THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0358 OF 2000

TRIAD HOLDINGS LIMITED :::::::::::::::::::: PLAINTIFF

VERSUS

1. NETWORKS EXPORTS PVT LTD]
2. SGS UGANDA LIMITED]
3. SOCIETE GENERAL DE]
SURVEILENCE S.A. LTD] ::::::::::::::::::
DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

The Plaintiff sued the Defendants, jointly and severally, to recover from them money lost in an importation transaction, special damages for breach of contract, interest and costs of the suit. The facts of the case are rather convoluted. However, going by the pleadings, the Plaintiff entered into a contract with the 1st Defendant to buy from the said 1st Defendant some rice of a stated description. It is claimed by the Plaintiff that it contracted the 2nd and 3rd Defendants to carry out the pre-shipment inspection of the goods which they did and they issued a clean report of findings. When the rice

arrived in Kampala, it was declared unfit for human consumption and destroyed. The suit is in respect of that loss.

After the hearing had commenced, Mr. Madrama for the 3rd Defendant raised a point of law. He argued that the plaint discloses no cause of action against the 3rd Defendant. Mr. Kanyemibwa said the same in respect of the 2nd Defendant. Since I had just taken over the case from the hitherto trial Judge, M.S. Arach – Amoko, J., I was of the opinion that my grasp of the point being raised by both counsel would be better if put in writing. All counsel agreed.

I have now addressed my mind to the able arguments of all counsel. It is not necessary to reproduce them verbatim as the written submissions form part of this record.

I will first deal with the submission by Mr. Kabega, counsel for the Plaintiff, that the point of law is resjudicata, the same having been directly in issue in an earlier point of law that was heard and disposed of by Justice Stella Arach – Amoko on 9/5/2005 and should therefore not be resurrected here.

From the records, the 3rd Defendant raised a point of law challenging the jurisdiction of this Court to hear and determine the suit. Perusal of the Ruling shows that the learned Judge confined her Ruling to the sole issue of jurisdiction. She did not comment on the issue of the alleged lack of the

cause of action and she was never invited to do so. It is trite that in order to give effect to a plea of res judicata, the matter in issue must have been directly and substantially heard and finally decided in the former suit. It simply means nothing more than that a person shall not be heard to say the same thing twice over in successive litigations: LT. DAVID KABAREEBE –VS- MAJ. PROSSY NALWEYISO CACA NO. 34/2003 (unreported).

Relating the above principle to the issue now before Court, it is very clear to me that what was handled and disposed of by my predecessor in the matter was the issue of jurisdiction. The instant one was not. Therefore, res judicata does not come into play. This objection must fail and it fails.

As regards the point of law now before me, it is trite that a plaint which discloses no cause of action must be rejected. To say that a plaint discloses a cause of action, it must show that the Plaintiff enjoyed a right; that the right was violated; and that the Defendant is responsible for that violation and therefore liable. See: Auto Garage & Others –Vs- Motokov (No. 3) [1971] EA 514.

In the instant case, it is not disputed that the 1st Defendant offered to sell rice to the Plaintiff. It is also not disputed that the Plaintiff accepted to buy it. This created a contract of sale between the Plaintiff and the said 1st Defendant. As fate would have it, the entire consignment was declared unfit

for human consumption and destroyed. Upon the destruction, the Plaintiff filed a suit against the 1st Defendant, among other parties. The 1st Defendant filed no defence. Judgment in default of defence was entered against it. It has not been set aside. This Ruling relates to the 1st Defendant's Co-Defendants.

The Plaintiff alleges in the plaint, para 5 (b) thereof, that it entered into a contract with the 2nd and 3rd Defendants to inspect the goods before shipment to ensure that they conform to the quality, quantity and packaging as stated in the 1st Defendant's Proforma Invoice and make price comparisons. If any such contract was in writing, Court has not accessed it. It is not among the Documents accompanying the plaint. It would appear that the purported existence of the said contract is based on the fact that the Plaintiff filled Form 'E', a requirement under the Bank of Uganda Pre – Shipment Inspection Regulations, annexture 'C' to the plaint. It is averred by the Plaintiff that by reason thereof, the 2nd and 3rd Defendants were obligated to inspect the Plaintiff's consignment before shipment. There is evidence of such inspection.

It is averred by the Plaintiff that the two Defendants breached their respective contracts with it and by reason of that breach caused it to suffer loss and damage which it holds them jointly and severally liable. The particulars of the alleged breach by them have been stated as:

i. failure to inspect the goods before shipment to ensure that they correspond to the description in the proforma invoice and the sample provided. This is mainly in so far as the moisture content and broken grain percentages were much higher than the agreed ones.

ii. issuing a clean Report of Findings that the goods in respect of which the said Clean Report of Findings was issued were of the right quality, merchantable and fit for human consumption whereas not.

These averments, in my view, raise two distinct issues:

1. Privity of contract.
2. Liability for the loss, whether contractual or tortious.

As regards privity of contract, as already observed above, there appears to be no direct contractual relationship between the Plaintiff and the 2 Defendants. The pleadings disclose existence of a contract between the Plaintiff and the 1st Defendant for the supply of rice. The 2nd and 3rd Defendants were not party to that contract and there is no argument that they were.

The pleadings also disclose existence of another contract between Bank of Uganda and the 3rd Defendant. This contract related to pre-shipment inspection of imports before entering Uganda. Under this arrangement, no payment would be made in or outside Uganda by or on the authority of BOU

or any licensed bank in Uganda, to the credit of any person, in respect of goods subject to pre – shipment inspection, unless and until a Clean Report of Findings (CRF) was presented together with the relevant shipping documents to an authorized bank. The 3rd Defendant was under the Regulations appointed the inspecting authority. The subject matter herein fell into the category of goods for inspection before shipment. That's how the 3rd Defendant comes into the picture. Payment to the 3rd Defendant was made through the 2nd Defendant. I have understood the Plaintiff's argument to be that by filling Form E, an Import Declaration Form and paying the requisite fee to the 2nd Defendant, the two Defendants became contractually obliged to inspect the Plaintiff's consignment before shipment. It is the view of this Court that filling the Form and paying the requisite fee perse did not create a contractual relationship between the Plaintiff and the two Defendants. This was simply a fulfillment of a statutory requirement before payment could be made to the seller. It was a statutory requirement of the day before BOU or any licensed bank authorized by BOU could release money for payment of goods outside Uganda. Although the Regulations themselves show no reason for their enactment, control of flow of forex outside Uganda appears to have been the reason behind that requirement. I'm fortified in this by the subsequent agreement between the same parties, that is, BOU and the 3rd Defendant dated 13/9/1989. The revised contract was, according to its preamble, necessitated by the desire:

“to provide for developments that have taken place since the conclusion of the Principal Agreement and to perfect the relationship between the parties by instituting additional measures for import verification in Uganda (Customs Oriented Programme) in order:

1. To maximize revenues collectable from duties and taxes on imported items.
2. To simplify import entry procedures and documentation so as to facilitate the inflow of imported goods to the Ugandan domestic economy.
3. To provide advance information of shipment to assist in arrival verification.

In my view, the mischief (the unsatisfactory state of affairs) which the Regulations were

meant to remedy must be understood in the context of those objectives as stated in the

subsequent revision of the contract between BOU and the 3rd Defendant. It was not, as counsel for the Plaintiff appears to suggest, to act as a substitute for the ordinary contractual obligations of the seller to the buyer as they are known under common law or the Law of Contract of Uganda. If the position were as counsel for the Plaintiff would invite this Court to believe, Regulation 9 would be rendered redundant. It provides:

"9. Nothing in these Regulations shall be construed as relieving any seller of his contractual obligations to the buyer of any goods liable to pre-shipment inspection."

To that extent, Court is of the opinion that the Plaintiff is a stranger to the contract between BOU and the 3rd Defendant. The general principle is that a stranger to a contract cannot sue upon that contract unless given a statutory right to do so: Halal Shipment Co. –Vs- Securities Bremmer [1965] EA 690; Kayanja –Vs- New India Assurance Company Ltd [1968] EA 295.

There is nothing in the Regulations of 1982 or the subsequent amendment of 1989 to be construed as making the transaction herein an exception to the above stated time tested general principle. Accordingly, Court accepts the submission of learned counsel for the 2nd and 3rd Defendants that there was no contract between the Plaintiff and their clients that could give rise to a cause of action for its breach. Court is of further opinion that the statutory requirement for inspection of imports before shipment could at most impose a duty on the 3rd Defendant the breach of which would be remedied by an action for damages, not for breach of contract as claimed herein but in negligence for a breach of a statutory duty. In the absence of such a claim grounded in negligence, the Plaintiff's claim against the 2nd and 3rd Defendants for breach of contract is in my view misconceived.

Having looked at the law as I have done above, I am of the considered opinion that even if I were to take the generous view that the issues raised by counsel be left to be determined on evidence, as justification to over rule the objection, I don't envisage the likelihood of the Plaintiff proving its claim against the two Defendants on the basis of its current pleadings. This is because as I have already observed, to say that a plaint discloses a cause of action against the Defendant, the Plaintiff must appear as a person aggrieved by a violation of the right and the Defendant as the person liable: Auto Garage, supra, at p.519.

It is averred by the Plaintiff that the two Defendants:

i. breached the pre-shipment agreement with it;

ii. the Plaintiff's consignment arrived at Kampala when caked, rotten, full of maggots and unfit for human consumption.

iii. the Plaintiff contracted McLarens Toplis to carry out a survey exercise to assess, inter alia, the cause of damage to the rice and that they made a report, annexture 'E' to the plaint, blaming the Defendants for the loss.

I have seen the report. It observes, among other things, that:

i. some water had ingressed into containers through the hard old rubber seals;

ii. the ventilator holes on the containers were sealed by celotape;

iii. the containers were rusted inside at the roof and at the side panels.

The report gives the cause of damage as the excessive rain and humid condition prevailing in the region which caused sweating inside the container and wet damaged the cargo.

The Plaintiff as consignee was advised to write to the shipper and carrier and C & F Agents holding them responsible for the damaged cargo. It is trite that a Plaintiff is at liberty to sue anybody he thinks he has a claim against and cannot be forced to sue somebody. Where he sues a wrong party, he has to shoulder the blame. In the instant case, in as far as the 2nd and 3rd Defendants are concerned, Court has not seen any thing in the Regulations of 1982 as amended or in the Clean Report of Findings any suggestion that the 3rd Defendant as the inspecting authority was responsible for the stuffing of the goods into the containers or anything to support the theory that it was responsible for the choice of the containers in which the cargo was transported. The Regulations, No. 4 thereof, limited the 3rd Defendant's mandate to quality and quantity inspection and price comparisons. Duty is cast upon the intending importer to make all necessary arrangements with the seller for the purposes of handling, presentation, unpacking and repacking, sampling, shop-testing and any other thing required <u>in connection with the inspection of the goods</u>, emphasis mine.

From the pleadings, damage to the cargo was long after the inspection, when the goods were already in transit. In the absence of any agreement to the contrary, the presumption is that it was the importer's obligation, through its insurers or otherwise, to ensure that the cargo was loaded into containers suitable for the transportation of rice for such a long distance and under the stated weather conditions. In these circumstances, I'm inclined to agree with the argument of counsel for the two Defendants that the Report which the Plaintiff heavily relies on does not blame their clients, as pleaded by the Plaintiff, for any failure on their part to inspect the cargo before shipment. On the contrary, the findings in the report as to the cause of damage to the cargo are indeed materially inconsistent with the Plaintiff's averment in the plaint that the two Defendants breached the pre-shipment contract and that they were blamed by the report for causing the said loss. The Report blames the damage to the cargo on the poor state of the containers which resulted in water gaining access to the cargo coupled with poor air circulation in the containers while the cargo was already in transit. Court has also not seen anything in the report to support the Plaintiff's averment that the rice before it got bad did not correspond to the description in the proforma invoice and the sample provided.

The plaint does not allege, and it is not documented anywhere that the two Defendants were responsible for: the poor choice of containers and/or the

loading on them; the water gaining access to the goods; or the actions of the shipper, the carrier and/or the C & F Agents.

In short, the pleadings do not support the Plaintiff's alleged cause of action against the 2nd and 3rd Defendants for a breach of a pre-shipment contract with them. Although the Plaintiff appears as a person aggrieved by a violation of a right, the pleadings do not support the averment that the two Defendants were responsible for that violation.

In the result, Court finds merit in the points of law raised by both learned counsel for the Defendants. They are sustained. Under 0.7 r 11 (a) of the Civil Procedure Rules, a plaint which discloses no cause of action must be rejected. I would accordingly reject the plaint herein in accordance with the said 0.7 r 11 (a) and order it struck out with costs to the 2nd and 3rd Defendants. I make no order as to the claim against the 1st Defendant.

It shall be so.

Yorokamu Bamwine
J U D G E

19/08/2005