

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 624 OF 1992

**OMEGA CHEMICAL INDUSTRIES
LTD.....PLAINTIFF**

versus

TRANSAM (K) LTD.....DEFENDANT

J U D G M E N T

The plaintiff lost the goods set out in the plaint while the said goods were in the custody of the defendant. The defendant who is a clearing and forwarding company denied liability through correspondence, pleadings and evidence adduced.

From the pleadings and the evidence presented it is common ground that the defendant received and stored goods for and on behalf of the plaintiff. These goods were comprised of araldite the particulars of which have been set out. It is common ground that the goods were lost while they were in the custody of the defendant. In a letter dated 25th February, 1991 written by the defendants advocates to the plaintiff's advocate part of it reads as follows:-

“Please be advised that my client denies any liability whatsoever in connection with the allegedly short delivered goods. Your client has time and again been advised that the subject goods were among those stolen from my clients’ godowns during the night of 15th and 16th December, 1990 by unknown thieves.....”
(Ext.12)

The admission of the loss was also confirmed by the defendant in its letter dated 9th January, 1991 addressed to the plaintiff. At the reverse of the said letter which was produced as Ext.11, the defendants standard Trading conditions are set out. Condition No.5 thereof provides that all goods without exception will be handled, stored and/or transported by the company strictly at OWNER'S RISK. Condition No.13(i) provides as follows:-

“The company shall only be responsible for any loss of or damage to goods or for any non-delivery or misdelivery if it is proved that the loss, damage, nondelivery or misdelivery occurred whilst the goods were in the actual custody of the company and under actual control and that such loss, damage, nondelivery or misdelivery was due to the wilful neglect or default of the company or its own agents.”

The defendants warehouse, were guarded by a security firm. That was a contract between the defendant and that firm. The arrangement had nothing to do with the plaintiff. The defendant owed the plaintiff a duty of care to secure its goods and that they were stolen while in its custody is prima facie evidence of that breach of duty of care. I cannot see how the defendant can escape liability in this case. In my judgment the plaintiff has proved its case on liability.

The plaintiffs claim is in the nature of special damages. The law requires that the same must not only be specifically pleaded but strictly proved. Paragraph 7 of the plaint sets out the particulars of loss and damage which satisfy the requirements of the pleadings.

Pw1 gave evidence in support of the pleadings. At the end of it all he stood firm under cross examination and left no doubt whatsoever that the plaintiff's claim in the sum of Ksh. 361,408.60 had been proved on a balance of probabilities. Most of the evidence was documentary which the defendant did not succeed to fault.

The witnesses called by the defendant were not working with the defendant at the time this cause of action arose. A summary of invoices was produced to support the claim of defendant as raised in the counter-claim. The particular invoices were however not produced. DW2 who produced the invoices had no knowledge of the invoices referred to in the said summary.

Further to the foregoing, the defendants counter-claim is also in the nature of special damages. Regrettably however, the pleadings and the evidence fall short of the requirements of law I set out herein above. The counterclaim must therefore fail.

I have noted however that in the defence to the counter-claim, the plaintiff admitted a sum of Kshs.126,057/- which it has always been willing to settle.

And so in the end, the plaintiffs claim of kshs. 361,408.60 which has been proved shall be reduced by the sum of kshs. 126,057 aforesaid.

I therefore enter judgment for the plaintiff against the defendant in the sum of kshs. 235,351.60 plus costs and interest at court rates. Order accordingly.

Dated and delivered at Nairobi this 3rd day of November 1998

MBOGHOLI MSAGHA

JUDGE