

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0464-2003

KENFREIGHT (U) LTD

PLAINTIFF

VERSUS

KEN ENTERPRISES (1998) LTD

DEFENDANTS

KEN ESTABLISHMENTS LTD

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. Kenfreight (U) Ltd, hereinafter referred to as the plaintiff filed this action seeking to recover from Ken Enterprises (1998) Ltd, and Ken Establishments Ltd, hereinafter referred to as the defendants, a sum of United States Dollars, US\$14,354.00. In the course of the trial this claim was reduced to US\$9,884.00 after abandoning invoices worth US\$4,470.00 either because no supporting documents were available or that the sums were not due.
2. The plaintiff is a clearing and forwarding firm that was retained by the defendants to clear their imports from the Kenyan Port of Mombasa. The plaintiff contends that the defendants did not pay the sums claimed in spite of demands to do so. The defendants contend that there are no sums outstanding to the plaintiff as they paid all sums due to the plaintiff, except 'where the plaintiff was not entitled to payment due to non-performance and/or where the plaintiff's conduct was responsible for the denial of payment to him.'
3. In its written statement of defence the defendants set out 12 general particulars as to why the plaintiff would not be entitled to payment without indicating in respect of which the invoices such particulars applied. This was an evasive manner of pleading.
4. At the scheduling conference the parties agreed on one issue, and that is whether the plaintiff was entitled to the sum of US\$14,325.00 as claimed.

5. The plaintiff called 3 witnesses. The defendant called 1 witness. In issue there were about 30 invoices. I will proceed to look at the evidence of all the parties in respect of each invoice in issue. Three key documents are exhibits P1 and P3. Exhibit P3 is the statement of account submitted by the plaintiff to the defendants. Exhibit P1 is the response of the defendants to P3 setting out what the defendants objected to with regard to each disputed invoice.
6. Invoices 2805, 2838, and 3423 for US\$ 300.00, US\$150.00 and US\$1,039.06 respectively were for demurrage in respect of container no. INBU 46566-8. PW1 tendered into evidence a refund voucher, exhibit P8, showing that demurrage was charged by the shipping line for 44 days totalling to US\$1,480.00. The plaintiffs paid the said sum of money through their parent company in Mombasa. The defendant has not adduced any evidence with regard to these invoices. I shall allow the sum of US\$1,480.00 in respect of these three invoices.
7. Invoice 2862 dated 22nd May 1998 was for US\$75.00 for demurrage in respect of container no. TPHU 608276-3. PW1 adduced exhibit P15 showing that US\$52.00 was charged by the shipping line. Defence has not adduced any evidence with regard to this invoice. It is allowed to the extent of US\$52.00.
8. Invoice 2833 dated 15th May 1998, (exhibit P11), was for US\$400.00 in respect of demurrage. It had no supporting documents. This was disputed by exhibit P1. It is disallowed on account of no supporting documents.
9. Invoice 2863 of 22nd May 1998, (exhibit P16), was in respect of container no. MLCU-208178/8 for demurrage for 16 days totalling to US\$400.00 for the period 22nd April 1998 to 7th May 1998. PW1 produced supporting documents for this invoice including a refund voucher in respect of demurrage from the shipping company, Star East Africa Co., for US\$410.00. Why the plaintiff's invoice is less than what the shipping company is explained by PW1 that the invoice was an estimate. The defence did not adduce any evidence with regard to this invoice. This invoice is allowed.
10. Invoice 2922 was not disputed in exhibit P1. Neither was it discussed in the testimony of the only defence witness. This is presumed as accepted and paid.
11. Invoice 2996 of 6th July 1998 was for US\$3658.72 but only US\$94.72 remained unpaid or outstanding. This was in respect of collection fees by the shipping company which it

charged upon collection of sea freight on arrival of the container in Mombasa. Exhibit P25 and P26 provide proof for payment of the said sum. The only defence witness did not offer any testimony in relation to this charge. I allow it.

12. Invoice 3285 of 7th September 1998 for US\$225.00 was demurrage. No supporting documents were made available in the testimony of PW1. The defence adduced no evidence whatsoever in connection with this invoice. It is disallowed.
13. Invoice 3226 of 25th August 1998 had an outstanding balance on it claimed by the plaintiff, in exhibit P3, of US\$195.00. PW1 failed to explain how this sum fully arose. Neither did he provide any supporting documentation for the claim. The defence did not adduce any evidence in regard to this invoice specifically. It is disallowed.
14. Invoice 3290 of 9th September 1998 was for US\$50.00 being demurrage for 2 days. No supporting documents were provided by PW1. Neither did the defence call any evidence in relation to this invoice. It is disallowed.
15. Invoice 2758 dated 25th April 1998 (exhibit P33), was for US\$130.00 for port rent due to local delivery delay. It had a supporting document tendered by PW2, a Kenya Ports Authority receipt for the same amount, exhibit P34. The defence did not adduce any evidence with regard to this invoice. It is accordingly allowed.
16. Invoice 2759 of 25th April 1998 is for port rent in the sum of US\$110.00. It has supporting documents from Kenfreight (EA) Ltd and Kenya Port Authority. Exhibits P 35, P36 and P37 refer. There is no evidence from the defendants on this item. It is allowed.
17. Invoice 2797 of 5th May 1998 is for US\$300.00 in respect of port rent due to local delivery delay, and survey charges. Supporting documents exhibit P39 to P41 show US\$100 for port rent but not for US\$200 for survey charges. PW2 did not explain what these charges were for. The defendants did not adduce any evidence in relation to this invoice. I allow only US\$100.00.
18. Invoice 3369 of 21st September 1998 was for US\$61.60 for container demurrage. There are supporting documents to support this charge including a detention charges sheet from the shipping line exhibit P46. The defence never adduced any evidence with regard to this invoice. I am satisfied that this charge was incurred. The charge is allowed.

19. Invoice 3371 of 7th September 1998 (exhibit P46) is for US\$90.00 for port rent due to local delivery delay. It has supporting documents tendered into evidence by PW2. These exhibits P47, P48, and P49. There is evidence from the defendant on this invoice. It is allowed.
20. Invoice 3424 of 7th October 1999 is for US\$160.00 for demurrage. There are supporting documents to show it was incurred. In particular a refund voucher from the shipping company, exhibit P 69. This sum is allowed.
21. Invoice 3439 of 14th October 1998 is for US\$2,287.84 of which the plaintiff claims US\$1,532.84 as still outstanding. Tendered in evidence are exhibits P71 to P77 that show that the charges therein were incurred. DW1 objected to the charge of Bond and Agency fee of US\$250.00. He claimed that they had paid Kenfreight (EA) Ltd directly the sum of US\$2,127.00, but provided no proof of such payment. He concluded that the plaintiff had not done sufficient reconciliation in filing this claim.
22. I accept the evidence of the PW2 that US\$1,532.84 is still outstanding on this invoice 3439, given that there is sufficient documentary proof that the fees and expenses were incurred or due as claimed. Defendant's objection remains unsubstantiated.
23. Invoice 3547 of 12th November 1998 is for US\$1000.00 with only US\$245.00 outstanding. DW1 testified that this invoice had a mistake of bond and agency having been charged differently from bond, agency, clearing and forwarding charges. All these items should have been charged US\$505.00 and not US\$755.00. PW2 explained each charge, and there is no reason why the two items should have been lumped together as demanded by DW1. There is documentation in support of the disbursements incurred by plaintiff in respect of late documentation charges and removal charges. See exhibits P79, P80 and P81. The difference between the Kenfreight (EA) Ltd invoice and Kenfreight (U) Ltd is US\$100.00 which was the agreed mark up for Kenfreight (U) Ltd. I therefore allow the claim for US\$245.00.
24. Invoice 3552 of 13th November 1998 for US\$2,770.00 of which only US\$870.00 is still outstanding. Supporting documents available and tendered into evidence by PW2 for all items save transport. This item was not disputed in exhibit P1. DW1 in his testimony stated that all the money had been paid, without offer of any proof of such payment. I allow the claim for US\$870.00.

25. Invoice 3560 of 16th November 1998 for US\$930.00 of which US\$175.00 is claimed as outstanding. DW1's objection to this claim is that bond and agency were not charged together with clearing and forwarding leading to an overcharge. There is no agreement that DW1 is able to point to that required these two different items to be charged together a definite sum. Bond and Agency is a different item from clearing and forwarding as explained by DW2. I allow the claim for US\$175.00.
26. Invoice 3713 of 9th December 1998 was for US\$1,864.70 of which US\$270.00 was disputed and US\$59.70 still due and owing totalling to US\$329.70 claimed by the plaintiff. DW1 in his testimony claimed that they had not received an invoice for US\$329.70 or a debit note. There was no need for issue an invoice or debit note for the balance. The sum claimed of US\$329.70 is allowed.
27. Invoice 3883 of 22nd January 1999, (exhibit P96) is for demurrage charges of US\$243.00 being the balance of demurrage charges incurred on the same container as charged above in invoice 3439. In invoice 3439 demurrage charged was US\$720.00 yet the whole demurrage incurred as shown by exhibit P98 is US\$963.00. DW1 did not testify about this invoice at all. It is allowed as claimed.
28. Invoice 3931 dated 29th January 1999 is for US\$138.00 for demurrage charges. DW1 objected to this invoice as there was no accompanying invoice from the shipping line, and Kenfreight (EA) Ltd. I am satisfied that there is no supporting document for demurrage incurred. This claim is disallowed.
29. Invoice 3963 of 5th February 1999 was for US\$3,306.67 of which only US\$306.67 remained unpaid. DW1 testified that this invoice is wholly paid, and at the same time stated that they disputed the bond and agency charge being separate from the clearing and forward charges leading to an overcharge of US\$250.00 And that there were no supporting documents for demurrage of US\$160.00. I agree that there are no supporting documents for the demurrage charge, and this is disallowed. The charge for bond and agency and clearing and forwarding charges being separate is fine. US\$146.67 is allowed on this invoice as being due and outstanding.
30. Invoice 4101 of 4th March 1999 is for US\$395.54 being demurrage charges charged on container no. CHBU 037965-8. It has supporting documents for this charge in the form of exhibit P107 and P108, indicating that it was incurred. The whole of it was disputed by

the defendants in exhibit P1. DW1 testified that this demurrage was caused by the clearing and forwarding agent without stating in which manner he did so. He attacked the invoice for not showing the number of days claimed or the period the container was kept by consignee.

31. Exhibit P108 is clear. The period charged is 39 days from 30th October 1998 to 4th January 1999. This expense is proved, and the invoice is allowed.
32. Invoice 4038 of 24th February 1999 is for demurrage charges in the sum of US\$852.59. PW2 tendered supporting documents including exhibit P111, a debit note, which shows that the shipping company charged US\$850.00 for 85 days for demurrage, and container cleaning Kenyan Shs.160.00. Exhibit 110 is the Kenfreight (EA) Ltd invoice to the plaintiff for these charges.
33. DW1 stated that Ken Enterprises could not have kept the container for all the 115 days. He stated that they gave the documents to their agents in time, and returned the container at the nominated depot in time. In this case after meeting with the plaintiffs they agreed to share these charges but these are not reflected in exhibit P3.
34. The defence must show how these charges were to be shared, and what proportion was the plaintiff to bear. It has not done so. The charge was incurred. The defendant, as principal, is liable for the same, unless it can shift responsibility to the agent, which it has failed. I allow this invoice.
35. Invoice 4411 of 19th May 1999 for US\$187.00 is conceded by DW1, in his testimony, but he asserts that it was paid. Exhibit P 3 shows that it is disputed. Exhibit P1 shows that it is not disputed by the defendant. However no evidence of payment was put forth by the defence, and I accordingly allow the same.
36. Invoice 4423 of 24th May 1999 is for US\$313.84 being container demurrage. Exhibit P119 shows date of discharge of the container, when it was returned, the number of days charged for demurrage, plus repair and cleaning charges. DW1 denies that they could have kept the container for this period but fails to show how long they kept it, and when they returned it. The expense in the circumstances was properly incurred on its behalf, and it is payable by the defendants, unless they establish that this was due to the fault of the plaintiff, which they have not done. This sum is allowed.

37. Invoice 4447 of 4th June 1999 for US\$513.01 was demurrage charges, and it has supporting documentation in exhibit P121 and P122. DW1 accepts that this was incurred, explaining it as systematic delay. I find that it is due to the plaintiff from the defendants.
38. Invoice 4678 of 5th August 1999 is for US\$2,438.00 being demurrage changes. The container cleared was in the names of Bridgeway Trading Establishment but cleared at the instance of Ken Enterprises (1988) Ltd. There are supporting documents to show that demurrage as charged was incurred. See exhibits P137 to P142. DW1 in his testimony stated that he did not know this company. Exhibit P135, a fax transmission to the plaintiff dated 12th February 1999 from Kigongo E.N., who was DW1, (with someone else signing on his behalf) clearly indicates that the plaintiff was instructed to clear the three containers in question covered by this invoice. I do not believe the testimony of DW1 on this claim, and hold the defendants liable for this invoice.
39. Invoice 2612 of 13th March 1998 for US\$4,650.00 of which US\$751.00 is still outstanding. The invoice charges, bond and agency, port charges, t.h.c., transport charges, and port rent due to local delivery delay. DW1 claimed that there was a credit note of US\$5100.00 which paid this invoice but he did not produce the credit note or any evidence in support thereof. Neither was this payment put to the plaintiff's witnesses during the cross examination. I find that the outstanding amount is due to the plaintiff from the defendants.
40. The plaintiff revised its claim downwards to US\$9,884.16, after abandoning several invoices. I have, however, disallowed some invoices, in whole or in part above herein, (Invoices 2833, 3285, 3226, 3290, 2797, 3931 and 3963), to the tune of US\$1,368.00, which I must deduct from the said sum, leaving a sum of US\$8,516.16 as due and owing to the plaintiff from the defendants on account of services rendered, and disbursements incurred.
41. The parties hereto maintained one account, for all their transactions, regardless of the fact that they were two entities one side, the two defendants, with the plaintiff on the other. And this suit proceeded on that one account for both companies. I enter judgment for the plaintiff, against both defendants, in the said sum of US\$8,516.16, with costs of the suit and interest on the decretal amount at court till realisation in full.

Dated, signed and delivered at Kampala this 27th day of July 2006

FMS Egonda-Ntende
Judge