IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Nyarangi JA, Platt & Gachuhi, Ag JJ A

CIVIL APPEAL NO 104 OF 1985

BETWEEN

1. HIGHWAY CARRIERS LIMITED

2. COAST HAULIERS …….APPELLANTS

AND

AWADH MARUS ……..…….…….. RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at

Mombasa (Aragon, J) dated March 12, 1985

IN

Civil Case No 494 of 1976)

JUDGMENT OF PLATT, AG JA

The proceedings during the trial of this case were complicated and somewhat irregular, and while both parties at different stages wanted leave to appeal (all such leave being refused,) the plaintiff finally earned the absolute right to appeal, having suffered judgment against it on a counter-claim, and having had its suit dismissed. Mr Inamdar for the appellants and Miss Jiwaji for the respondent have fortunately left this court with a very clear idea what the issues really were, and the court is grateful.

The plaintiff, Highway Carriers Ltd had initially claimed against Messrs Awadh Mahrus, Kshs 26,592.65 being the balance due by the defendant for moneys spent for and on behalf of the defendant at the defendant's request, for the upkeep, maintenance and repair of the defendant's request, for the upkeep, maintenance and repair of the defendant's vehicle, as well as the supply of petroleum products during the year 1976. This suit was brought in August, 1976.

In the defendant's defence, he denied owing this or any other sum, and in effect stated that the plaintiff had got the whole matter wrong. In paragraph 3 he set out what he thought had happened.

The defendant was the registered owner of vehicle No KNP 341. On or about October 1, 1975 the plaintiff entered into an oral agreement with the defendant for the transportation of 25 tons of cargo for

Kigali from Mombasa in the defendant's vehicle. The defendant was very sure of this. He stated that it was in pursuance of "the said oral contract and not otherwise, the 25 tons of cargo were loaded on the vehicle and transported to Kigali." The agreed price was Kshs 12,500.00. The plaintiff was also entitled to deduct from the agreed price all sums expended by the plaintiff in the transportation of the 25 tons. But despite these deductions the plaintiff still owed Kshs 7,095.35. So the defendant counterclaimed for this sum. That was filed in October, 1976.

That must have surprised the plaintiff, which obtained unlimited time to file a defence to counterclaim and reply to defence of the defendant. But it was the defendant's turn in May, 1977 to be startled by an amended plaint being served upon him. It was clear that the plaintiff had to abandon his original plaint. Instead, the plaintiff embellished the basis of the defence. The defendant was either a common carrier or alternatively he carried on the business of a transporter between Mombasa, Uganda and Kigali. Truly, in October, 1975, the defendant received and accepted 25 drums of oil of which the plaintiff was the special owner, and agreed to carry the said consignment of goods to Kigali and had them over to the United Nations Development Programme Authorities in Kigali. It was the defendant's duty, or alternately agreed by him, to transport the goods safely and securely, and be responsible for any short delivery or damage to them while in his possession. Unfortunately, the defendant short delivered drums to the extent of Kshs 33,652.00. It was true that the transport charge was Kshs 12,500.00; but the plaintiff expended Kshs 5,440.65 and so the defendant was entitled to payment of Kshs 7,059.35. The balance in the plaintiff's favour was the original sum of Kshs 26,592.65. So the plaintiff asked for that sum. But of course questions arose, viz; whether the amended plaint really meant that the counter-claim was admitted; whether the amended plaint could be filed without leave and whether the defendant had to file a new defence and couterclaim?

These questions did not easily attract answers. Mr Jiwaji, it seems, asked Simpson, J to strike out the amended plaint. That was in August, 1977. But the plaintiff's representative had taken out a summons for directions in July, 1977. The problem was not resolved. Sheridan, J gave directions instead in September, 1977. That meant that the pleadings were closed; and there the matter rested until Aragon J had the misfortune to be obliged to unravel the increasing knots. In October, 1983, Aragon, J granted leave to amend the plaint; the amended plait already filed and served was to be "deemed as having been properly done". The defendant got the costs and the chance, if he wished of filing an amended defence. That had the merit of by-passing the type of argument, Mr Inamdar addressed to this court that leave was not required. The pleadings were not closed, he said, so therefore under order 6A rule 1 of the Civil Procedure Rules Cap 21 leave was not required for this first amendment. That may be technically correct in one sense, but rather difficult to assert after directions had been given. Aragon J's view was reasonable, and had he dealt with the existing defence, whether it too could be deemed to have been filed in answer to the amended plaint, perhaps there would have been less confusion. At any rate some order was necessary to join issues on the unresolved claims. I leave open the question whether after leave to amend the plaint a defence is necessary. I observe that it is not usually thought necessary.

Mr Jiwaji decided to appeal. I do not know what happened to that appeal. Aragon was swept on through 1984 to March 1985 when the parties presented the next battle. That was whether there had ever been a defence to the counter claim. The learned judge held that the plaintiff had failed to file a defence to counter-claim within the prescribed time, and therefore he entered judgment for the defendant in the sum of Kshs 7,059.35 with costs and interest of 12%. Mr Inamdar was very critical of this step in one sense, and rather grateful in another. It was, he claimed wrong procedure; it was the defendant who had to defend the amended plaint. But on the other hand, it spoke volumes for the existence of a contract as agreed between the parties. Moreover, as the sum of Kshs 7,059.35 was agreed by both sides, it had to be accounted for in some way, either as set off in the amended plaint, or as a counter claim in the defence. In this imperfect world it is almost a poetic retribution. It was the plaintiff who got the basic pleadings into a tangle of issues, the first alleging a non-existent contract, and then in general accepting the defendant's account as to what these parties had agreed.

But one last battle was yet to come; and Mr Inamdar accepted the blame for the lack of understanding of his junior; yet he still claimed victory. The only issues were whether twenty three drums were not delivered and one drum was leaking, and secondly what was their price. Hence, was the value of the short

delivery Kshs 33,652.00? Everything else was agreed. All three of the plaintiff's witnesses testified that that shortage had occurred. There were twenty three empty oil drums and one leaking drum. There was an invoice for these drums for Kshs 33,652.00. The defendant neither cross-examined these witnesses nor called evidence in rebuttal. That appeared to mean that the defendant accepted that 125 drums had been transported, and that there was twenty four which were neither empty or leaking. This would seem to have been the end of the case. Not so. The plaintiff asked leave to add a firm called Coast Hauliers as an additional plaintiff. That was because the plaintiff's witnesses explained some system of sub-contracting that existed. Coast Hauliers and the plaintiff had some common personnel. But contacts between the defendant and Coast Hauliers were outside the pleadings, and especially in this case, when it was the defence and counter claim, that established the contract between the defendant and this particular plaintiff. Indeed, it was the defendant who claimed Kshs 7,059.35 from the plaintiff in the couterclaim. Having laid this foundation itself, and having failed to cross-examine or defend, the defendant as good as accepted the claim. The system of sub-contracting was not relevant, and could not be led to outside the pleadings. It is trite law that evidence cannot be led outside the pleadings.

There is no evidence that these parties were perpetrating a fraud on innocent third parties unaware of suit.

The learned judge however thought that he was bound by the evidence before him that this plaintiff had made no contract with the defendant. His judgment is based entirely on this point of view. Had the learned judge analysed the pleadings and drawn up issues before the trial, he would have seen that all he needed, was what the witnesses found had been short-delivered and the value. Judgment would clearly follow for the plaintiff.

There is further confirmation. Had the defendants accepted the sub-contracting system and realised that they had never contracted with this plaintiff, the defendant could have applied to amend and enter a simple defence of no contract at all. I am not sure what the defendant would have done with the couterclaim. It did not do so. It challenged the addition of Coast Hauliers as quite wrong. The learned judge allowed the additional party to be added. The defendant asked leave to appeal. The defendant was content to deal with the plaintiff, and in the circumstances, that position should have been respected.

It is quite plain that on the issues for trial arising from the pleadings, and on the evidence relevant to these issues, which was not challenged by the defence, judgment had to be entered without doubt for the plaintiff in the sum claimed Kshs 26,592.65. There was no reason to join Coast Hauliers. If Coast Hauliers were to be joined, then they should have been properly treated as party. But they took no part. It is not the purpose of this judgment to catalogue the steps taken or assess blame for them. There is only one precept in point; and that is that issues are drawn upon the pleadings and evidence is led within the pleadings to those issues. On that basis, I would allow the appeal and set aside the judgment dismissing the suit. There should be substituted therefore the second of Mr Inamdar's proposals. I would substitute judgment for the plaintiff in the sum of Kshs 33, 652.00 on the plaint, I would allow the award of Kshs 7,059.35 on the counter claim to stand, giving rise to a final judgment of Kshs 26,592.65 (following order 8 rule 2 of the Civil Procedures Rules Cap 21. I would set aside the award of interest and costs on Kshs 7,059.35, and award the plaintiff interest of 12%; but only half the costs, on the Kshs 26,592.65. I would further award the plaintiff who appealed successfully in this court, the costs of this appeal. The plaintiff is greatly to blame for these tortuous proceedings.

It may be as well to note the general rules when asked for leave to appeal against interlocutory rulings. A litigant should be allowed to exercise his constitutional right to appeal when there are arguable issues to debate. Depending on how much effort would be worthless if the trial continued. Depending on how much effort would be worthless if the trial continued, a stay of proceedings would not usually be a satisfactory order during an interlocutory appeal on matters relevant to this case. Different considerations apply to injunctions and other far-reaching interlocutory orders, for example, stay proceedings on disputed arbitration clauses. It may be relevant to decide whether the appeal will be rendered nugatory. As far as is reasonably possibly, trial should proceed to conclusion, and the appeal which may then be instituted, may take up all interlocutory as well as substantive matters. That may sometimes be achieved by granting leave but refusing a stay of proceedings, and in appropriate cases by refusing leave. But the appearance of arbitrary refusal of leave should be avoided.

Dated at Mombasa this 18th day of March, 1986.

HG PLATT

JUDGE OF APPEAL