THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0561-2006

TRANSLINK (U) LTD :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

Sofitra Cargo Services Ltd & Others :::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

The plaintiff company sued the defendants to recover inter alia a total sum of US $909,522.56. From the plaint, US $421,217.73 is claimed as special damages and the rest as general damages.

Although all the defendant companies bear the first name of Sofitra, they are differently and variously described in the plaint. For instance, the 1st defendant is described as a limited liability company incorporated under the laws of Uganda doing clearing and forwarding, shipping line and transport in Uganda and DRC (Democratic Republic of Congo). The 2nd one is described as a limited liability company incorporated under the laws of Kenya and doing transport and forwarding business in Kenya while the 3rd one is described as a

private company under the laws of DRC doing business in DRC, Kenya and Uganda.

When the suit came up for a scheduling conference on 17/8/2007, Mr. Kandeebe for the 2nd and 3rd defendants intimated to Court that he would be raising points of law. The said points of law were framed as issues (1) and (2). They are by way of preliminary objection to the suit against the two defendants, 2nd and 3rd. Counsel's arguments are that:

(i) the Court lacks jurisdiction to hear and determine the suit.

(ii) the plaint discloses no cause of action.

Counsel does concede that it appears that there was a contract to transport various consignments. Counsel's concern is that the plaint does not say the transportation was from which point to which one. That it does not say where the clearance was to be done and yet the law requires that the plaint discloses at which place the contract arose and at which place the contract was to be performed. That these should have been set out in the pleadings and that if this had been done, Court would be in position to see whether it has jurisdiction.

As regards the issue of cause of action, counsel's argument is that in para 6 (c) of the plaint, the plaintiff states that some containers were damaged and insurance claims were rejected due to delays. Plaint does not say which container delayed and for how long. In his view, para 6 (a) of the plaint does not show which defendant was to do what and yet for the defendant to be liable, liability ought to have been apportioned or else made joint. That the plaint ought to have set out the role of each defendant or the joint role of each.

Mr. Wakida for the 1st defendant fully associates himself with the views of counsel.

In reply, Ms Verma Deepa Jivram invited me to find no merit in the two objections. In specific reply to Mr. Kandeebe's argument relating para 6 (a) of the plaint, counsel submits that the plaintiff's case is that since 2001, the plaintiff contracted the defendants. She thinks that what ever else is not disclosed in the plaint can be gauged from the supporting documents. In her view, the plaint does not have to go into the details. Where contract was concluded, where clearing was to be done, are all matters of evidence. I have addressed my mind to the able arguments of all counsel.

It is trite that parties cannot confer jurisdiction on a Court which lacks the same. They can only choose any of the Courts simultaneously having jurisdiction over the matter. Section 15 of the Civil Procedure Act confers jurisdiction on our Courts, according to:

(a) the place where the contract was made;
(b) the place where the contract was to be performed; and
(c) where the defendant voluntarily resides, carries on business or personally works for gain.

In the instant case, it is an admitted fact that the plaintiff and the defendants have had previous business dealings prior to the institution of this suit. This in my view is a good starting point. That some relationship existed between them is evident from the documents attached to the plaint. While the relationship is admitted, the parties are not agreed as to where the contract was made. I consider this to be a minor point, given that this appears to be one of those cases in modern trade where deals are negotiated and concluded on internet;

one of those cases where the terms of the relationship can only be determined on evidence based on the practice of the parties.

I should note that at the time of hearing the preliminary objections, the Court had concluded the scheduling conference where points of agreement and disagreement were sorted out. It is my considered opinion that the two matters raised by Mr. Kandeebe are indeed points of disagreement. They are, in my view, partly points of law and partly points of fact.

As Law J.A. observed in **Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Ltd [1969] EA 696** at 700:

> "***So far as I am aware, preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer th***e dispute to ***litigation."***

Then at p. 701 Sir Charles Newbold, p. added:

> "***A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts***

pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion."

And in **NAS Airport Services Ltd –Vs- A.G. of Kenya [1959] EA 53,** it was held that though the objection of a preliminary objection is expedition, the point of law must be one which can be decided fairly and squarely one way or the other, **on facts agreed** or **not in issue** on the pleadings and not one which will arise if **some fact or facts in issue should be proved**: (Emphasis is mine).

Applying the above principles to the case now before me, I have already observed that under section 15 of the Civil Procedure Act, a cause of action arises within the meaning of that law at any of the following places:

(i) the place where the contract was made;
(ii) the place where the contract was to be performed or the performance thereof completed; or

(iii) the place where in the performance of the contract any money to which the suit relates was expressly or impliedly payable.

The point made by Mr. Kandeebe about pleadings is very important. It was emphasized by the Supreme Court in **Interfreight Forwarders (U) Ltd –Vs- EADB [1994 – 95] HCB 54.** Holding No. (ii) thereof states:

"***(ii) The system of pleadings is necessary in litigation. It operates to define and deliver with clarity and precision the real matters in controversy***

between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them."

I have looked at the documents said to support the plaintiff's claim. Their contents are of course part of the pleadings. They show that the goods, the subject matter of the contract, were in transit to Kampala via Mombasa. The last destination is given as Kampala, the place of residence of the consignee. By implication, the performance of the contract would have been completed on receipt of the goods by the consignee or its authorized agent. In these circumstances, subject to any evidence to the contrary, the presumption is that the Court is seized not only with territorial jurisdiction but also with jurisdiction over the subject matter of the suit. The burden will be on the party contending otherwise to rebut that presumption.

I now turn to the issue of cause of action.

The general rule is that where there is a right recognized by law, there exists a remedy for its violation.

0.6 r. 1 (a) requires all pleadings, generally, to contain a brief statement of the material facts on which the party pleading relies for a claim or defence. Before rejecting a plaint for non-disclosure of a cause of action, the Court should be duly satisfied that the case as presented before the Court is unmaintainable and/or inarguable.

In the instant case, I have already indicated that it is an admitted fact that the parties have had previous business dealings spanning over a considerable period of time. The plaint shows, perhaps in not so admirable detail, that the defendants were contracted to clear, transport and deliver containers full of merchandise and that some of them are to-date unaccounted for. The plaintiff would of course have been of help to Court if it had singled out the role of each defendant in the alleged violation of its rights. But in **Auto Garage –Vs-Motokov (No. 3) [1971] EA 514,** Spry V.P. summarized the test to be applied in such a situation as follows:

> "***I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment."***

Now the contents of paragraph 6 of the plaint do show, in my opinion, that the plaintiffs enjoyed a right. They also show that the right has been violated and that the plaintiffs hold the defendants liable for the violation. What the plaint is silent about is whether or not the plaintiffs hold the defendants jointly and/or severally liable. It goes without saying, in my view, that a party sued with others ought to know what is being alleged against him. The pleadings ought to show whether or not the act complained of was done by the defendants in their individual capacities or jointly. Accordingly, I consider this to be an

omission in the plaint. In keeping with the test laid down in **Auto Garage Case,** supra however, the omission is curable by amendment. It does not warrant dismissal of the suit or striking out of the plaint, unless of course the plaintiff opts not to remedy it.

For reasons I have endeavoured to give above, Court is of the considered opinion that the grounds of the preliminary objections advanced cannot be disposed off without ascertaining some facts. They are matters appropriately classifiable at a scheduling conference as points of disagreement. I would over rule them, allow the plaintiffs further leave to amend the Amended plaint within 14 working days from the date of this order, and direct that the suit be set down for hearing on it merits.

Costs attendant to the amendment, if any, shall be met by the plaintiff in any event.

Orders accordingly.

Yorokamu Bamwine
J U D G E
18/12/2007

18/12/2007
Joy Ntambirweki holding brief for Kandeebe.
Parties absent.
Court: Ruling delivered.

Yorokamu Bamwine
J U D G E

18/12/2007

Court: Hearing on 20/3/2008 at 9 a.m. Date fixed in the presence of Tendo

Andrew from the plaintiff’s firm.

Yorokamu Bamwine
J U D G E

18/12/2007