THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 251 - 2005

AGRO VALUE PROCESSORS IMPEX (U) LTD ::::::::::::::: PLAINTIFF

VERSUS

UGANDA RAILWAYS CORPORATION ::::::::::::::::::::::: DEFENDANT

BEFORE THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The Plaintiff Company M/s Agro Value Processors Impex (U) Ltd brought this case against the Defendant Uganda Railways Corporation a statutory corporation seeking the payment of the sum of (U) Shs. 21,985,000/= being the value of the goods lost by the defendant, interest on the amount, general damages and costs.

The suit was instituted by the Plaintiff for the benefit of Jubilee Insurance Company of Uganda (the Insurance Company) under the law of subrogation.

The brief facts of the case are that sometime in December 2003, the Plaintiff contacted the Defendant to transport its consignment of enamel ware by rail from Mombasa to Kampala – Uganda. In the consignment to be transported to Kampala was container No. PCIU 967519-7 which

contained 925 cartons of enamel ware. The consignment was delivered by the Plaintiff at the Defendant's railways goods shed in the first week of July 2003 and at the certification which was witnessed by Customs officials, the Plaintiff's officials, Clearing and Forwarding agents and Railway police. The Plaintiff claims that it was found that the container had been tampered with by the agent of the Defendant acting in the course of their employment and as a result the said container had 530 cartons less. The Plaintiff therefore holds the Defendant vicariously liable for the acts of its agents which caused loss to the Plaintiff.

The Defendant, however, denies liability and avers that at the time of verification when the container was opened in the presence of a customs official, police officer, a clearing agent of the Plaintiff and the Defendant's officials all the seals on the container were found intact. The Defendant also denies that the said goods or any part thereof were stolen by its agents whilst at its goods shed or tampered by the Defendant's agents as alleged, and avers that the Insurance Company did not suffer any loss occasioned by it or its agents and that its not liable to pay (U) Shs. 21,985,000/= to the Plaintiff. The Defendant also further averred that the Plaintiff is bound by their usual terms of carriage of goods and thus there was no breach of its duty as a bailee.

The issues for trial were as follows –

1. Whether container No. PCIU967519-7 was tampered with while in possession of the Defendant.

2. Whether any goods contained in the said container were stolen by the Defendant's agents/servants and what was their value.

3. Whether the Plaintiff is entitled to compensation from Defendant.

Mr. J. Luswata appeared for the Plaintiffs while Mr. P. Ahimbisibwe appeared for the Defendants.

Before I address the above issues for resolution I need to address an objection as to a point of law that was raised by counsel for the defendant after the commencement of the trial (during the plaintiff's case) and again during the submissions. It was the contention of counsel that the matter before court is illegal as it is barred by the law of limitation as far as it was filed after twelve (12) months from the time the alleged cause of action arose in contravention of Section 52 of the Uganda Railways Corporation Act (CAP 31).

This section provides that :-

> "*where any action or other legal proceedings is commenced against the corporation in any act done in pursuance of execution, or intended execution of this Act or any public duty or authority in respect of any neglect or default in execution of this Act or of any such duty or authority, the following provisions shall have effect:-*
>
> (a) *....*
>
> (b) *The action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months after the act, neglect or default complained of or in the case of a continuing injury or damage, within six (6) months after its cessation."*

It was the Defendant's contention and submission that having established that 530 cartons were allegedly missing on 9th July 2003, the Plaintiff's alleged cause of action against the Defendant arose on the said date and therefore ought to have filed the suit on or before 9th July 2004, in the premises of Section 52 of the Uganda Railways Corporation Act and not on the 21st March 2005.

In answer to this counsel for the Plaintiff in his submissions opposed the objection and noted that this issue was fit for preliminary trial as a preliminary objection. That the earliest time should have been at the time of the scheduling. That the point was not raised at that time and thus it cannot be raised now.

The relevant rules relating to these objections can be found on Order 6 rule 28 of the Civil Procedure Rules (CPR).

Order 6 rule 28 provides that any party shall be entitled to raise by his pleadings any point of law and any point of law so raised shall be disposed of by the court at or after hearing; provided that by the consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at anytime before the hearing.

Order 6 rule 29 provides that

> "*if in the opinion of the court, the decision of such point of law substantially disposes of the whole suit, or of any distinct cause of action, ground or defence, set-off, counterclaim, or reply therein; the court may there upon dismiss the suit or make such other order there in as may be just.*"

The effect of the rules referred to above were considered by the Supreme Court in the case of **Major General David Tinyefunza and the Attorney General** Constitutional Appeal No. 1 of 1999 [Unreported] where at the commencement of the hearing of the petition by this court, three preliminary objections were raised by the Attorney General.

Oder JSC (as he then was) had this to say on the effect of the rules:

> *"In my view, the effect of the rules under orders referred to appears to be this: the Defendant in a suit or the Respondent in a petition may raise a preliminary objection before or at the commencement of the hearing of the suit or petition that the plaint or petition discloses no reasonable cause of action."*

The majority of the Justices of the Supreme Court in the **Tinyefunza case** (supra) cited with approval the speech of **Romer L.J.** in the case of **Evenett vs Ribbands and Another** [1952] 2QB 198 at 206 where he stated;

> *"For myself, I think it is a pity that point was not set down as a preliminary one; I understand it was estimated to last three days' and I can well believe it would. The point of law if decided, as has been against the Plaintiff, would have been decisive of the case. Although there may have been good reason for not applying, I would have thought this was the very class of case in which an application ought to have been made under Order 25 rule 2 to have the point determined before the hearing …. And have the question decided at that very early stage. I think that where you have a point of law, which, if decided in one was is going to be decisive of litigation, then advantage ought to be taken of facilities afforded… to have it disposed of at the close of pleadings."*

In this particular case the point of law sought to be relied on was not pleaded by the Defendants who instead filed a comprehensive defence to the case and allowed the matter to go to trial. In such a situation Order 6 rule 29 of the CPR gives the Court several options of actions including *"… to make such orders in the suit as may be just…"* I find that the trial

having progressed as it did, this objection was an afterthought which should have been brought at the earliest opportunity which it was not. The just thing to do in these circumstances therefore is to over rule the objection and continue to resolve the dispute as defended in the written Statement of defence.

Issue No. 1: Whether container No. PCIU90519-7 was tampered with while in possession of the defendant

Mr B. N. Bhattacharya (PW2) a Loss adjuster, gave evidence that he had inspected the container on 9th July 2003 at the Railways goods shed, Kampala. Mr Bhattacharya in his capacity as a loss adjuster made a survey report No. M8/21/03 Exhibit P.5. He gave evidence that he had found during his inspection of the container that the padlock number was different and it would not be opened with the insured's key. He also found stains of super glue on the door rivet. He said that it was proved that the rivet was cut neatly without disturbing the doors seals and the cargo was then stolen.

Mr. Bhattacharya also referred to photographs which were taken during the inspection; however these were not produced in evidence. In his report (Exhibit P 5) Mr. Bhattacharya advised that the carrier and the defendant should be held responsible for this loss.

For the defence however Mr. Brogan Musana (DW1) the Senior Marketing Officer of the Defendant Corporation relying on the tally sheet Exhibit P.6, which was filled in during the verification exercise of the containers (which was witnessed by a customs official, police officer, a clearing agent of the Plaintiff and the Defendants officials) testified that all the

seals on the container were found to be intact. There was no mention of any tampering in any way. He further testified that the police report (Exhibit D.1) also disclosed that the seals of the container were found intact. It was therefore his testimony that it was not the defendants who were responsible for the alleged theft.

I have perused the pleadings, the evidence and the submissions of both counsels in this case. It appears that the dispute revolves not so much around whether or not the container was tampered with but rather whether the defendant was responsible for this.

A comparison of the shipping documents (the bill of lading Exhibit P 8) and the tally sheets confirm that the container had a short lading of 530 cartons of Enamel ware. From the evidence Exhibit D1 Mr Musana for the defendants traveled to Mombasa to investigate this loss and wrote a report dated 13th February, 2006. In that report he observed that the container in question was not weighed in at the Changamwe (I believe in western Kenya near the coast) rail weighbridge which was strange. He concluded in his report that the shortage could only be ascertained from the Kilindini Port records in Kenya. Mr. Musana concludes that the defendant cannot therefore be held liable for the loss.

I am inclined to believe the evidence of Mr. Musana in this regard. The fact that the seals were found intact objectively suggests that any tampering took place before the seals were put in place and not after. I also agree with the testimony of Mr. Musana that it is difficult to believe that the container doors were removed from the hinges and put back with *“super glue”* which is widely known to be for domestic use contrary to Exhibit P5.

I accordingly find that the container No. PCIU 90591-7 was never tampered with while in the possession of the Defendants.

Issue No. 2: **Whether any goods contained in the said container were stolen by the defendant's agents/servants and what was their value.**

Given my findings in issue No 1 I answer this second issue in the negative as there is no evidence to suggest that agents or servants of the defendant stole the plaintiff's goods.

Issue No. 3: **Whether the plaintiff is entitled to compensation from the defendant**

The Plaintiff in his pleadings prayed for the payment of the sum of (U) Shs.21,985,000/= the equivalent of the value of the goods lost, interest on the amount, general damages and costs.

Whereas there is evidence to suggest that the plaintiff incurred this loss there is no evidence that the defendants should be held liable for the loss. I according therefore dismiss this suit against the defendant with costs

Geoffrey Kiryabwire

JUDGE

Date: 26/06/08