



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 52 of 1997**

**MITCHELL COTTS FREIGHT (K) LTD..... PLAINTIFF**

**-VERSUS-**

**ROADMASTER INDUSTRIES (U) LTD.....DEFENDANT**

**RULING**

M/s. Mitchell Cotts Freight (K) Ltd., filed through their advocates M/s. Omondi Waweru & Co., Advocates, a suit against the Defendants M/s. Roadmaster Industries (U) Ltd., on the 4th of March, 1997.

The Plaintiff sought against the Defendant a sum of US \$36,010 being a sum incurred by way of demurrage for late return of containers. Previously on the 11.1.95 the parties entered into an agreement that:-

"The Defendant would appoint the Plaintiff as a Clearing & Forwarding agent.

That the purpose of clearing consignment on through bills of lading at the Port of Mombasa are in transit through Kenya by rail or road to Kampala, Uganda."

The Defendants were thereby bound to pay the Plaintiff on account of Defendant all the ports and related charges including demurrage of the containers.

The Defendants had incurred demurrage charges for unreturned containers on time that amounted to US \$ 36,010.2

It is this claim that the Plaintiff sues against including interest at banks rate.

As the Defendants were situated outside the jurisdiction of this court the Plaintiff successfully applied for leave to serve summons outside this jurisdiction. On the 18.3.97 M/s. Aboo & Co. Advocates entered appearance on behalf of the Defendant and filed defence on the 2.4.97. In brief what the defence stated was that the Plaintiff failed to give a description of the containers; that the agreement was never executed as it lacked the company seal, as such it was not binding. That this court had no jurisdiction to hear this suit. That the freight was pre-paid and payments made to the Plaintiff's principal shipping company. This was inclusive of the returning charges. If the Plaintiff had thus paid US \$ 36,010 then it was so paid without their authority and/or knowledge. They denied the claim.

The Plaintiff immediately filed a notice of motion seeking for prayers of summary judgment that was dated the 22.7.97 and filed on the 28.7.97. The application was filed under Order 35 r.1 & 2 of the Civil Procedure Rules. I believe this should have been Order

35 r.(1) and (2) C.P.R.

2)(1) In all suits where a Plaintiff seeks judgment for-

a) a debt or liquidated demand with or without interest, or

b).....

where the Defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof and interest, or for recovery of the land or rent or mesne profits.

(2) The application shall be made by motion supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) .....

The Respondent/Defendant filed grounds of opposition and replying affidavit whereby they strongly opposed the said application.

The arguments put forward by Mr. Waweru are that the parties had entered into an agreement which included the payment by the Plaintiff on behalf of all ports and other relevant charges incurred by the Defendants. . . .

It also stated that if no container is returned on time the demurrage would be charged.

As the Defendants have now failed to pay for the demurrage that has amounted to US \$ 36,010 on account of cargo and goods cleared on behalf of the Defendants they should be made liable to pay.

A bundle of invoice was annexed to the application reflecting the exact amount of demurrage that had been incurred and on what containers. The same was forwarded to the Defendants. They failed to respond to the demands made for payments.

The shipping company known as the UNICORN notified the Defendants on the said claim.

The advocate then relied on the case of Zola & Others -v- RaLL Brothers Ltd. & Another, 1969 E.A. 691, whereby Order 35 enables a Plaintiff to obtain a quick summary judgment.

(The case actually dealt with the issue of an affidavit deposed to under Order 35 r.2 C.P.R. and if it was made by a person who could positively swear to the facts verifying the cause of action).

City Printing Works (K) Ltd., -vs- Bailey, 1977 KLR 85, whereby the Defendant must show he has a defence. This must be shown in the pleadings.

(The case actually dealt with the issue where the "defendant advances a defence which is reasonable, or plausible and bona fide, the Judge must allow him unconditional leave to defend where however the proposed grounds of defence as a sham he has a discretion if he grants leave to defend, to impose conditions on the defendant."

Further, the advocate stated just because the Defendant's director signed the agreement, it meant there was an authority to have the agreement signed.

I believe the advocate was bringing out the argument on the validity of the agreement. He relied on the case of H.L. Bolton (Engineering) Co. Ltd. -vs- T.J. Graham & Sons Ltd., whereby the court held per curiam

"The state of mind of directors and managers who represent the directing mind and rule of a company and

control what it does is the state of mind of the company and is treated by the law as such."

As such a company can only work through the directors. If the directors signed the agreement then it should be treated as the intention of the company.

Indeed he tried to prove this by relying on the case of Freeman & Lockyer (a firm) -vs- Buckhurst Park Properties (Mangal) Ltd. & Another, whereby K & H formed a firm to buy and resell property. K instructed a firm of architects to act on the firm's behalf to develop an estate. The work was executed. When the architects claimed their fees - the amount which was not in dispute the Judge entered judgment against K & H as a firm stating that the architects did not have to inquire whether there was authority or not for K to appoint them or K's action amounted to him taking the role of a managing director although not actually appointed.

The case of Hely Hutchison -v- Brayhead Ltd & Another, (1967) 1 QB 549 followed the same line of findings as the Freeman & Lockyer case above.

As to the issue of jurisdiction the advocate for the Applicant relied on the case of Ruby General Insurance Co. Ltd. -vs- General Land and Insurance Agencies Ltd., 1963 E.A. 154.

This was a case where the Plaintiff appointed the Defendant agents in Tanganyika (as it was then) all commission remuneration made was forwarded to their Mombasa offices. The offices were closed down and the Defendant forwarded the proceeds of the business to Kampala.

The Defendant failed to make payment. The Plaintiff sued in Kampala, the Defendant raised the issue that the court had no jurisdiction to entertain the claim it was held:-

"i) the fact that after the closure of the Plaintiff's Mombasa office the Defendant forwarded all business to the Plaintiff's Kampala office and made payment by cheque to that office was cogent evidence of a course of dealing from which it could be properly inquired that the parties had agreed that Kampala was thereafter to be the place at which the Defendant would complete performance of its obligations under the contract and make payments to the Plaintiff.

ii) the court had jurisdiction to entertain the suit. "

The advocate for the Applicant relying on the above case stated that the court had jurisdiction to entertain the said case.

The Civil Procedure Advocate S.15 explanation (3)(U) applied.

I must state at this juncture, that Section 15 of the Civil Procedure Ordinance explanation (3) (U) applies to subordinate courts. See the case of RIDDLESBARGER & ANOTHER -VS- ROBSON & ANOTHER, 1958 E.A. 375 "held i.e. S.15 of the Civil Procedure Ordinance applies only to subordinate courts." The principles raised though have been noted.

In reply to this application the advocate for the Respondent at the end of his address when asked to give a comment on the case law that had been raised by the Applicant and referred extensively to this court stated:

"I do not need to refer to authorities

I am not responding to the authorities on jurisdiction."

It is unfortunate that the advocate for the Respondent had nothing to say on authorities that had been served on him in advance and touched on his arguments.

The advocate for the Respondent relied on two major points in opposing the application for summary

judgment. This is on:

i) Jurisdiction and on

ii) The summary procedure.

i) On jurisdiction he stated that the suit should have been filed in Uganda. The reasons being that it was difficult to determine whether the document was signed in Uganda or not.

The freight transported was pre-paid was an argument put forward under the heading of jurisdiction. It is unclear what the advocate may have meant here. Perhaps I would understand it to mean that as the freight was pre-paid, no payment was incurred in Kenya and thus no jurisdiction over the matter occurred in Kenya.

As to the summary procedure, the advocate, for the Respondent prayed for leave to defend unconditionally the claim made against it as there are triable issues. He went further to question the Applicant's documents as filed. Looking at the documents they are referring to MITCHELL COTTS LTD whilst the Plaintiffs are MITCHELL COTTS FREIGHTS.

It thus means that invoices have no relationship at all to the Defendants. There was a time, the Defendants known as Road Master Industries are referred to as Road Master Cycles (U) Ltd. These are two and different and distinct companies.

There is also Lenicorn Shipping who is not party to the suit.

Documents filed do not even refer to the Defendant nor are they copied to the Defendant when written.

There seems to be a claim of US \$29,316 and yet a claim of US\$36,010 - this is a discrepancy.

The parties should therefore appear and explain these discrepancies.

When the advocate was asked whether he made application to apply for further and better particulars on the alleged discrepancies he admitted that the Plaintiff/Applicants had supplied him with the documents in advance and in good time.

My task as this movement is to consider whether the Applicant's prayer for summary judgment should be granted or not.

From the documents supplied by the Applicants this is an agency agreement that had been entered into. There seem to be an agreement entered into in India with Mitchell Cotts Kenya Limited. The Defendants were notified that Mitchell Cotts Freight (K) Ltd., Mombasa was a separate entity from Mitchell Cotts Kenya. That any work done would be separate and distinct from Mitchell Cotts Kenya Ltd. This seems to have been understood from the agreement entered into. The actions of the parties clearly shows that work was done on behalf of the Defendant by the Plaintiff.

I would rule that this court has jurisdiction to entertain this cause although the Ruly General Insurance Co. Ltd. Case reflects that the intention of the parties inferred that an agreement occurred at a particular place and that Section 15 of the Civil Procedure Rules dealt with subordinate courts. Riddlesbarger & Another - vs- Robson & Others case.

I would rule that the High Court of Kenya has inherent power to bear the jurisdiction of this country. The issue of jurisdiction would have been answered if the suit was "filed in the subordinate courts where the place of the contract was not made or performed or performance completed or where in performance of the contract any money to which the suit relates was expressly or impartially payable."

In this situation the suit was not filed in the subordinate courts but in the High Court.

Payments if any would have been made to the Plaintiff in Kenya.

As to the summary Judgment in the case of Camille -vs- Aminmohamed Merali. (1966) E.A. 411, 419 the dictum of Spry, J.A. stated:-

"The general rule is that leave to defend should be given unconditionally unless there is good ground for thinking that the defences, put forward are no more than a sham and it must be more than mere suspicion." One would wonder why the Defendant/Respondent had not earlier on Requested for further and better particulars to the plaint and to the documents they seem to have been given to their advocates. Many for these questions that arose as discrepancies were brought up in this application and that could have been easily cleared if so made.

Is the defence a sham and a mere suspicion?

I find that it falls short of such classification. I believe that the issue of accounting has to be dealt with extensively and in this particular instance there are triable issues.

I hereby decline to grant the orders sought and give leave to the Defendant to defend their case.

I order that the costs be in the cause. I would thank Mr. Waweru for the authorities supplied to this court.

Dated this 14th day of October, 1997 at Mombasa.

M. ANG'AWA

JUDGE