**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 389 OF 2010**

1. **RAHIMA NAGITA }**
2. **DRAKE KYEYUNE }**
3. **FRED M BAGUMA}..... PLAINTIFFS**

**VERSUS**

1. **RICHARD BUKENYA }**
2. **BN CARGO SERVICES }**
3. **W.E. LINES LTD }**
4. **UGANDA REVENUE AUTHORITY}..... DEFENDANTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA**

**RULING**

This ruling arises from a preliminary objection that the suit against the third defendant discloses no cause of action against it. The plaintiffs filed this suit against the defendants jointly and severally for order of release of motor vehicle and goods including special and general damages and interest. The plaint avers that the first and second defendants are joint owners of motor vehicle BMWX 60JTF chassis No. WBA FB 32040LH 60221, Engine No. 51132290 and the 3rd plaintiff is the owner of motor vehicle No. BMWT 793UDU, Chassis No. WBADR 1204 OBR 97158, Engine No. 38491990. The plaintiffs allege that they engaged the second the second defendant on the 30th of March 2010 to transport their motor vehicles and other assorted goods from London to Kampala. As evidence they attached annexure "A" to the plaint which is a bill of lading for combined transport. The plaint avers that the vehicles arrived in Uganda on the 25th of August 2010 and that it was packed in one container for all the three plaintiffs. That since the goods arrived in Uganda they have tried in vain for the 3rd defendant to release the goods to them. The further aver that the 1st defendant is the agent of the second defendant in Uganda while the 2nd defendant is based in London and has been elusive towards the plaintiffs as far as the transaction is concerned.

The 3rd defendant in paragraph 6 of its written statement of defence pleaded that it would raise a preliminary objection that the suit discloses no cause of action against it.

At the hearing the plaintiff were represented by Counsels Bernard Mutyaba and Dennis Kanabi while the 3rd defendant was represented by Counsel Francis Buwule.

**Preliminary objection of the 3rd Defendant**

Counsel Francis Buwule who raised a preliminary objection on behalf of the 3rd defendant submitted that the objection to the suit against the 3rd defendant was brought under order 7 rules 11 of the Civil Procedure Rules which provides that a plaint shall be rejected if it does not disclose a cause of action. He contended that the plaint does not disclose a cause of action against the defendant.

Counsel contended that a look at paragraph 6 of the plaint shows that the plaintiff sued the defendants jointly and severally claiming for release of goods which they contracted the second defendant to transport from England. They further allege the goods described in the plaint were transported by the 3rd defendant and they attach the relevant bill of lading as annexure "A" to the plaint. Annexure "A" is a contract of shipment between the second defendant as shipper and the 3rd defendant as the shipping company with the first defendant being the consignee of the goods. Counsel asserted that nowhere in the plaint do the plaintiffs plead any relationship with the 3rd defendant. He concluded that there is no nexus between the plaintiff and the 3rd defendant.

The 3rd defendant's counsel contended that the plaintiff's claim for release of goods under the plaint cannot be enforced against the 3rd defendant. He submitted that there could have been a contract between the plaintiff and 2nd defendant but as between the 3rd defendant and 2nd defendant, the contract of shipment shows that the plaintiffs are strangers and they cannot purport to enforce that contract. He submitted that on the basis of the plaint no cause of action was disclosed against the 3rd defendant.

He submitted that under order 7 rule 11 such a plaint ought to be rejected as against the 3rd defendant with costs. The rule is mandatory. Counsel cited that case of **Auto Garage vs. Motokov 1971 EA 514** for the proposition that the rule in question is mandatory. In establishing whether a plaint discloses a cause of action or not, the court only examines the plaint. He prayed that I reject the plaint with costs.

**Reply by plaintiff's counsel**

In reply Counsel Bernard Mutyaba submitted that the plaint discloses a cause of action against the 3rd defendant. A number of decided authorities have thrown light on what constitutes a cause of action. He relied on **Auto Garage vs. Motokov 1971 EA 514.** He contended that the authority shows in brief that for a plaint to disclose cause of action, three elements have to be shown. (1) That the plaintiff enjoyed a right (2) that the right has been violated and 3) that it is the defendant who violated that right. He contended that it is specifically pleaded in the plaint under paragraphs 6 and 7 that the plaintiffs engaged the first and second defendant to transport 2 motor vehicles among others. The 3rd defendant who is a shipper has hitherto refused to release those two motor vehicles.

Counsel referred to paragraph 7 of the plaint and contended that the 3rd defendant does not dispute the fact that it is holding on to the motor vehicles. In 7 of the 3rd defendants WSD (c) of paragraph 7, it concedes that it is indeed retaining the consignment belonging to the plaintiffs and that it is only waiting for settlement of an invoice alleged to have been raised for the services rendered in the transaction. Auto Garage case specifically at page 517 gives this court discretion to allow for an amendment where the facts upon which a cause of action is based have not been sufficiently pleaded. The East African Court of Appeal considered the provisions of order 6 rule 11 equivalent to the Ugandan order 6 rule 19 and held that the court can exercise its inherent powers to order for an amendment to clarify on those aspects that ought to have been provided for under a particular cause of action if such amendment is meant to enable the court to effectually and effectively decide the matter in controversy. He submitted that plaint discloses a cause of action against the 3rd defendant and that if they are any other details, that court deems necessary to be provided for, he prayed that the court grants leave to amend the plaint pursuant to order 6 rule 9 of the Civil procedure Rules and that the objection is overruled.

Rejoinder:

In rejoinder Counsel Francis Buwule submitted that the provisions of order 7 rule 11 of the Civil Procedure Rules are mandatory and it is settled law that no amendment can be allowed on a plaint which discloses no cause of action. As far as the submission relying on the case of **Auto Garage** counsel submitted that 3 aspects of a cause of action must be present, he submitted that firstly the plaintiff must have enjoyed a right as against the defendant. Secondly that the right has been violated and that it is the defendant who had violated that right. Contended that there has to be a nexus which is absent in the plaintiffs case. Paragraph 6 of the plaint avers that the plaintiff did business with the 1st and 2nd defendants. Annexure "A" to the plaint is the Bill of Lading. It discloses a completely different contract between 3rd defendant and the 2nd defendant. This court can only enforce the contract as between the 3rd defendant and the second defendant who is a consignee. The court cannot enforce a contract in favour of strangers to the agreement. He invited the court to examine the pleadings and conclude that on the face of the plaint, there is no relationship disclosed between the plaintiffs and the 3rd defendant. Lastly, in paragraph 5 of the plaint, the plaintiffs ask for release of the vehicles but these vehicles are the subject of a shipping contract to which the plaintiffs are strangers. He prayed that the plaint be rejected under order 7 rules 11 of the Civil Procedure Rules with costs and any earlier order made by the registrar be set aside.

**Ruling**

The provision that a plaint be reject is found under order 7 rule 11 (a) of the Civil Procedure Rules which provides that a plaint shall be rejected for "(a) disclosing no cause of action". The second limb of the rule is order 7 rules 11 (d) which provides that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law". The two sub rules of order 7 are related. Where a plaint is barred by law such as the law of limitation, no

cause of action is disclosed. On the other hand order 7 rule 11 (a) is wide enough to incorporate failure to plead necessary facts to disclose a cause of action against the defendant.

In the case of **Auto Garage versus Motokov (1971) EA 514** it was held that the provision that a plaint be rejected for disclosing no cause of action is mandatory. It must be emphasised that order 7 rules 11 uses the mandatory word "shall" in the sentence: "The plaintiff shall be rejected". Secondly the **Auto Garage** Case (Supra) decides that a plaint which discloses no cause of action is a nullity and cannot be rectified through amendment. It also decides that an amendment to a plaint will not be allowed to introduce a cause of action barred by the law of limitation.

In deciding whether or not a suit discloses a cause of action, the court examines the plaint only and any attachments to it and assumes that the facts alleged in the plaint are true. This was held in the case of **Attorney General vs. Oluoch (1972)** EA.392 following the decision in **Jeroj Shariff & Co Vs Chotai Family Stores (1960 EA 374)**. In this exercise the court examines the plaint only and does not consider the written statement of defence.

Having set out the basic elements of the law, I have carefully considered the submissions of counsel and examined the pleadings of the plaintiffs in the plaint. The crux of the 3rd defendant's preliminary objection is that there is no enforceable contract between the plaintiffs and the 3rd defendant. This is based on the pleading in the plaint namely paragraph 6 (b) thereof that the plaintiffs engaged the second defendant to transport their goods from London to Kampala. In support of this averment the plaintiffs annexed annexure "A" which is the shipping document (the bill of lading). The face of the bill of lading shows that the shipper is BN Cargo Services while the consignee is Richard Bukenya of P.O. Box 22179 Kampala. Richard Bukenya is the first defendant. The party to be notified in the bill of lading is also Richard Bukenya. Paragraph 2 of the plaint explicitly avers that the first and second defendants namely Richard Bukenya and BN Cargo Services are international transporters/carriers of cargo engaged by the plaintiffs to deliver their goods to Kampala from London.

The plaint introduces some ambivalent averment in paragraph 3 when it pleads that "the 3rd defendant is a shipper who carries on the business of shipping and was engaged for that purpose". It is not expressly indicated who engaged the 3rd defendant on the face of the pleadings except by reading annexure "A" to the plaint. This is the only instance where the 3rd defendant is mentioned in the facts constituting the cause of action. The question is whether this averment coupled with other facts pleaded is sufficient to establish a cause of action against the 3rd defendant for release of the vehicles at the instance of the plaintiffs.

The submission of the 3rd defendant's counsel is based on the doctrine that only a party who is privy to a contract may sue upon it and is further based on annexure "A" attached to paragraph 6 (b) of the plaint. Relating this to paragraph 3 of the plaint, it is apparent on the face of the document that the 3rd defendant was engaged by the second defendant. According to paragraph 2

of the plaint the first and second defendants are international transporters and carriers of cargo engaged by the plaintiffs. The basis of the 3rd defendant's objection is that the document which gives entitlement to claim the goods from the 3rd defendant does not name the plaintiffs. This document is a bill of lading annexure "A" to the plaint. The shipper on the basis of the said bill of lading is only obliged to hand over the goods to the consignee named in the bill of lading namely Mr Richard Bukenya, the first defendant. The submission of the 3rd defendant's counsel is based on the rights and obligations conferred on parties by a bill of lading which is a document of title. The legal implications and rights and duties conferred by a bill of lading are of essence in this matter.

**Halsbury's Laws of England 4th edition reissue, vol. 43(2) paragraph 1532,** defines a Bill of Lading as a document signed by the ship owner, or by the master or other agent of the ship owner, which states that certain specified goods have been shipped in a particular ship and which purports to set out the terms on which the goods have been delivered to and received by the ship. The general rule is that the owner of the goods is the person named in the Bill of lading as consignee and the one who holds the original bill of lading. In the case of **P & O Nedloyd Uganda Ltd Vs Tesco International Ltd C.A. C.A. 86/2004** the learned Justices of the Court of Appeal in Uganda held that a Bill of lading is a document of title. However this is a general rule and there are exceptions to it. According to **Stroud's Judicial Dictionary of Words and Phrases Sweet and Maxwell 2000** edition:

> "A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for certain freight. The contract, in legal language, is a contract of bailment (2 Raym. Ld. 912). In the usual form of the contract, the undertaking is to deliver to the order, or assigns, of the shipper. By the delivery on board, the ship-master acquires a special property to support that possession which he holds in right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act, sufficient in law, to transfer property. The endorsement of the bill of lading is simply a direction of the delivery of the goods" (per Loughborough C.J., Lick barrow v. Mason, in, HL Mason v. Lick barrow, 1 Bl. H. 359). A bill of lading is for a separate parcel or parcels of goods..."

**In Heskell v. Continental Express [1950] 1 All E.R. 1033 Devlin J held at page 1042 that:**

> A bill of lading, which is in the popular sense a negotiable instrument, is a document on the accuracy of which much commerce may depend, and carelessness with regard to it is surely something, counsel argues, for which the law can find a remedy. On the commercial aspects of this argument, I shall say a word later. On the legal issues, my views are confined by the authorities. The reason why a bill of lading is a document of title is because it contains a statement by the master of a ship that he is in possession of cargo, and an undertaking to deliver it. It is not easy to see why carelessness in making this sort of statement should be distinguished from negligent mis-statement generally. In

> any event, I think that the authorities show that the issuing of a document of title or negotiable instrument is not of itself the subject of any general duty. Carelessness in the drawing of a bill of exchange has frequently been considered by the courts.

In the case of **S.S. Ardennes (Owner of Cargo) v. S.S. Ardennes (Owners) [1950] 2 ALL ER 517** Lord Goddard CJ held that the bill of lading was not in itself the contract between the ship owner and the shipper, and, therefore, evidence was admissible of the contract which was made before the bill of lading was signed and which contained a different term. Between pages 519 bottom and 520 he said:

> It is, I think, well settled that a bill of lading is not, in itself, the contract between the ship-owner and the shipper of goods, though it has been said to be excellent evidence of its terms: see **Sewell v Burdick, per Lord Bramwell (10 App Cas 105**), and **Crooks v Allan**. The contract has come into existence before the bill of lading is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board. No doubt, if the shipper finds that it contains terms with which he is not content or that it does not contain some term for which he has stipulated, he might, if there were time, demand his goods back, but he is not, in my opinion, thereby prevented from giving evidence that there was a contract which was made before the bill of lading was signed, and that it was different from that which is found in the document or contained some additional term. He is not a party to the preparation of the bill of lading, nor does he sign it. It is unnecessary to cite further authority than the two cases which I have already mentioned for the proposition that the bill of lading is not itself the contract, and, therefore, in my opinion, evidence as to the true contract is admissible. ..."

As far as the objection of the 3rd defendant is concerned the doctrine that only a party privy to a contract may sue on it is a well known common law doctrine reviewed by the House of Lord in the case of **Scruttons Ltd vs. Midland Silicones Ltd [1962] 1 ALL ER 1** per Viscount Simonds where it was observed to be a fundamental principle that only a person who is a party to a contract can sue on it at pages 6 – 7

> "...it is a very different matter to infer a contractual relation between parties who have never entered into a contract at all. In the present case the cargo owners had a contract with the carrier which provided amongst other things for the unloading of their cargo. They knew nothing of the relations between the carrier and the stevedores. It was no business of theirs. They were concerned only to have the job done which the carriers had contracted to do. There is no conceivable reason why an implication should be made that they had entered into any contractual relation with the stevedores...."
>
> ... Learned counsel for the respondents met it, as they had successfully done in the courts below, by asserting a principle which is, I suppose, as well established as any in our law, a "fundamental" principle, as **Viscount Haldane LC called it in Dunlop Pneumatic**

> **Tyre Co Ltd v Selfridge & Co Ltd ([1915] AC at p 853**), an "elementary" principle, as it has been called times without number, that only a person who is a party to a contract can sue on it."

This fundamental principle was upheld in Uganda by the Supreme Court in the case of **Shiv Construction vs. Endesha Enterprises Ltd [1999] 1 EA 329**. In the case the parties entered into a contract to form a joint venture company. Among the issues was whether a beneficiary who was not a party to the contract could sue on it. The Supreme Court of Uganda held that though a contract for the benefit of a third party did not enable the third party to assert rights arising under it, the contract remained enforceable between the promisor and the promisee. Moreover, in proper cases a court could make an order of specific performance in favour of third parties at the instance of one of the contracting parties. The 3rd defendant's objection is squarely on this principle. Otherwise the plaintiffs pleading reveal that the 3rd defendant is in possession of the goods which belong to them.

In the above case there was a specific contract signed between Endesha Enterprises and Shiv Construction. However a bill of lading though generally a document title, is not conclusive. The plaintiffs aver that they instructed the first and second defendants to convey the goods to Uganda. On the face of the pleadings the first and second defendant are agents of the plaintiffs while the plaintiffs by pleadings are undisclosed principals as far as the bill of lading is concerned. The plaintiffs desire the release of their goods. To bar them at this stage without hearing evidence as to their connection as principals of the first and second defendant and without giving them an opportunity to prove their title does not fall squarely within the ambit of order 7 rule 11 (a) of the Civil Procedure Rules. Evidence of a prior transaction or contract before the bill of lading was issued unilaterally by the master or agent of the ship-owner may be adduced. As stated in the case of **Ardennes** (Supra) a "bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board." Moreover the face of the bill of lading shows that it is for "combined transport."

The goods on the face of the pleadings belong to the plaintiffs but the 3rd defendant challenges their locus standi to sue it on the basis of annexure "A" which does not name them. In my judgment this objection is premature and should be handled as a point of law after evidence has been adduced. I am fortified in this holding by the case of **NAS Airport Services Limited v The Attorney-General of Kenya [1959] 1 EA 53** (CAN) decided by the Court of Appeal at Nairobi before Sir Kenneth O'Connor P, Gould and Windham JJA. Windham JJA held at page 58 – 59 that where facts are in dispute a preliminary objection should not be upheld until the dispute is resolved. In this case if the court finds that the plaintiffs are the owners of the goods pleaded and that they did instruct the first and second defendants who in turn instructed the 3rd defendant, the plaintiffs would still be entitled to the goods in possession of the 3rd defendant. In any case if they do or not the 3rd defendant would be indemnified in costs or may be entitled to cost of demurrage. In **NAS Airport Services Ltd** (Supra) Windham JJA who delivered the judgment of

court states at pages 58 – 59 as far as an equivalent of order 6 rule 29 of the Civil Procedure Rules is concerned:

> "Clearly the object of the rule is expedition. But to achieve that end 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 not arise if some fact or facts in issue should be proved; for in such a case the short-cut, as is so often the way with short-cuts, would prove longer in the end. On this ground an order made under the English rule was set aside in **Western Steamship Company Limited v. Amaral Sutherland & Company Limited (5),[1914] 3 K.B. 55**. And in such a case, as was pointed out in **Scott v. The Mercantile Accident Insurance Company (6) (1892), 8 T.L.R. 431**, where a refusal to make such an order was upheld, it is "very desirable that the trial should not be delayed, for during the delay witnesses might die or go abroad or their memory of occurrences might become weak or confused," and it is "desirable, therefore, that such issues should be tried as soon as possible." The principle to be applied in making such an order is very clearly expressed in the following two passages from the judgment of Humphrey, J., in **S.C. Taverner & Co., Ltd. v. Glamorgan Country Council (7) (1940), 57 T.L.R. 243**: "It is right to say by way of preliminary observation that the cases in which O. XXV, r. 2, can be conveniently invoked with a view to the saving of expense or time must be few and far between. I am not the only judge who has taken that view, although I was not aware of that when these proceedings came before me. I have been referred by leading counsel for the plaintiffs to what may be described as a wealth of authority, and it appears that many judges have made the same observation. It is very rarely that the facts are so clearly and definitely stated in pleadings (in this case supplemented by the clear and precise language of a document in writing–namely, the contract between the parties) that the court can say that it has all the necessary facts before it and can therefore decide the case, without hearing any witnesses or any more about it, on the pleadings and certain admitted documents."

Unless the facts are so clear as to require no evidence, is when order 7 rule 11 can be invoked. In assessing this the court retains a discretionary power as to whether the point of law is of a nature which can handled preliminarily or should await adducing of evidence. Because the point of law depends on a bill of lading annexure "A" and in terms of order 15 rule 2 of the Civil Procedure Rules, the 3rd defendants preliminary objection cannot be handled preliminarily but should be set up as an issue for determination in the main suit after hearing the evidence. The 3rd defendant's objection on cause of action is stayed and the point of law may be raised again after the plaintiffs have adduced evidence. As far as the application for amendment is concerned, it will be handled on its merits after a proper application has been made. The costs of this objection shall abide the outcome of the main suit. All execution proceedings are stayed until the final outcome of the suit.

Ruling delivered this 15th of August 2011

Hon. Mr. Justice Christopher Madrama

In the presence of:

Dennis Kanabi and Barnard Mutyaba for the plaintiff,

Frances Buwule for the 3rd Defendant,

Second plaintiff in court.

Patricia Akanyo Court clerk

Hon. Mr. Justice Christopher Madrama