THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

CIVIL SUIT NO. 1441 OF 1999

FAMO FORWARDERS LTD :: PLAINTIFF

VERSUS

RAFIKI TRADING CO. LTD :: DEFENDANT

BEFORE: THE HON. LADY JUSTICE M.S. ARACH - AMOKO

JUDGMENT:

The Plaintiff is a clearing and forwarding company incorporated in the Republic of Kenya. The Defendant is a trading company incorporated in the Republic of Uganda.

The facts of this case are that the Plaintiff and the Defendant entered into an agreement by which the Plaintiff cleared consignment of 5853 metric tonnes of salt at Mombasa Entry Port. The Plaintiff alleges that it incurred extra costs amounting to US $6,468 as a result of:

a. The Defendant's delay in transporting the cleared consignment to its final destination which was the Defendant's responsibility.
b. The increase in bond charges due to the Defendants failure to transport the consignment within the time allowed under the earlier paid bond which expired due to the Defendant's inordinate delay.
c. The Defendant's extension of the entry period of its consignment which fell out of the 90 days prescribed by Kenya Parts Authority.
d. Destruction of the Defendant's salt.

The Plaintiff now brought this suit for payment of the US $6,486, interest at Court rate, general damages plus costs.

The Defendant denied the Plaintiffs claim in total and contended that all the Plaintiffs claims which were verified have been fully settled by the Defendant. The Plaintiffs claims are therefore unfounded. The Defendant further averred that it understood that the bond charges of US $979 would cover one year and since it was a huge consignment which could not be transported from Mombasa to Kampala within one year, time was not of the essence. Further, that the Plaintiff raised further invoices without prior notification to the Defendant and did not prove that it had paid such additional costs on behalf of the Defendant. Further still, the Defendant averred that the Plaintiff did not notify it about the need for periodic renewal of the bond otherwise it would have arranged to transport the consignment within a short time. That it was also not notified that part of the salt had been destroyed by the Kenya Port authorities. The Defendant finally averred that in settling the Plaintiffs account it paid US $2000, which the Plaintiff had not accounted for, and it counter claimed this money.

The Plaintiff filed a reply contending that it would adduce evidence to show that the Defendant authorised it to incur all expenses in respect of the cargo in the form of bond fees, salt destruction charges, transportation and other expenses. The Defendant was notified of the expenses and authorised the expenses which would be paid by the Defendant. The Plaintiff notified the Defendant of the destruction of the salt by KPA. It is therefore estopped from denying that knowledge. It has failed, neglected or refused to pay the extra expenses despite several reminders.

When this suit came up for a Scheduling Conference, the parties agreed to explore a possibility of settling the matter ex curia. As a result of a meeting brokered by their lawyers, the Defendant conceded to pay the following expenses:
a. Charges for destruction of salt US $678.
b. Bond extension charges US $500.

The claim of US $5,000 as bond charges was unresolved, and so was the US $2000 counterclaim.

The issues for determination were therefore:
1. Whether the Defendant is liable to pay a further US $5000 bond fees on top of the US $979 bond fees initially paid.

2. Whether the Defendant is entitled to the US $2000 counterclaim.

The Plaintiff called one witness and so did the Defendant. Written submissions were filed.

Regarding the first issue, counsel for the Plaintiff submitted that the Defendant was liable to pay the US $5000 extra bond charges on top of the US $979.

This is because the duration of the transaction was not specified in the Plaintiffs letter of 6/2/96 and 19/2/96 (Exhibit Dl). PW 1, who is an experienced person in the business of clearing and forwarding in Kenya, testified that upon putting up a transit bond, they are given a transit entry by Kenya Ports Authority which is valid for a 30 days period, with an automatic extension of 30 days. That is all the time envisaged for getting out goods out of Kenya; thereby discharging the bond. In the instant case, the transit entries were passed on 23rd February 1996, and the 60 days ended around 24/4/96. His contention was that the quotation in Dl only relate to the normal period allowed for transit clearing. The Defendant paid extra storage charges on top of what was agreed in Exhibit Dl; for the period 1/9/96 - 28/9/96. Why would there be charges for storage and not bond charges when Exhibit Dl specifies them in the same terms? The quotation and payment in respect of storage and bond covered the standard time that is envisaged for clearing and transporting such cargo out of Kenya. For the period beyond the envisaged time there had to be additional charges. Time and again the transit entries had to be extended. The Defendant admits this fact. Extension by its natural meaning implies that the time allowed had expired. PW1 testified that he had to continue extending the transit entries and indeed this entailed extra costs part of which the Defendant paid in the settlement of part of this case.

The Defendant gave lame excuses about lack of funds, elections in Uganda and confusion as a result of introduction of VAT. (Exhibit P5). This was in July 1996 for cargo that should have left Kenya by the end of April 1996.

The Plaintiff even gave the Defendant a grace period that expired in September 1996, in respect of the issue of the bond and informed the Defendant by fax dated 13/9/96 (Exhibit P6) that it was going to start levying a fee of US $2000 per month for bond charge in light of the continued delay in clearing the goods. That was a specific demand followed by the US $2000 bond charges paid in September 1996.

It is illogical to execute a bond to cover a period of one year, when the purpose in only for 60 days maximum. The attempt by counsel for the Defendant to make the payment of US $2000 bond charges for September 1996 appear a mistake is futile. The Defendant paid it after receipt of the fax (Exhibit P6) which stated very clearly why the charges were being levied. The Defendant did not deny receiving the fax.

The submissions filed by the Defendant's counsel are inconsistent to the testimony. At the top of page 3 he states that the duration of the bond was for one year and towards the bottom of the page he states that the bond was for an unspecified period. He also states that the Manager was new, and yet none of the witnesses stated that the Manager was new. This should be condemned and it is symptomatic of the Defendant's insincerity in trying to avoid paying bond charges that were justifiably levied. Indeed when the Plaintiff raised the invoices for the bond charge at a rate of US $2000 per month, the Defendant was free to object and/or change clearing agents. They did not.

The Defendant's counsel submitted on the other hand that it was clear in the mind of the Defendant that the payment of US $979 was for a duration of one year. The entire consignment took $1^{1}/_{2}$ years to clear and forward by the Plaintiff. The Defendant paid US $2000 bond charges (Exhibit P7) but this payment was according to DW1 - Mr. Hussein Mohammed made in error by his new Manager. The amount was demanded from the Plaintiff as a refund but the Plaintiff refused to make the refund and thus the counterclaim for US $2000.

It is trite law that for a promise to be enforced legally has to be supported by consideration. The authorities are numerous on this point and include **COMBE -VS COMBE** [1951] 1 AER ER 767.

It is clear from the first invoice by which the Plaintiff was paid, there was consideration, one party promising to deliver services and the other paying for that. service; however, when it came to new claims for further bond charges, these charges could not be sustained because if indeed the Plaintiff raised the invoices genuinely, the work which was done, if at all it was done, was what is referred to as "past consideration" and which cannot sustain a contract. See: **ROSCORLA-VS-THOMS** (1942) 3 QB 234.

In the alternative but without prejudice to the above, Mr. Kibuuka submitted that any new invoice for bond charges was an attempt to create a new contract, which contract was not consummated because the Defendant objected to it by refusing to pay for the invoices raised. According to Mr. Kibuuka, no material had been presented to Court to show that the Plaintiff offered additional services to the Defendant by extending the bond on assurances that the Defendant would pay. On the contrary, the Defendant refused to pay for any additional bond charges right from inception.

In his view, the payment of US $2000 cannot be taken to mean recognition by the Defendant that it had agreed to pay additional bond charges because DW1 made it clear that the payment was made in error by the Defendant's new Manager.

The Plaintiff is therefore not entitled to this money and the Defendant is within its legal rights to demand the same. The Plaintiff conceded through PW1 that this money was received as bond charges yet bond charges had been paid by the Defendant for an unspecified period.

The Defendant has therefore ably demonstrated that it carried out its part of the bargain and paid bond charges and the Plaintiff was not justified in raising fresh invoices for work already done. It is clear that the Plaintiff knew the invoices were not genuinely raised because the Plaintiff proceeded to clear the Defendant's cargo despite the Defendant's refusal to pay any further money towards bond charges; apart from the US $2000 paid in error. The Defendant has also ably proved the counterclaim for the US $2000 because it has been established that the Defendant was not entitled to pay more than what was charged at the inception of the arrangement between the two. The Court should dismiss the Plaintiffs suit and enter Judgment for the Defendant in the sum of US $2000 with costs.

The circumstances of this case make it a mixed question of law and fact, as was rightly pointed out by Mr. Resida, learned counsel for the Plaintiff. It is not in dispute that the transaction the subject of this action arose out of a quotation which the Plaintiff gave to the Defendant to clear 5853 Metric Tonnes of salt at Mombasa dated 6/2/96, followed by a break down in a fax of 19/2/96 (Exhibit Dl) as follows:

Port charges ……..US $29,235.

Warehouse In/Out ……..US $46,913
Agency ……US $979
Bond …….US $979
Total US $78,196

The duration of the transaction was not specified in Exhibit Dl. According to the evidence of PW1, a witness who impressed me as knowledgeable and experienced in the clearing and forwarding business in Kenya, however, is that the customs authorities give a minimum of 30 days to clear and forward cargo after date of approval. For a cargo like the Defendant's, one can request for an extension and can be given another 45 days. In this particular case, he lodged the transit entry with customs on the 23/2/96. The entries were approved on the same day. The Plaintiff Company did clear the cargo on the same day. They did not forward it within the 30 days because the Defendant failed to pay for transportation. The Plaintiff got an extension of the transit bond but the Defendant was still unable to transport the same within the prescribed time. By 8/7/96 the issue was still outstanding - the Defendant's Chief Executive (DW1) wrote a letter (Exhibit P5) requesting the Plaintiff to "Kindly arrange for a further extension for a further three months" for the goods due to lack of funds to clear the very large consignment, stoppage of cargo from Mombasa into Uganda as a result of election and confusion and price increases caused by introduction of VAT.

According to PW1, they gave the Defendant a grace period of 6 months, which in his view was more than enough or reasonable enough to run the cargo to its final destination. PW1 stated that:

> "At the end of the 6 months he failed to transport his cargo to its final destination. So he put us in a very embarrassing situation. My bond was tied up, I was losing business, I could not cover my overheads e.g. salaries."

Eventually when it became unreasonable to absorb the problem financially, PW1 decided to warn the Defendant through a fax dated 13/9/96, (Exhibit P6) after having spoken to him on phone on several occasions, and after DW 1 kept on saying that he had financial problems. By then only 1,000 tons had been forwarded, leaving a balance of 4,802.2. In the fax PW1 advised DW1 to

seek assistance from Uganda Railways. He also informed DW1 that they were "charging him US $2000 w.e.f. September 1996 for holding our bond". DW1 accepted and paid (Exhibit P7) US $2000 in September. The relevant part of the letter reads:

> "2. Due to your delay in evacuating of balance of Cargo which is holding our bond please be advised that we shall charge you US $2000 per month as from the month of September 1996 hence forth. We have no choice to do so since the bond in force held up really affecting our business operation hence incurring losses."

According to PW1, he computed the US $2000 bearing in mind the premium the Plaintiff Company had paid and the loss of business as a result of the bond being held up. That he was unable to clear other consignments of other clients during this period and he was losing agency fee of US $979 bond fee of US $979, so he rounded it up to a total of US $2000. The consignment was finally forwarded. He did assist the Defendant and the last consignment left Mombasa on 25/3/97; and his bond was released on 4/12/97, 18 months later.

PW1 clearly stated that his claim is for the agency fee that he would have gained through clearing other consignments. The total claim is comprised of:

US $2000 for October 1996.
US $1500 for November 1996.
US $1500 for December 1996.

He did not charge the Defendant for the whole of 1997 because of the problems the Defendant had.

In cross-examination PW1 said:

> "When we receive the documents you assume that there will be no delay. Clients sometimes delay and you charge them bond fees. I did not anticipate any delay when I received the document of Rafiki. When he came to us, he was very serious and he sent faxes to me that I should be very fast which I was. We have been witnessing delays before with other clients. This is the first problem I had with Rafiki. He had been paying promptly."

From the evidence of PW1, therefore, it is clear that the quotation he gave in Exhibit Dl was in respect of normal situations - that is where there is no delay and the goods are cleared and forwarded with the 60 days. In this case, he did not expect any delay due to the good track record of the Defendant. He was therefore operating on the normal time limit. The Defendant himself had told him to act fast which he did by lodging the entries and getting approval on the same day. What transpired later caused his bond to be held up for over one year. He was not able to use this bond to clear other goods and make more business. In my view, he is therefore justified in asking the Defendant to pay extra money to cover for a period beyond the standard time. Time had to be extended at the request of the Defendant, which entailed extra costs which the Defendant has paid.

DW1 was definitely not a reliable witness. He had no knowledge about bonds and how they operate. He kept saying he would ask his import Manager who was more knowledgeable in there matters. He stated that if there was a demand for bond charges from the Plaintiff for the extra period, he would have paid.

The question of lack of consideration raised by the Defence counsel cannot also be maintained. PW1 stated that the claim was for the loss incurred when his bond was held by customs. There was therefore consideration during the time the bond was in force for the 18 months instead of the standard 60 days, for this kind of transaction.

The Plaintiff did not create a new contract by raising a fresh invoice for the extra time. The contract remained the same in my view as long as the Plaintiff’s bond was withheld by customs under the same transaction. The Defendant received Exhibit P6 from the Plaintiff expressing the effect of holding the bond for a long period and then sent an invoice. The Defendant did not refuse to pay as alleged. The Defendant paid. He had an option to change clearing agents or refuse to pay the US $2000, he didn’t.

All in all, I find that the Plaintiff was justified in charging the extra US $5000 bond fee. It is entitled to it and I answer this issue in the affirmative.

In respect of the counterclaim, I agree with the Plaintiff's counsel for the reasons already given, that this is an afterthought by an ungrateful business partner and I dismiss it with costs.

In the result, I enter Judgment in favour of the Plaintiff for:

1. US $5000 bond charges.
2. Interest on (a) at 15% p.a from date of filing till payment in full.
3. Costs.

M.S. Arach - Amoko

JUDGE

28/4/2003

Judgment delivered in the presence of:

1. Mr. Badru Bwangu for the Plaintiff.
2. Mr. Kibuuka Musoke for the Defendant.
3. Okuni - Court clerk.

M.S. Arach - Amoko

JUDGE

28/4/2003

Mr. Kibuuka:

I have instructions to appeal. I request for **a** temporary stay to enable to file the necessary papers within 13 days.

Mr. Bwangu:

I have no objection.

Court:

A temporary' stay is granted as prayed.

M.S. Arach - Amoko

JUDGE

28/4/2003