REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 336 of 1993

HIGHWAY CARRIERS LIMITED…….....……PLAINTIFF

-VERSUS-

HUGHES LIMITED……...……1ST DEFENDANT

INTERNET EXPRESS CARGO LIMITED……...2ND DEFENDANT

JUDGMENT

Highway Carriers Limited (Highway) the plaintiffs are engaged in the business of transportation of goods within and outside Kenya. They came to court by way of a plaint dated 14.6.1993 claiming a liquidated sum of Shs. 895,000 from two defendants-Hughes Limited (Hughes) and Internet Express Cargo Limited (Internet).

The plaint is in simple form and the facts constituting the cause of action appear on the face of it, to be unhappily worded. It lays the claim in the alternative and seeks no joint liability against both defendants. Highway seeks judgment either against Hughes or alternatively against Internet. Highway submitted through their counsel Ms. Okumu that such pleading was proper because the plaintiff was in genuine doubt as to who was liable to pay the sum due. In such event Order 1 rule 3 and 7 of the Civil Procedure Rules apply as they state:

3. All persons may be joined as defendants against when any right to relief in respect of or arising out of the same act or transaction or serves of acts or transactions is alleged to exist; whether jointly severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

7. Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress he may join two or more defendants in order that the question as to which of the defendants is liable and to what extent may be determined as between all parties.

Although objection to the form of pleading was threatened by the defendants, no issue was made of it nor was it raised as a point of law. I accept that the pleading accords with the Civil Procedure Rules.

The cause of action thus remains:

Sum due for work done and transportation services rendered to Hughes at the request of Internet in 1992.

Either Hughes or Internet was liable for payment of such sum.

In their defence filed through M/s Ngatia & Associates on 21.7.93. Hughes vehemently denied any privity of contract with Highway and averred that it was a stranger to the allegations made in the plaint. It admitted having requested a cargo company to carry out some specified activities which it over paid for in 1992. It was aware of some inconsistent claims having been made against it by Highway but these were denied and it was clarified to Highway that there was no authority, express or implied, for Internet to enter into any sub-contracts with Highway. The suit was therefore frivolous, an abuse of process, misconceived and bad in law. The jurisdiction of the court was also denied.

On their part, Internet through their advocates M/s Hamilton, Harrison & Mathews in a defence admitted by the court after setting aside an earlier ex-parte judgment, on 8.9.93 denied any indebtedness in the sum of shs. 895,000 or any sum at all. In the same breath they averred that if any services were rendered, which they also denied, then these were rendered to a disclosed principal and therefore they were not liable for the principal's debts.

All the parties' Advocates signed a consent letter dated 3.8.94 filed in court on 12.10.94 dispensing with summons for direction and agreeing on a set of issues. They agreed on the hearing to take place in Mombasa High Court for a period of two days and gave liberty to either party to apply. This consent was made by an order of the court on 22.3.96. There was no application made before the hearing by either party and the hearing proceeded before me on 18.9.96 for one day, with each party tendering evidence through one witness.

The issues filed on 12.10.94 were signed by counsel for Highway and counsel for Hughes. But as stated above the consent letter filed with those issues was also signed by counsel for the Internet. It follows therefore that the only issues agreed on by all the parties and submitted to me for determination are these:

1. Does the plaintiff have a cause of action against the 1st defendant?

2. Did the 1st defendant request the plaintiff to render the services alleged in the plaint?

3. Is there any privity of contract between the plaintiff and the 1st defendant?

4. Did the plaintiff do any work and render services to the 1st defendant at the request of the 2nd defendant during the year 1992?

5. Does the 1st defendant have any contractual relationship with the 2nd defendant. Further is the 1st defendant wrongly joined in the suit?

6. Does the court have jurisdiction to hear and determine this case?

7. Is the sum of shs. 1, 786,487 paid by the 1st defendant to the 2nd defendant an overpayment for services rendered?

8. Are the 1st and 2nd defendants jointly and severally indebted to the plaintiff in the sum claimed Kshs. 895,000 or at all?

9. Is the plaintiff's claim as pleaded inconsistent with the plaintiff's demand prior to commencement of this suit?

10. Is the 2nd defendant authorized by the 1st defendant to enter into contracts on behalf of the 1st defendant?

11. Who would pay costs and interest?

I was disappointed to note in the written submissions filed by counsel for Highway , Ms.Okumu and counsel for Internet Mr. Ochwa, that they did not address these specific issues that they agreed on. They

instead dwelt on matters of disclosed and undisclosed principals and Agency law when no such issue was framed for determination. It is clear from the provisions of Order 20 rule 4 and 5 that the court can only make a decision on issues submitted to it. They state:

4. Judgment in defended suits shall contain a concise statement of the case, the points for determination the decision thereon and the reasons for such decision.

5.In suits in which issues have been framed the court shall state its finding or decision with the reasons therefore upon each separate issue.

Underlining supplied.

It has indeed been held by the Court of Appeal in Kukal Properties Development Ltd. –vs-Tafazzal Maloo & 3 Others (CA 155/92) (Gachuhi/Kwach/Muli JJA that " the failure to consider all the issues separately or omitting some rendered the judgment defective, Per Kwach J.A.

Once issues were framed the Judge was obliged to decide each and every one of them and in failing to do so he committed a serious breach of procedure.

I shall therefore proceed to examine, as counsel for Hughes did in his written submissions, each of the above framed issues seriatim.

On the first issue the cause of action as stated above was elaborated in the oral evidence of the plaintiff. This came through Shabir Hassanali, an Assistant Accountant in that company since 1988, who was familiar with the transaction which took place in 1992.

It was the evidence of this witness that Highway dealt with Internet for the first time in June 1992 when Internet approached them for the transportation of some goods from Mombasa to Narok. The request was made on telephone and in a letter faxed to them on 18.6.92. That letter is the basis of Higway's claim because its contents were accepted in writing by Highway on the same day and a contract was precipitated or constituted. It is important to set out the contents of the two letters where were produced as Exh.1 and Exh.2.

Exh.1.

June 18, 1992

Highway Carriers Limited

P.o Box 81339

MOMBASA.

KENYA.

(Att: Mr. Amin Khalfan.)

Fax 011-432018

Dear Sir,

We wish to reserve eight (8) low loaders and eight (8) semi trailers for loading eight combine-Harvesters and eight 40 foot containers. This shipment is to be transported from Mombasa to the Narok area, at the following rates:

Low loaders: Mombasa-Narok area-Kshs. 110,000 per trip.

Semi trailers: Momabas-Narok-Kshs. 50,000 per trip.

Part of this shipment required in the Narok area by June 23rd 1992 therefore we would require at least six low loaders and four semi trailers by 2 p.m. on Friday June 19th 1992 in order to commence loading. Internet will make the necessary arrangements at its own costs to ensure that the port facility is open should loading be necessary on Saturday June 20th 1992.

30% down payment will be made to you on loading and the balance upon presentation of proof of delivery.

Please confirm the availability of the six low loaders and four semi trailers for the specified date. It is our understand (sic) that whatever remaining units, two (2) combine harvesters and four (4) 40' containers will be loaded from Port not later than Monday June 22, 1992.

Yours faithfully,

Internet Express Cargo Ltd.

Signed

Fred Arungah

Manager

General Sales.

The letter was from Internet Express Cargo Limited and not form "Internet Express Cargo" or any other person as submitted by Mr. Ochwa in his written submissions. Clearly a belated attempt to attack the description of the 2nd defendant, which is a non-issue.

Exh.2. Date 18th June 1992

From Highway Carriers Limited

Mr. A. Khalfan

To: Internet Express Cargo

Attn: Mr. Fred Arungah

RE: 8 LOW LOADERS & 8 SEMI-TRAILERS

We refer to our various telecomm resting with your Fax dated 18th June 1992. We will endeavour to meet your requirements as per your above quoted fax.

We would wish you to confirm to us the following:-

(a) 50% payment on loading balance on presentation of signed delivery notes

(b) Goods in Transit insurance will be obtained by you at your cost

(c) The name of the vessel

Regards,

A. Khalfan.

The witness was emphatic that at the time of exchanging telephone calls or the two letters there was no disclosure that Internet was acting for anyone else other than themselves. The letters themselves were not copied to anyone else. It was a direct communication between Highway and Internet. It is Internet which made the initial deposit of Shs. 385,000- Exh. 3- directly to Highway pursuant to their agreement.

It is common ground and it was proved, that Highway delivered the goods as stated in the contract between 22nd June 1992 and 2nd July 1992. They forwarded to Internet 16 delivery notes as proof of delivery of the items and they attached thereto 16 invoices for the total sum of Shs. 1, 280,000. All this time upto 2.7.92, Highway had no knowledge of Hughes and Internet did not introduce them into the contract. Payment of the balance of the transport charges was not forthcoming from Internet. Oral requests and faxes for payment were ignored until Highway made enquiries from Internet on the owners of the goods and were informed that they belonged to Hughes. Highway then wrote to Hughes directly on 14.9.92 (Exh.6) demanding payment. Hughes did not respond to that demand since they were not aware of any liability owed to Highway. It was instead Internet who responded on 15.9.92 in Exh. 7 and said in part:

Please note that we are now taking every measure possible to ensure that we recover what is owed to us by Hughes (K) Ltd. and feel that an independent attempt by yourselves to recover what is owed to you separately will greatly undermine our clients chances of recovering the almost shs. 1, 600,000 owed to us jointly.

It was not until another demand notice was served on Hughes by Highway's advocates on 24.3.93 (Exh.9) demanding shs. 895,000 and threatening court action, that Hughes responded on 8.3.93 (Exh.01) in Part:

Please also note that we are not aware of any direct or indirect outstanding or pending contracts between our company, Highway Carriers Ltd. and/or Internet Express Cargo Ltd. as alleged in your letter.

Therefore should you proceed with your threat to sue us on the basis of a non-existent contract, the suit will be strongly defended at your client's costs.

Despite this Highway filed this suit against Hughes on 15.6.93.

On cross examination by counsel for Hughes, Highway's witness stated:

From the time I received the 1st request upto 2.7.92 I had not been requested by Hughes Ltd. to transport anything. Throughout all the period that I did not know anything about Hughes Ltd. I sued them after failing to receive money from the 2nd defendant. I never wrote to Hughes until September 1992. I cannot say we gave an undertaking to Hughes since we did not know them.

On this admission and from the evidence in documents cited above, it becomes difficult to see how Highway can found a cause of action against Hughes. I would therefore answer the first issue in the negative.

The second issue has partly been answered in the first issue. The communication between Highway and Internet was not copied to Hughes. It is admitted in oral evidence on oath by Highway's witness that there was no request made by Hughes for any services to be performed for them by Highway. The witness may be cited further verbatim:

I have not entered into any contract with Hughes upto September 1992. I have never received any verbal requests from anyone in Hughes Ltd. to transport combine harvesters. Hughes never told me either orally or in writing that they will pay us.

During the transportation period Internet never told me they were an Agent of Hughes Ltd. and Hughes Ltd. never told me they had any Agent called Internet. After delivery Hughes Ltd, never told me in writing or orally that Internet was their agent….

We sued Hughes because Internet told us they had not received any payment from Hughes, not because Hughes told us to do anything for us.

Internet's witness Osborne Arunga on this aspect of the matter admitted that the request for services were made by his company and they did not indicate anywhere that they were anyone's agents. The letter did not even tell Highway that they will be paid by Hughes upon delivery. After delivery they did not tell Highway they will be paid by Hughes. They paid shs. 385,000 as deposit to Highway without mentioning that they had received 50% of all transport charges from Hughes.

On all accounts, the answer to the 2nd issue must be No. The 1st defendant did not request the plaintiff to render services as alleged in the plaint.

Arising from my findings on issues 1 and 2, the answer to issues No. 3, 5, and 8 must be in the negative for reasons earlier stated in those issues. I accept the evidence of the witness for Hughes Antony Mzee, that they imported some combine harvesters in 1995 and upon being advised about their shipping they approached Internet and contracted with them for clearance, transportation and delivery to Narok. Clearance involved payment of duties and taxes due to the government and then transportation of the goods to customers in Narok. The agreement was entered into in Nairobi where the offices of Hughes were.

After delivery Internet submitted invoices to Hughes and a sum of shs. 1,786,487 was paid out to Internet. Some disagreement on the invoices arose but that is the subject matter of another suit. As far as they are concerned Hughes discharged their liability upon agreement with Internet. No authority was sought by Internet from Hughes to sub contract the tasks given to them. It was their duty to clear, transport and deliver as instructed and this was a complete contract in itself. The invoices submitted by internet for transport charges alone amounted to shs. 2, 160,000 to Highway under their contract. It makes no commercial sense for Hughes to pay the higher amount if it was their intention to have different persons carry out the tasks, instead of going directly to the transporters and paying them the lower sum. I find on the evidence that there was a complete and separate contract between Internet and Hughes. Internet entered into these contracts consciously and independently. Hughes, as already stated had nothing to do with the contract between Internet and Highway and I accept their evidence that they came to know about the interests of Highway when Highway wrote to them in September 1992. The 1st defendant is neither jointly nor severally indebted to the plaintiff and ought not to have been joined in this suit.

That brings us back to issue No. 4 which seeks a determination of whether the plaintiff rendered any services to the 1st defendant at the request of the 2nd defendant in 1992.

There is no dispute that the plaintiff, Highway rendered services at the request of the 2nd defendant, Internet, but as I have found above, the request did not specify that the services were to be rendered for Hughes or that Hughes would be liable for the charges. I have accepted the evidence of Hughes, in the absence of other evidence to the contrary, that there were no instructions given to Internet that the request for services be made on their behalf. A vain attempt was made and considerable time taken by the witness for Internet and their counsel to import the principles of agency. As there was admittedly an express disclosure to Highway of Hughes as the principal, the witness for Internet tried to imply such disclosure from Internet's nature of business "Clearing and Forwarding Agents" and by introducing import documents handed over to them by Hughes showing Hughes as the importer of the goods and also the consignee in some of the delivery documents. Asked however whether the mere description of Internet as clearing agents would automatically constitute them as agents of Hughes in this transaction, the witness answered no, and rightly so. He also conceded that the import documents alone cannot constitute automatic agency relationship. Asked again whether he informed Hughes thtat he was going to sub contract the tasks

entrusted to Internet, the witness assumed a stone walling demeanour by stating on repetition of the same question three times, that "they knew." He then said "yes" he informed them but produced no further evidence to show the manner of conveying such information. This was of course denied by Hughes who also denied the allegation made by the same witness that they undertook to pay the transportation charges to Internet. Given a choice of accepting the two oral versions of the evidence, I would prefer the evidence of Antony Mzee to that of Osborne Arunga. I noted their demeanour in the witness box. Mr. Arunga struck me as an opportunistic businessman who would not shy from introducing a lie if it can be confused for the truth and work in his favour. Apart from hesitating to give direct answers to questions posed, he made attempts to withhold evidential material and at one point consulted his counsel to find out whether he should produce them. These were documents relating to payments made to Internet by Hughes. He denied having in his possession some invoices only to end up being shown copies of those invoices by counsel for Hughes and to admit readily that they contained correct information. It was clear to me that the witness withheld production of invoices because they do not show anywhere that he had indicated to Hughes about sub contracting to Internet. And why would Hughes know this any way when Internet was reaping huge profits from such subcontract? That is the amazing part about the witness' claim that Hughes knew about the subcontract at lower rates and still accepted to pay Internet at their own higher rates cited in invoices! In all probability the sub contracting or agency if any, was kept away from Hughes and from Highway by Internet. If there was any need of establishing a disclosed principal/agency relationship surely an express and acceptable disclosure ought to have been made by Internet. I am not called upon to answer such issue as none is framed, but if it was, I think the Authority cited by Mr. Ochwa Irvine & Co. –vs-Watson & Sons would be against him. Thus:

The fact that the contract is made with an agent and credit is given to the agent does not preclude the creditor from having recourse to the principal provided that the agent disclosed the fact that he had a principal at the time when the contract was made.

The underlined proviso, in my finding is non-existent in this case. As between Highway and Internet, Internet contracted as a principal. In answer to the issue posed therefore, services were rendered at the request of the 2nd defendant but it was not disclosed that the services were being rendered for the 1st defendant.

Does the court have jurisdiction to determine the case as posed in issue No. 6?

It obviously has as admitted by the same counsel who raised the issue. His quarrel was based on the submission that the two defendants reside and carry on business in Nairobi although the plaintiff resides and works for gain in Mombasa. In Mr. Ngatia's view the suit should have been filed in Nairobi which is the geographical location of the defendants. As it is the defendants were forced to travel at high cost to Mombasa to defend the suit. This has nothing to do with the jurisdiction of this court which as I say is unlimited and is not doubted. It has to do with the place of suing as provided for under section 15 of the Civil Procedure Act. It is a matter that should have been thrashed out at the stage of summons for directions but as shown above, instead of any objections being raised on the "place of suing" all the parties agreed that the case shall be heard in Mombasa for two days. I cannot go beyond such consent as no fraud or misrepresentation is alleged. At all events the cause of action in this suit arose in Mombasa and I cannot find any valid grounds for objection on the place of suing. The issue was misconceived.

The 7th issue as conceded by the 1st defendant's counsel is also misplaced. There is evidence tendered by the 1st defendant's witness and admitted by the 2nd defendant's witness that there is another case HCCC 4457/93 between the same parties and on the same subject matter which is still pending determination in Nairobi. In the circumstance I do not see how I can make a determination of that issue without affecting the outcome of that other case. I strike out the issue as misconceived.

The matter of inconsistency of the plaintiff's claim was raised in the defence of the 1st defendant,

Highway. As I have held that Hughes is wrongly sued in this matter, the issue becomes superfluous. It may however be observed in passing that there was an admission by Highway's witness that a demand made to Hughes in the letter dated 15.9.92 for shs. 1,015,000 was erroneous. He blamed his advocate for the mathematical error. It is however proved by Highway that they delivered the goods they contracted to deliver and submitted invoices at the agreed rates to Internet. The total charges amounted to shs. 1,280,000. They proved that they have only been paid shs. 385,000. The arithmetic of it leaves a balance of shs.895,000. This they have not been paid and it is not denied in evidence by Internet that they have not. This non-denial is of course inconsistent with the defence of Internet which admitted of nothing. I accept the claim of the plaintiff at shs. 895,000 as pleaded in the plaint and further accept that the demand for a higher figure previous to the filing of the suit was an innocent error of counsel.

I find no evidence to support the 10th issue. Statements by Mr. Arunga for Internet that Hughes had authorized the subcontracting of works to Highway are bare assertions and I have already dismissed them. It was not for lack of witnesses who would have confirmed the assertion that the authority was granted. Present when the contract was awarded to Internet by Hughes were other persons including Internet's General Manager on Fred Arunga. There was also one Griffin and one De Mello. All these were admitted by the witness to be alive but, he could not explain why they were not called to support his allegations against Hughes on the actual terms of the oral agreement. I accept Mr. Ngatia's submission and reliance on section 3(1) & (2) of the Law of Contract Cap 23 Laws of Kenya. The absence of any written authority vitiates any alleged promise by Hughes to answer for the debt.

In view of my findings on the various issues I would enter judgment against the 2nd defendant, Internet Express Cargo Limited for the sum of shs. 895,000 as prayed by the plaintiff.

On the material before me, I am of the view that the confusion as to who between the two defendants should pay the debt was created by the 2nd defendant. The 2nd defendant knew very well that it was indebted to the plaintiff on the basis of a clear written contract and should not have sought refuge in the 1st defendant. In the circumstances I order that the plaintiff's costs and the 1st defendant's costs in this suit be borne by the 2nd defendant.

Interest on the principal sum shall accrue at court rates from the date of filing the suit until payment in full.

Dated at Mombasa this 19th day of February 1997

P.N.Waki

JUDGE