IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & MWILU, JJ.A)

CIVIL APPEAL NO 210 OF 2011

BETWEEN

SAFMARINE KENYA LIMITED……...……...APPELLANT

AND

KRK IMPEX PVT LIMITED…….……..……1ST RESPONDENT

ACCORD METALS (KENYA) LIMITED.……..…….…..……2ND RESPONDENT

(an appeal from the ruling and order of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 12th March 2010

in

High Court Civil Case No 693 of 2008)

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JUDGMENT OF THE COURT

By way of an amended plaint dated 24th November 2008, the 1st respondent herein, sued the appellant and the 2nd respondent. In that amended plaint, the 1st respondent alleged that the 2nd respondent had given an undertaking to the appellant relinquishing all its rights in respect of seven containers of cast iron metal scraps. The undertaking was given on behalf of the appellant, who refused to honour it and further refused to issue bills of lading in respect of the cargo in favour of the 1st respondent, or to follow instructions with regard to shipping of the cargo. It emerged that the undertaking had been revoked by the 2nd respondent without any notice or reference to the 1st respondent. Thus the 1st respondent claimed the enforcement of the undertaking issued by the 2nd respondent, or in the alternative, a refund of the sum of US$ 100,000 received for the cargo. The 1st respondent also claimed demurrage charges or any costs associated with the holding of the cargo.

In opposition to the plaint, the appellant filed a statement of defence wherein it stated that no binding undertaking could be issued by the 2nd respondent that would divest it of its ownership to the cargo. It further claimed that the undertaking was inconsequential since the 2nd respondent had a contractually binding shipping agreement which was incapable of being transferred or assigned without the written agreement of the parties; that the 1st respondent and itself had no legal relationship that was capable of

being enforced as there had been no consideration that had moved from the 1st respondent to itself; and that even if there was such an undertaking, it was countermanded by the 2nd respondent and thus, the appellant could not take instructions from the 1st respondent or any other third party with whom it has no contractual relationship. The appellant also denied the jurisdiction of the court, claiming that the cargo in question had already been shipped to India and thus had left the jurisdiction of the court prior to the institution of the suit.

The 1st respondent also applied for an interlocutory injunction restraining the appellant and the 2nd respondent from releasing the cargo to any other person other than itself. The 1st respondent sought, in the alternative, an order of mandatory injunction against the 2nd respondent requiring it to refund all the money received in respect of the cargo.

In response to this application, the appellant filed a replying affidavit in which it maintained that the goods had already left the jurisdiction of the court, that it would therefore not be possible to comply with the orders of the court if they were granted, and that the 1st respondent was a stranger to it after the 2nd respondent had countermanded the undertaking by way of a notification dated 29th October 2008. The appellant therefore contended that it was under no obligation to revert to the 1st respondent.

That application culminated in a ruling in which it was held that ***"it is clear the 2nd defendant/respondent had no right to countermand the undertaking which he gave upon receiving the money from the plaintiff and therefore the stand taken by the 1st defendant is illegal."*** The application was therefore allowed and orders sought granted.

The appellant did not comply with the orders granted leaving the 1st respondent with no choice but to file another application to salvage its position which appeared hopeless and precarious in view of the loss of the cargo and the money. It was then that the 1st respondent filed an application seeking orders striking out the appellant's written statement of defence and judgment against the appellant and the 2nd respondent. The application was based on the grounds that the defence was scandalous, frivolous and vexatious; that it would prejudice embarrass and delay the fair trial of the suit; and that it was without merit.

In response, the appellant filed a replying affidavit in which it reiterated the contents of the written statement of defence, stating that there was no privity of contract between itself and the 1st respondent, and thus there was no undertaking between the two parties.

In a considered ruling, the High Court allowed the application in the following terms:

> ***"the two defendants have a contract between themselves. The 2nd defendant admitted that he has received money and has surrendered its interest to the plaintiff of the cargo identified. In the circumstances, there cannot be a defence to the plaintiff's claim. The plaintiff would lose his money paid for the goods … and justice demands that he be paid the money he has paid on the strength of the undertaking to Accord Metals Limited. The***
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> ***Court … is satisfied that there is no defence with merit and the first defendant's statement is hereby struck off. Furthermore there is no defence filed by the 2nd defendant who admits to have received the money. The application is allowed and judgment is entered in terms of the amended plaint against the two defendants jointly and severally as prayed…."***

Thus, the appellant's defence was struck out and judgment entered in favour of the 1st respondent. The appellant is aggrieved by that order and filed the present appeal in which it faults the finding of the trial judge on 11 grounds which we have summarized as follows:

1. ***Failure to apply the general principles of international maritime law thus creating uncertainties;***

2. ***Basing the ruling on previous interlocutory findings without taking into consideration the relevant facts;***

3. ***Failing to appreciate that the only way a third party to a contract can enforce it is by either giving consideration or by way of novation;***

4. ***Failure to appreciate that the goods in question had already been shipped to India;***

5. ***Erring by striking out the defence entirely despite the fact that there were triable issues that could only be determined after a full trial of the matter.***

The appellant submitted that the trial judge was wrong to find it liable on a single document, the purported undertaking, which was written by the 2nd respondent. The appellant is of the view that it is not bound by the said letter as it only evinces a contract between the two respondents who were transferring cargo between themselves; that there was no consideration passed to it from the 1st respondent and therefore, any purported undertaking cannot be enforced.

The 1st respondent on its part submitted that the letter which was addressed to the appellant constituted a transfer of rights in the cargo between the parties. By that undertaking, the 2nd respondent transferred all the rights of the cargo, and in exchange received full payment. According to the 1st respondent, the undertaking was irrevocable as there was no return of the consideration; that is to say that the money paid to the 2nd respondent was not refunded. The 1st respondent contends that the test in the striking out of pleadings is whether they raise bona fide triable issues, and as the statement of defence failed this test, the trial judge was correct in striking it out.

The application to strike out the statement of defence was premised on Order VI Rule 13(1)(b),(c) and (d) of the former edition of the Civil Procedure Rules which gave a court power to strike out pleadings if they were scandalous, frivolous and vexatious, or if they were an abuse of the court process.

The rule was intended, as was held by this Court in ***Coast Projects Ltd v M R Shah Construction (K) Ltd [2004] 2 KLR 119***, to:

> ***"… give quick remedy to a party that is being denied its claim by what may be described as a sham defence. It is, however, a procedure that is to be resorted to in very clear, plain and obvious cases."***

The obiter statements of Madan JA in ***D.T. Dobie & Co. (K) Ltd. v- Muchina [1982] KLR 1*** ring true to this day. He observed that:

> ***"the power to strike out should be exercised only after the court has considered all facts, but must not embark on the merits of the case itself as this is solely reserved for the trial judge."***

A written statement of defence, or any pleading for that matter, would only be struck out where it is vexatious, frivolous or an abuse of the court process. This was affirmed by this Court in ***Coast Projects Ltd v M R Shah Construction (K) Ltd (supra)*** where it was held that:

> ***"A plaintiff is entitled to apply to strike out a defence in a situation where the defence is frivolous and/or vexatious. A mere denial is not a sufficient defence in most cases."***

The defence that is the subject of this appeal denied the 1st respondent's claim by stating that the undertaking was of no legal consequence, that there was no consideration that passed between the

respondents and that there was no privity of contract between the appellant and the 1st respondent. It is evident from the defence that the appellant never denied that it received an undertaking from the 2nd respondent regarding the said cargo. In fact, it admits to receiving the said undertaking. That undertaking was in the form of a letter from the 2nd respondent to the appellant, dated 14th October 2008 which reads as follows:

> ***"…***
>
> ***we hereby undertake in writing and intimate to you that we have transferred all the rights of the cargo to KRK Impex PVT Ltd, New Delhi and received full and final payment in cash from them of the cargo….***
>
> ***Now we hereby request your good self to issue the B.Ls for these booking nos … to Mr. Satish Kumar of KRK Impex Pvt Ltd, New Delhi, INDIA. Also we will lose all our rights for giving you any instructions of any kind in respect of the above mentioned Booking Nos.***
>
> ***Now from onwards, only Mr. Satish Kumar will be authorized to give the shipping instructions and ODs if required in respect of the above mentioned bookings.***
>
> ***…"***

Various pertinent and fundamental points on the undertaking can be gleaned: First, it was given by the 2nd respondent to the appellant. Secondly, the 2nd respondent transferred, without any reservation or recourse, all its rights and obligations in the subject cargo, to the 1st respondent. Third, the 2nd respondent confirmed, unequivocally and in clear express terms that it had received full and final payment in cash for the cargo. Fourth, the 2nd respondent mandated and directed the appellant to issue the bills of lading to a Mr. Satish Kumar, a representative of the 1st respondent. Fifth, the 2nd respondent, clearly and without any reservation, transferred all or any legal or equitable rights and obligations in lieu of full payment received, and finally, the 2nd respondent categorically indicated that it would issue no further instructions in respect of the ownership and dealings with the subject cargo, and that the 2nd respondent irrevocably authorized the appellant to deal with Mr. Kumar on all issues arising out of the shipping of the cargo.

Our understanding of this letter is that the 2nd respondent relinquished all its rights to the cargo and directed the appellant to release the bills of lading in respect of the goods to the 1st respondent. It later emerged that the 2nd respondent had purported to countermand the undertaking. This was done by way of a notation made on a copy of the letter of undertaking which reads ***"Mugo, please revoke these instructions"***, and followed by an email from the appellant to the 2nd respondent asking the latter to confirm that the said undertaking had been revoked. This purported revocation was never brought to the attention of the 1st respondent despite the fact that the 2nd respondent had received full payment for the cargo and had expressly stated that it would no longer have any rights over the cargo, and that any further instructions in respect of the cargo were to be obtained only from the 1st respondent or its representative.

In the impugned ruling, it is clear that the trial judge made a definitive finding that ***"the 2nd defendant admitted that he has received money and has surrendered its interest to the plaintiff of the cargo identified."*** In addition, the trial judge found that ***"…the plaintiff would lose his money paid for the goods…."*** This was a matter that was plain and obvious from the pleadings that were before the court. In ***Attorney General v Equip Agencies Ltd [2006] 1 KLR, 10*** this Court opined that:

> ***"Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination."***

In that regard, the Court held that ***"a defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition."***

The appellant's position that the undertaking could not be enforced because there was no contract of novation executed by the parties is rather interesting. For one to understand that proposition, it is essential to appreciate the meaning and import of a contract of novation. A novation ***"is an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter discharged. See 22 Halsbury's Laws (5th Edn) para 598)."*** That text states that to have a novation, ***"two things must concur: there must be the* animus novandi*, and the substitution of some other thing for that original obligation out of which the debt arose…. The* animus novandi *…is a thing which is not to be proved as a fact, but is an inference from the facts which are proved."***

Novation can also, therefore, be implied from the conduct of the parties where it is clear that it is intended to substitute the parties to the original contract, and that the parties intended to protect the integrity of the transaction between them. That was the case here. The conduct of the appellant, to the extent that it made an enquiry of the 2nd respondent regarding the previously given directions, indicates that the undertaking in question was binding. Thus the appellant was clearly debarred from undertaking any actions that would undermine the integrity of the transaction between himself and the 1st respondent.

The undertaking was quite clear that the 2nd respondent had received full payment for the cargo, and that from the date of writing the letter, only the 1st respondent could be authorized to give shipping instructions in respect of the cargo. Thus a complete transfer of the rights in the cargo had occurred, and the 1st respondent was guaranteed that the cargo would only be dealt with in accordance with the instructions that it would give; this was a guarantee upon which the 1st respondent placed reliance.

In our view, the appellant owed not only a duty of care to the 1st respondent, but also a contractual duty to exercise reasonable care and skill in carrying out its operations with regards to the protection of the 1st respondent's rights to that cargo. The standard of that reasonable care and skill is the objective standard applicable. These relationships include the normal obligation of using reasonable skill and care, which duty is owed to the other party of the contract. Therefore a guarantor is under a duty to exercise reasonable care and skill in carrying out its part with regard to dealing with the subject cargo in a manner that is not prejudicial to the rights of the affected party, who in this case was the 1st respondent.

The appellant's argument that the undertaking was revoked by the 2nd respondent is illogical. A contract of this nature creates certain guarantees which the 1st respondent acted upon. If one party to a contract intends, for whatever reason, to opt out, the prudent and reasonable expectation of the law is that the affected party must be in the know. It is only after the consent and the knowledge of the affected party is sought and obtained that the other party can release himself from the obligation or liability under the guarantee. Post termination period actions have to be proportionate and the 1st respondent was entitled to have either his money refunded or his property properly safeguarded from any loss.

It is only reasonable to expect a guarantor to employ or put in place reasonable systems and measures which would minimize any loss occasioned by opting out of the contract. Such mechanisms of preserving and protecting the interest of the other party before any release of goods is a usual inbuilt measure to ensure that no party is exposed to unwarranted loss of money and goods. In our view, this route is not an unreasonable demand of the law. This explains the basis for the guarantee having clear and explicit clauses to protect both sides of the bargain.

In the matter before us, a transfer of the rights in the cargo, and subsequently in the bills of lading occurred, and the 1st respondent had every right to be informed before the 2nd respondent decided to opt out. As part of its duty to exercise reasonable care and skill in carriage of the cargo, the appellant was bound to disclose to the 1st respondent its communications with the 2nd respondent. If the 2nd respondent intended to then revoke the undertaking or opt out of the contract, then such a decision ought to first have been brought to the attention of the affected party. In the same vein, the appellant had no legal right to

release the bills of lading to representatives of the 2nd respondent without recourse to the 1st respondent. The appellant acted negligently when it released the bills of lading on the instructions of the 2nd respondent without the consent and knowledge of the 1st respondent. When looked at wholesomely, the conduct of the appellant and the 2nd respondent was entirely dishonest. The position, it seems to us, is this: in whatever capacity or situation obtaining the appellant owed the 1st respondent a duty akin to that expected of a reasonable man faced with the circumstances at hand. It is an obligation applicable, in so far as valid, during the period of the guarantee. It was expected, at a minimum, to put in a defence giving reasons for not honouring or answering the guarantee; mere denials are unlikely to be regarded as sufficient reason for not honouring or failing to release the goods to third parties.

Another issue which is of fundamental importance is whether or not the 1st respondent waived or acquiesced to the way the appellant conducted itself by divesting the ownership of the goods to the 3rd parties. We say so because that is an essential factor in the determination we are about to make.

A waiver is often defined as '***the voluntary relinquishment of a legal right or advantage***.**'** See Black's Law Dictionary, 9th Edition (Gardner, Ed.) A waiver can either be express or implied. Acquiescence refers to ***'a person's tacit or passive acceptance; implied consent to an act'*** (see ***Black's Law Dictionary***) There was no waiver by the 1st respondent; there was similarly no acquiescence by the 1st respondent of the appellant's actions. The averments in the plaint were not at all controverted. There was a breach of duty of fidelity and the 1st respondent was therefore entitled to claim or be compensated.

It seems to us to be a negation of common sense were such the case that such conduct were said to be reasonable. In our judgment, the law is not at variance with common sense in this matter. The judge was therefore right to rule the way she did. We see no flaw in her reasoning as the defence in question did not raise any triable issues, and based on the material that was at the time before the court, it was apparent that the undertaking had in fact been given by the 2nd respondent, and that the appellant ought to have acted in conformity with those instructions. The issue, of course, is whether it is in all circumstances proper to draw inferences from the failure of the appellant to notify the 1st respondent before he could change the bills of lading and release the goods to a third party. In the present case we cannot see any basis upon which the trial judge could have done anything other than put liability where it squarely falls.

The terms of the undertaking are plain, and they are binding, and the appellant's statement of defence did not raise any triable issue as against the averments in the plaint. The 1st respondent was innocent of knowledge, participation in or condonation of any wrongdoing by the appellant. The 1st respondent believed that the appellant was carrying on its business regularly and had no reason to believe that any transaction, and in particular a transaction that it involved in, was vitiated by any impropriety. The appellant exhibited dishonest conduct and it is time for it to acknowledge that significant wrong doing. The appellant cannot at any rate have his cake and eat it. He either withdraws the veil and waives privilege, or he does not withdraw the veil and his privilege remains intact. But he cannot have it both ways. If he does, then he remains unprotected from the perils of the law. In this case, he deliberately and without any basis or reasons exposed the 1st respondent to substantial and unmitigated loss and he therefore must shoulder the blame for his deficiency or delinquent behavior in a serious and communicated financial agreement. It matters not that the goods in question had at the time of bringing suit been shipped to India because the 1st respondent had already suffered a loss which is compensatable by way of damages in the form of money.

Applying the principles contained in the decisions that we have already cited above, we are of the considered view that the conclusions reached by the trial judge were based on a proper appreciation of the law and the facts before her. The statements contained in the plaint were not denied by the appellant; the 2nd respondent did not file a statement of defence. It therefore remained unchallenged that the 2nd respondent had received consideration from the 1st respondent, and had subsequently relinquished all its rights to the cargo, and further had indicated that the bills of lading in respect of the property should be released to the 1st respondent; that undertaking categorically and clearly stated that only one Mr. Kumar

of the 1st respondent could give any instructions with regard to the cargo.

Our approach is also consistent with that followed by the trial court. The appellant's defence was in deed a sham, and the trial judge was right to strike it out. Now, no matter how attractive and persuasive the submissions of the appellant may be; no matter how many times we thoroughly comb through the appellant's case; no matter how far we stretch our imagination and understanding of the law; no matter how many attempts the appellant makes to run away from its obligations, whether through evasion, distortion, ingenuity and utter sophistication; no matter how long it takes to postpone or delay fate, so long as the appellant tries to defeat or destroy the case of the 1st respondent alone and without any help from the 2nd respondent, who was its Siamese twin, it will drag itself to death or destruction by shouldering the damage, injury and loss suffered by the 1st respondent. There is no way out of the mess created by its own omission or commission, period. We have irresistibly and inevitably come to the conclusion that the appellant laid his own trap and no matter how far it goes, it cannot extricate itself from its own mess. This appeal therefore has no merit and it must fail. We hereby order it to be and is hereby dismissed with costs.

Dated at Nairobi this16th day of October 2015

H. M. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR