



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MARAGA & J. MOHAMMED, J.J.A.

CIVIL APPEAL NO. 320 OF 2003

BETWEEN

NJOKA TANNERS LIMITED APPELLANT

AND

OCEAN FREIGHT (EA) LIMITED

MEDITERRANEAN SHIPPING COMPANY SA GENEVA RESPONDENTS

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Hewett, J) dated 30th March, 2001

in

HCCC NO. 607 OF 1998)

JUDGMENT OF THE COURT

Background

This appeal arises from a decision of the High Court made on 30th March, 2001, which granted the prayer to strike out the 2nd respondent from the amended plaintiff and dismiss the suit against it. This decision was made following a chamber summons application dated 28th September, 2000, seeking to strike out the amended plaintiff as against the 2nd respondent.

The appellant by an amended plaintiff dated 29th November, 1999, sought to recover special damages in the sum of \$ 81,898 or its equivalent in Kenya shillings, general damages and costs. The appellant in its statement of claim stated that the 1st respondent carried out duties in Kenya for shipping and transportation as an agent of the 2nd respondent, asserting that all acts of the 1st respondent were therefore, binding on the 2nd respondent as the foreign principal.

The appellant averred that it was the owner of goods, Kenya Wet Blue Tanned Hides weighing 40,000 Kilograms; that he contracted the 1st respondent, a common carrier shipping and transporting goods from Kenya to ship the appellants goods from the Port of Mombasa to Modena through Leghorn in Italy to a

Consignee namely EMC SRI; that the 1st respondent entered into the contract as an agent and on behalf of the 2nd respondent who were the foreign principals.

As a result of the contract, the appellant claimed to have paid the 1st respondent freight in the sum of KShs.169,354/- and thereafter, the appellant asserted that the 1st respondent on behalf of the 2nd respondent issued a Bill of Lading Number MSCUM-0785156; and that the 1st respondent, contrary to implied or express terms of their agreement, released goods to the Consignee without authority from the appellant or production of the Bill of Lading. The Bill of Lading was to be evidence of safe delivery and an indication that the Consignee had paid for the goods. The appellant claimed that as a result of the said unlawful and wrong release of its goods by the respondents, it suffered loss and damage.

The respondents both denied liability. The 1st respondent stated that it neither entered into a contract with the appellant nor did it issue a Bill of Lading as alleged. The 1st respondent claimed that the appellant upon giving out the goods in issue for shipping, lost proprietary interest in them and thus had no *locus* in the current suit and that the alleged lost goods were shipped as per terms of the Bill of Lading and fresh instructions from the appellant that varied the place of delivery.

The 2nd respondent admitted that it carried on the business of ship-owners and carriers of cargo between East Africa and Europe and that the 1st respondent was indeed its agent in Mombasa; that under a freight prepaid Bill of Lading Number MSCUM-0785156 issued by its agents in Mombasa on 14th February 1998, 2 containers claimed to be carrying 24 pallets of Kenya Wet Blue Crome Tanned Hides were shipped for carriage to and delivery at Modena; that the goods in issue were released upon instruction from the appellant to Messrs Nipel SAS,

Customs Warehouse, Z.I.2 Road 53, 36071, Arzignano; that the goods in issue were released to the consignee with authority from the appellant once the consignee had settled its account with the appellant; and that since it was joined into the suit outside the one year period within which the appellant should have instituted the suit against it, as provided in the International Convention relating to Bills of Lading (Hague Rules) and the contract of carriage in the Bill of Lading, the claim against it was time barred.

The 2nd respondent in its chamber summons application dated 28th September, 2000 sought to be struck out from the suit, on the ground that the suit against it was frivolous, vexatious and an abuse of the process of the court. The 2nd respondent through its representative, one Captain Tommaso Castellano, averred that in support of its application, it relied on the contract of carriage between the parties in this matter, which was contained in the Bill of Lading that the appellant relied on in its claim. It averred that the contract of carriage incorporated the Hague Rules, which rules including the conditions set out in the Bill of Lading, regulated the contract between the parties herein; that by virtue of the terms and conditions of the Bill of Lading and the Hague Rules, the claim against it by the appellant was extinguished. The basis of this assertion was that by the time it was joined as a party to the action by the appellant, on 9th December, 1999, the limitation period of one year, within which they should have been sued, had lapsed; that its joinder to the appellant's cause of action could not be backdated to the time the plaint was filed; that the action against it can only be considered to have been brought on 9th December, 1999, the day it was joined as a party to the suit. By virtue of this, the 2nd respondent averred that it had been discharged from all liability in respect of the alleged loss or damage suffered by the appellant.

In response, the appellant by an affidavit sworn on 18th October, 2000, averred that the suit instituted against the respondents was one of fraud as opposed to one of loss or damage, and therefore, The Hague Rules and the conditions in the Bill of Lading were inapplicable.

Upon hearing the arguments of counsel, the High Court made a ruling that allowed the 2nd respondent's application, dismissing the appellant's suit against it. The High Court found that by virtue of The Hague Rules and special condition No. 21 of the Bill of Lading, the appellant's claim against the 2nd respondent was time barred; that goods belonging to the appellant were delivered to the said consignee on or about

19th March, 1998, without the Bill of Lading and

consequently, without payment; that as a result, the appellant instituted a suit against the 1st respondent on 14th October, 1998; that hearing partially proceeded against the 1st respondent on 18th and 19th August, 1999, and the 2nd respondent was only joined to the suit thereafter on 9th December, 1999; that based on the date on which the cause of action arose, the latest the 2nd respondent should have been joined to the suit was on or before 11th October, 1999, making 9th December, 1999, two months too late. The court noted that by virtue of Article III paragraph 6 of The Hague Rules and Clause 21 of the Conditions and Carriage in the Bill of Lading the cause of action against the 2nd respondent was time barred.

The court held that the joinder of the 2nd respondent to the amended plaint did not relate back to the date the suit was instituted against the 1st respondent, but to the date the 2nd respondent was joined as a party to the suit.

Aggrieved by the court's decision, the appellant filed this appeal. The appellant contests the High Court's finding that the claim against the 2nd respondent was time barred. The appellant avers that since the 2nd respondent admitted to being the 1st respondent's agent, the suit against it should relate back to the time the suit against the 1st respondent was instituted, that is, 14th October, 1998. The appellant contests the High Court's finding that the claim was solely based on the Bill of Lading, stating that the cause of action was also based on fraud and illegality, and the court as a result should have come to a different conclusion. The appellant contends that the 2nd respondent's application was bad in law and should not have been allowed.

Submissions by counsel

At the hearing of this appeal, Mr Muriithi learned counsel for the appellant submitted that since the relationship between the 1st and 2nd respondents was one of principal and agent, the cause of action should date back to the time the suit was first instituted against the 1st respondent. He argued that since the cause of action against both respondents was the same, the High Court was wrong to make a finding that the cause of action against the 2nd respondent was time barred. Mr Muriithi submitted that it was wrong for the learned judge to go against his previous reasoning in the ruling dated 18th May, 2000, where he dismissed an application by the 1st respondent seeking to have the suit against it dismissed. The court while dismissing that application had argued that the issues arising from the cause of action, required that the matter should not be determined summarily. Mr Muriithi argued that the same reasoning should have been used to dismiss the 2nd respondent's application, stating that several issues arose that required a full trial. Counsel for the appellant also argued that the 2nd respondent's application was fatally defective for failing to expressly indicate under which rules it was brought. On the issue of limitation, Mr Muriithi submitted that this question could only be determined upon ascertaining when the goods were delivered to the consignee. He argued that the goods did not arrive at the destination and any doubt to this could only be determined after a full hearing. He argued that as per the *Carriage of Goods by Sea Act (Cap 392)* time starts to run the moment the respondents declared that the goods were lost or damaged, which the appellant argued was never done in this case. The appellant submitted that the respondents had only reported release of the goods to a wrong party. Mr Muriithi concluded that the 2nd respondent owed a duty of care to the appellant which it had not discharged.

In response, Mr Kishore, learned counsel for the 2nd respondent, submitted that the appellant sued the 2nd respondent as a principal and had no ground to challenge the relation back principle as established in *NEW TEXTILE CO. LTD VS LESLIE ANDERSON (E.A) LTD & ORS, HCK CIVIL CASE NO. 882 (A) OF 1978 (Unreported)*. He contended that the relationship between the appellant and the 2nd respondent was governed by The Hague Rules and since the appellant did not institute the suit against the 2nd respondent within a year as required by the Rules, the suit against the 2nd respondent was time barred. In reference to the order made on 18th May, 2000, the 2nd respondent submitted that the order only

referred to the 1st respondent and did not affect the 2nd respondent. In answer to the submission that the appellant's claim was not based on the Bill of Lading but an issue of fraud or illegality, Mr Kishore submitted that this was not pleaded in the statement of claim and on the contrary, paragraphs 7 and 8 of the amended plaint sets out the cause of action as loss arising from a breach of contract following the release of goods without producing a bill of lading; that the cause of action arose on 19th March, 1998 when the goods should have reached their destination; that the High Court's decision was correct, reiterating that the suit against the 2nd respondent was out of time; that it was obvious that the 2nd respondent's application was brought under **Order VI rules 13 and 16** and the failure to mention the applicable sub rules did not render the application fatally defective. He concluded that by virtue of The Hague Rules the appellant's claim against the 2nd respondent had been extinguished.

Mr Ouma for the 1st respondent supported the decision of the High Court submitting that the claim against the 2nd respondent had been extinguished.

Analysis and determination

We have carefully considered the record of appeal, the submissions by learned counsel and the law. This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. See **SELLE V ASSOCIATED MOTOR BOAT CO LTD, (1968) EA 123, 126 PARAS H-I, KENYA PORTS AUTHORITY V KUSTON, (KENYA) LTD, (2009) 2 EA 212** and **PIL KENYA LTD V OPPONG, (2009 KLR 442)**.

The appellant contends that this was a case not solely based on the Bill of lading, but also constituted fraud and illegality.

The amended plaint indicates that the cause of action arose following the release of goods by the respondents to a Consignee who had not issued a Bill of Lading. This action, the appellant stated, was in breach of the agreement between it and the respondents. The amended plaint makes no reference to the claim of fraud and/or illegality. It is trite law that any claim based on fraud must be particularised in the pleadings. This was not done by the appellant in its amended plaint and it cannot now claim that fraud formed the basis of its claim.

We find that the cause of action is governed by the contract between the parties, which was governed by the Bill of Lading.

On the issue whether the appellant's action was time barred, the case of **ARIES TANKER CORPORATION V TOTAL TRANSPORT LTD, (The "Aries") [1977]** Lloyd's Law Reports supports the provision of **Article III (6) of the Hague Rules** to the effect that if a suit is not filed within the 12 months of discharge of cargo by carrier, the cause of action is extinguished.

Further, the case of **KETTEMAN AND ORS V HANSEL PROPERTIES LTD, [1988] 1 All ER 38** held that:

"Where a person is added as a defendant to an action the joinder does not relate back to the issue of the writ against the original defendant. Instead the action is considered to have been brought against the added defendant when that defendant was joined as a party to the action."

The case of **KENYA RAILWAYS V ANTARES CO. PTE LTD, ("The Antares") (Nos. 1 and 2) [1987]** Lloyd's Law Reports sets out that a Judge's discretion cannot override the time limit set out in **Article III, paragraph 6 of the Hague Rules**.

Both parties agree that it is not in contention that the plaint against the 2nd respondent was filed more than a year after the cause of action arose. The relation back principle cannot apply in this case. As was stated in the case of **PAYABI AND ANOTHER V ARMSTEL SHIPPING CORP AND ANOTHER, (The**

Jay Bola) (1992) 3 All ER 329 at p. 330:

“Where a cargo owner who was party to a bill of lading contract incorporating the Hague Visby Rules sought to join a new party to a writ after the expiry of the one-year time limit laid down in art III, para 6, the principle of relation back did not apply to enable the defendant to be treated as if the proceedings against him had been commenced on the original date of issue of the writ...”

Accordingly, the case against the 2nd respondent was time barred.

In the circumstances, we find that the High Court was right in striking out the plaint against the 2nd respondent. Accordingly, this appeal has no merit and it is dismissed with costs.

Dated and delivered at Nairobi this 21st day of November, 2014.

R. N. NAMBUYE

JUDGE OF APPEAL

D. K. MARAGA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

