



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT MOMBASA

Civil Case 200 of 2006

UNISHIPPING SAS [Suing through their local agents Messrs. BAT – HAT BARWIL

AGENCIES LIMITED

.....PLAINTIFF

VERSUS

**1 SUDAN PEOPLE’S LIBERATION MOVEMENT ARMY
[SPLAM]**

.....1ST.DEFENDANT

**2 BOSS FREIGHT TERMINAL LIMITED2ND
DEFENDANT**

R U L I N G

This is an application by the plaintiff for attachment before Judgment and for injunction. It is brought under the Provisions of Order 38 rules 1(a) (iii), 2(1), 5, 6,11 and 12; Orders 39 Rules 1,2,3 and 9 of the Civil procedure Rules and Section 3A of the civil Procedure Act. It is based on the ground that other than the trucks which it has just imported and are lying at the second defendant’s premises at Mombasa, the first defendant has no known assets in Kenya and if they are left to leave the jurisdiction of the court the plaintiff will be obstructed or delayed in the execution of any decree that may be passed in this case against the first defendant. A summary of the facts will make the case and the issues raised by all the parties clear.

The Plaintiff’s case is that by a Charter Party and Bill of Lading dated the 12th April 2006 and 22nd April 2006 respectively it freighted 444 Packages of YRAL & Trucks aboard its motor vessel “THEOFANO” (“the Vessel”) from the port of Novorossysk in Russia to Mombasa. To accomplish that trip it had to pass through the Suez Canal in Egypt. The Suez Canal Authority (“the Authority”) which runs the Canal has regulations requiring any vessel passing through the Canal with cargo of a military nature to declare it as so failing which the owner of the vessel is liable to pay a non-refundable surcharge of 25%. The Charter Party in this case described the Trucks aboard the Vessel as non-military. Upon passing through the Suez Canal on the 29th April 2006 the Authority, after inspecting the cargo, found it to be military in nature and levied a surcharge of USD 25,063.16. To be able to join the South bound convoy and to mitigate on its losses the plaintiff through its agents in Egypt paid that surcharge.

Upon arrival at Mombasa the Plaintiff through its local agents decided to exercise its right of lien under the Charter Party and held the Cargo. According to the plaintiff, the defendant, through one Colonel Johnson Maduk Madel who also doubled as an agent of the Government of Southern Sudan (“the GOSS”), undertook to pay the amount and the plaintiff released the Trucks. Upon failure to pay the

mount, the plaintiff filed this suit and obtained an ex-parte order attaching 10 Trucks belonging to the defendant which had arrived at Mombasa aboard another motor Vessel and were lying at the second defendant's premises. Eight of those Trucks were later by consent released to the defendant but two are still held. The plaintiff therefore prays for the confirmation of the order of attachment before judgment until the first defendant provides security and a further order of injunction restraining the second defendant from releasing those Trucks to the first defendant until security is furnished.

The application is supported by two affidavits of Hashim Ahmed, the General Manager of BAT-HAF BARWIL Agencies Limited the plaintiff's local agents in which he has deposed that as the first defendant is based in Southern Sudan it will at the end of the day be left with a paper judgment with no chance of recovering the decretal amount that will eventually be awarded in this case if the trucks are released before security is furnished.

The first defendant's case on the other hand is that this application is totally untenable. It is not party to the Charter Party and even in the Bill of Lading it is not the consignee. It is only shown as the party to be notified upon arrival of the cargo. There is therefore no privity of contract between it and the plaintiff. It was further contended for the first defendant that the plaintiff should have sued the charterer named in the Charter Party and or the consignee named in the Bill of Lading.

The first defendant dismissed the undertaking given by Colonel Maduk to pay the amount as not binding on it the same having been given on behalf of the GOSS and not on behalf of the first defendant.

For its part the second defendant contends that this application has no basis as the plaint discloses no or no reasonable cause of action against it.

Presenting the application Mr. Mohamed, Counsel of the plaintiff, urged me to ignore the replying affidavit sworn on behalf of the first defendant by Colonel Maduk. Reason: He had no *locus standi* in the matter as the Power of Attorney given to him by the first defendant had, at the time he swore the affidavit, expired. Though he did not raise it as a Preliminary Objection Mr. Mohamed argued that even the appointment of M/S Karigithu Kinyua and Company Advocates by Colonel Maduk as advocates for the first defendant is on that score irregular.

Mr. Kinyua countered that argument by referring me to Section 2 of the Kenya Interpretation of Statutes and General Provisions Act, Chapter 2 of the Laws of Kenya which defines "month" as the calendar month and arguing that the first defendant having given Colonel Maduk the Power of Attorney on 1st March 2006 for a period of six months the same should be understood to have expired on 30th September 2006.

I do not agree with Mr. Kinyua's contention. The Power of Attorney is very clear. It states that "THIS POWER OF ATTORNEY" is made this 01st of March 2006, for a period of six months." I understand that to mean that it is for a period of six months from 1st March 2006. There is nothing in the whole Power of Attorney to suggest that it was valid for a period of six calendar months.

In the same breath I do not agree with Mr. Mohamed that the replying affidavit sworn by Colonel Maduk should be ignored. He swore it not as an attorney of the first defendant but as a Colonel in the Sudan Peoples' Liberation Army and as the person designated by the GOSS to oversee the importation of the said trucks. In the circumstances I hold that Colonel Maduk's replying affidavit is properly on record.

From the arguments put forward in this case it appears to me that two main issues fall for determination in this application. They are whether or not the first defendant is liable to pay to the Plaintiff amount of the surcharge it paid to the Suez Canal Authority and whether or not the Plaintiff is entitled to orders of attachment before judgment and injunction as prayed in this application.

I agree with Mr. Kinyua that the first defendant is not party to the contract contained in the Charter Party. That contract is clearly between the Plaintiff and the Charterer therein named. On the basis of that

contract there is therefore no privity of contract between the plaintiff and the first defendant. But I do not agree with him that the first defendant is not bound by the guarantee given by Colonel Maduk in this matter.

The Bill of Lading gives the name of the consignee of the Trucks as Stanbic Bank Kenya Limited. But it is understood by all and as stated in that Banks letter of 24th July 2006 that the Bank was a nominal consignee. It only financed the importation of the trucks and the real consignee was the first defendant who is stated in the Bill of Lading as the buyer of the trucks.

When the trucks arrived at Mombasa, the plaintiff was perfectly entitled to hold them on lien, as it did, until the amount of surcharge was paid by either the Charterer or whoever was entitled to take delivery of them. In this case the person entitled to take delivery was Stanbic Bank Kenya Limited as the consignee named in the Bill of Lading. Instead of doing that it endorsed the Bill of Lading to the 1st defendant. I am satisfied that Colonel Maduk held or described himself to the plaintiff's representatives, as he has done in the replying affidavit, as a Colonel in the Sudan People's Liberation Army and the Person designated by the GOSS to take delivery of the trucks. The consultations referred to in the guarantee that he held with plaintiff's representatives were definitely held in those capacities otherwise he could not have qualified as a representative of the first defendant to whom the Bill of Lading had been endorsed and who was to take delivery of the trucks.

We are here dealing with the issue of *bona fides*. Colonel Maduk holds himself out as a representative of SPLM/A and GOSS but in the written guarantee he states that he is guaranteeing payment on behalf of GOSS. After taking delivery of the trucks SPLM/A and or the GOSS refuses to pay the guaranteed amount and the self same Colonel Maduk swears a replying affidavit in his dual capacity as a representative of SPLM/A and the GOSS and wants the court to believe the SPLM/A, the first defendant in this case, had nothing to do with the guarantee. That is disingenuous ruse that that I cannot allow. I hold that the first defendant is bound by the guarantee.

The remaining issue is whether or not the plaintiff is entitled to the orders for attachment before judgment and injunction. The first of these orders is sought under Order 38 Rules 5 and 6. As is stated by **Mulla on the Indian Code. (13th Edition, Page 1502)** the object of Order 38 Rule 5 is to prevent the decree that may be passed from being infructuous.

It is not in dispute that the first defendant wants to take the trucks out of the jurisdiction of this court. If that happens the plaintiff will end up with a paper judgment with no chance of recovering the decretal sum that may be found due to it. Mr. Kinyua said that the first defendant's headquarters is in Nairobi but he did not say whether or not it has any properties in Kenya. In the circumstances the plaintiff is entitled to attachment before judgment. I therefore order that the two trucks do continue to be held by the second defendant at the cost of the first defendant until the first defendant deposits USD 25,063.61 in an interest bearing account in the names of the Advocates for the plaintiff and the first defendant or until it provides alternative and acceptable security for the due performance of the decree that may be obtained in this case. The plaintiff shall have the costs of this application against both defendants.

DATED AND DELIVERED THIS 29TH DAY OF NOVEMBER 2006

D.K. MARAGA

JUDGE

