiff and its statutory duty, the defendant failed to carry out any preshipment physical inspection of soya beans; permitted to be loaded on the vessel for shipment to Kenya and consigned to the plaintiff soya beans which did not comply with the specifications in the IDF or the contract of sale either in quality or quantity, and which were in fact partly rotten and/or mixed with other substances not contracted for; failed to carry out any inspection of the goods at destination; having failed to inspect the goods, falsified a clean report of findings in the full knowledge that the same was false, and the goods had already left the port of exit, and thus preshipment inspection was impossible; and failed to comply with the statutory import regulations.

It also alleged in paragraph 6 of the plaintiff that in further breach of its duty to the plaintiff, the defendant did not carry out any inspection at the port of exit and issued a spurious Clean Report of Findings purporting it to be a record of the results of an inspection which it had not in fact conducted. In

effect, the plaintiff contended, the defendant permitted the shipment of goods of sub-standard quality and which did not conform to the specifications stipulated in the IDF. As a result of all these breaches, the plaintiff suffered loss and damage for which it claims Shs 35,241,968/= as special damages, general damages, interest and costs of the suit.

The defendant sought particulars of certain averments in the amended plaint which the plaintiff's Advocates supplied on 14th July, 1997. On 25th July, 1997 the defendant filed a defence denying the plaintiff's claim. It also denied being under any contractual or statutory duty to perform any of the functions alleged by the plaintiff in relation to the consignment of the soya beans.

On 20th August, 1997 the plaintiff's Advocates took out a Notice of Motion under section 3A of the Civil Procedure Act, Order 6 rule 13 (1) (c) and (d), Order 12 rule 6 and Order 35 rule 5 of the Civil Procedure Rules seeking three main orders-

(1) That the defence filed by the defendant be struck out on the ground that it may delay the fair trial of the action and it is otherwise an abuse of the process of the court.

(2) That judgment be entered in favour of the plaintiff on admission.

(3) That summary judgment be entered against the defendant in terms of the amended plaint.

The application was supported by the affidavit of Wycliffe Basa Mwangale, the Chairman and Managing Director of the plaintiff sworn on 19th August, 1997. The application was opposed and the replying affidavit was sworn by Bosco Karingithi, the Manager of the defendant. The application was heard by Nambuye J who dismissed it, saying-

"In the final analysis I am inclined to rule that the pleadings of both parties and the documents annexed as forming the basis of the contract leading to the proceedings raise triable issues and this is not a proper case where judgment should be entered on admission, defence struck out and summary judgment entered."

The plaintiff has appealed against this decision on 14 grounds which Mr Ojiambo, learned Counsel for the plaintiff, argued together. The gravamen in all these grounds is that the learned Judge erred in law and in fact in dismissing the plaintiff's application. As we have already said, the application was presented under three separate orders and we propose to consider each aspect separately to see whether the learned Judge's decision was correct.

First, the plaintiff sought to have the defence struck out under *Order 6 rule 13 (1)(c)* and (d) on the grounds that it may delay the fair trial of the action and that it is otherwise an abuse of the process of the court. The submission in support of this contention was that the defence is a bare denial and that the defendant has no defence to the plaintiff's claim. That the defendant was under a duty both contractual and statutory to undertake pre-shipment inspection of the soya beans and that upon it being shown by credible evidence that in breach of this duty, the defendant failed to carry out the inspection, it can have no defence at all to the claim. The defendant issued a Clean Report of Findings (CRF) dated 6th March, 1995 certifying that the goods were inspected in accordance with their mandate and found acceptable as to quantity, quality and price. It was issued at Chantilly, Virginia, USA, in relation to 1000 metric tons of soya beans imported by the plaintiff. The goods were on board a carrier called Ashley Lykes. The CRF was signed by the defendant's Inspection Representative.

Mr Karingithi tried to get round the CRF by deponing in his replying affidavit that-

"22 (a) The defendant has no knowledge how the bags were loaded nor of the letter from the shipping agent dated 11th September, 1995.

(b) The inspection method used by the defendant are random (sic). The inspection carried out on the identified soya beans complied with the Import Declaration Form.

(c) *The soya beans inspected by the defendants are not the soya beans delivered to the port of Mombasa. The defendant's inspector found both the quality and quantity of the soya beans identified to him satisfactory.*

(d) *The Clean Report of Finding issued by the defendant did not make reference to a letter of credit or to a proforma invoice."*

As Karingithi did not carry out the inspection, his affidavit in relation to this CRF has no probative value. He did not inspect the goods himself nor did he issue the CRF. It is the person who inspected the goods and issued the CRF who should have sworn the affidavit unless, of course, for some reason he could not be found, in which case, this should have been indicated and explained by the defendant. The CRF being a commercial document speaks for itself and the attempt by Karingithi to explain it away must be rejected. The defendant having admitted receiving the IDF and the proforma invoice, both of which had the specifications of the soya beans required, and the payment to cover the cost of preshipment inspection, cannot deny that it was under a duty to inspect the goods and to ascertain that they were in accordance with the specifications.

In relation to liability therefore, we are satisfied on the strength of the material before us, that there is no defence to the plaintiff's claim. The defence dated 4th July, 1997 and filed in court on 25th July, 1997, raises no triable issue as regards liability. Accordingly, save as to admissions, paragraphs 2 and 3 of the defence are struck out. We also strike out in their entirety paragraphs 4, 5, 6 and 7 of the defence. Since the plaintiff is claiming general damages and a very large sum of money by way of special damages, some of which relate to payments alleged to have been made to third parties, the plaintiff has to prove these by evidence. The grounds of appeal relating to the dismissal of the application under Order 6 rule 13 (1)(c) and (d) accordingly succeed and are allowed.

Having arrived at this conclusion, it is not necessary to consider the efficacy of the application under Orders 12 and 35 of the Civil Procedure Rules except to make two points. Mr Ojiambo conceded that this is not really a proper case for summary judgment under Order 35 having regard to the nature of the claim. As regards admissions, we found none either in the defence or correspondence exchanged between the parties which would entitle the plaintiff to judgment under Order 12 of the Civil Procedure Rules.

Mr Kimani Kiragu, for the defendant, submitted that the Judge's decision was correct and should be upheld, but having regard to what we have said about the critical documents, scanty defence and the affidavit of Karingithi, we do not agree with him at least on the issue of liability.

For all these reasons, we allow this appeal, set aside the ruling and order of the learned Judge and substitute therefor an order allowing the plaintiff's application by striking out paragraphs 2, 3 (*denials only*), 4, 5, 6 and 7 of the defence and entering judgment for the plaintiff on the issue of liability only. The plaintiff will also have the costs of the motion and the appeal.

Dated and delivered at Nairobi this 26th day of March, 1999.

J. E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR