



REPUBLIC OF KENYA

Highway Carriers Ltd v Mahrus

High Court, at Mombasa May 12, 1985

Aragon J

Civil Suit No 494 of 1976

May 12, 1985, Aragon J delivered the following Judgment.

In October 1975 Tononoka Haulage Contractors agreed with a subsidiary of the United Nations organization called the World Food Programme to carry some drums of oil from Mombasa to Kigali in Ruanda. Tononoka Haulage Contractors did not have sufficient lorries themselves so they entered into an agreement with Coast Hauliers in terms of which the latter were to carry some 125 drums to Kigali being a part of the total consignment.

The drums were however not carried by Coast Hauliers but by a Mr Awadh Maharus.

It is admitted, or at least not seriously contested by Awadh Mahrus, that out of those 125 drums which he carried, 23 drums were delivered empty and one was leaking.

Mr A M Nathwani, one of the partners of Tononoka Haulage Contractors testified that that firm compensated the ultimate consignee for the loss thus sustained and in its turn deducted the amount of the compensation thus paid from the freight payable to Coast Hauliers by Tononoka Haulage Contractors. The amount so deducted was Kshs 116,000.

The position so far is perfectly clear but the trouble now starts.

Instead of Coast Hauliers however claiming damages from Awadh Mahrus, a Limited Company called Highway Carriers Ltd made that claim and is in fact one of the co-plaintiffs in this suit.

The relationship between Coast Hauliers and Highway Carriers Ltd has been described as sister firms. Of course in law that is absolutely nonsense. There cannot be any sibling relationship as such between a limited liability company and a partnership firm. No doubt a partnership firm can be a shareholder in a limited liability company and the latter can be one of the partners in another partnership firm but that in no way makes them "sister firms". In any event it is incorrect and a complete misdescription to describe a limited liability company as "a firm". That term can only refer to a partnership and never to a limited liability company since they each are different legal conceptual entities. The only information given to the court regarding the relationship between the two concerns is that the majority shareholder in the limited liability company is a Mr Shamsuddin Khosla whilst the same Mr Shamsuddin Khosla is one of the partners in the firm known as Coast Hauliers. However the other partner in Coast Hauliers is in no way associated or concerned with the limited liability company. The firm and the company are thus quite different.

Mr Khosla and his employees perhaps treat the two concerns as alternatives but of course in law that is

not so.

Mr D B Parmar who describes himself as Mr Khosla's personal assistant testified that there was a standing agreement between the defendant and Highway Carriers Ltd for the former to carry on behalf of Highway Carriers Ltd such goods as were given to him to carry. There was no evidence however, of a similar general agreement between the partnership firm and the defendant.

Seeing Tononoka Haulage Contractors had agreed with Coast Hauliers for the 125 drums to be carried and that ultimately it was the defendant who carried the drums, it necessarily follows that there must have been a separate single or special agreement between Coast Hauliers and the defendant for the carriage of the drums.

Originally as the plaint stood, Coast Hauliers were not even a party to the suit and it was only during the course of the hearing that Mr Khanna who appeared for the then sole plaintiff ie Highway carriers Ltd realised that he was in trouble. He therefore applied for Coast Hauliers to be added as parties. I allowed that application but that addition still does not, in my view, change the situation.

Coast Hauliers have at no time made claim on the defendant. They neither make any such claim in the plaint. For all I know Coast Hauliers may have decided to waive any claim they may have had against the defendant. There is not even any evidence of any assignment of the chose in action, ie the claim, from Coast Hauliers to Highway Carriers Ltd. It is also interesting to note that whilst, according to Mr Nathwani, Coast Hauliers compensated Tononoka Haulage contractors for the loss sustained to the extent of Kshs 116,000 ,the claim made by Highway Carriers Ltd is of only Kshs 33,652 gross according to exhibit 2. Why is there no claim for the difference? There has been no explanation forthcoming from the plaintiffs.

At any rate it was Coast Hauliers who contracted with the defendant for the defendant to carry the 125 drums. Tononoka Haulage contractors made their claim on Coast Hauliers. I therefore fail to see where Highway carriers Ltd come in or what right they had in law to make any claim on the defendant when Coast Hauliers do not.

It may be that through some carelessness in the office, an invoice headed Highway Carriers Limited was sent but it is not for me to speculate. I can only look at the fact apparent from the documents presented in evidence and the testimony adduced.

I hence find as a fact that at no time have Coast Hauliers claimed any damages from the defendant and that Highway carriers Ltd were in no way involved in the carriage of the 125 drums. There is thus no privity of contract whatsoever between Highway Carriers Ltd and the defendant in relation to the carriage of the 125 drums.

No doubt there was a contract between the defendant and Highway Carriers Ltd for the defendant to carry such goods as might be entrusted to him by Highway carriers, but I have found it as a fact that it was not Highway Carriers Ltd who entrusted the defendant to carry the 125 drums. It was Coast Hauliers. The claim against the defendant is based on a breach of the contract of carriage entered into between Coast Hauliers and the defendant. Hence it is only Coast Hauliers who are entitled to claim damages for such a breach. Coast Hauliers however have at no time ever lodged any claim nor made any complaints whatsoever. The only person who has made any claim is Highway Carriers Ltd who were not a party to the contract and hence not entitled to do so.

How or why this confusion has arisen is not for me to speculate. Perhaps the defendant does not deserve to escape his admitted liability because of this error and seeing also that he has left his own advocate completely stranded. He has not even appeared at the hearing. www.kenyalawreports.or.ke

Nevertheless this court does not dispense justice in the abstract. The justice it dispenses must be in accordance with the law. The law in this case is in favour of the defendant. In those circumstances I must dismiss the suit with costs.

