

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

HCT - 00 - CC - CS - 468 - 2012

KEN GROUP OF COMPANIES LTD ::::::::::::::::::::::::::::::
PLAINTIFF

VERSUS

MULTIPLE FREIGHT SOLUTION LTD (2012) ::::::::::::::
DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

This suit is brought by Ken Group of Companies Ltd herein after referred to as the Plaintiff against Multiple Freight Solutions Ltd (2012) referred to in these proceedings as the Defendant.

The Plaintiff's claim against the Defendant is for recovery of goods encased in two containers that were transported to Uganda by the Defendant on behalf of the Plaintiff. The Plaintiff also claims for the return of the custom documents in respect of the importation of those goods, they also seek an order for payment of demurrage arising out of the Defendant's failure to return the said containers to the shippers in time, special and general damages; costs of the suit.

To understand this case properly, it is necessary to outline the background of the suit. The Plaintiff contracted the Defendant to clear and transport the cargo from Mombasa to Kampala upon terms and rates stipulated in a letter dated 26th March 2010. One of the conditions was that the contract was subject to handing over a full set of complete documents within 3 days before arrival of the vessel; that is, properly endorsed bills of lading, packing list, commercial invoice and certificate of incorporation. Sometime in March 2012, the Plaintiff contracted the Defendant to transport 6 containers from Mombasa to Kampala before 23rd March 2012. The vessel containing the Plaintiff's cargo arrived in Mombasa on 31st March 2012. The Plaintiff delivered to the Defendant the documents of title of the containers to clear and transport the same to Kampala on 3rd April 2012. The containers were ready for transportation on 18th April 2012 but there were no trucks to transport them. Trucks were allocated on 23rd April 2012 and the cargo arrived at the Plaintiff's premises on 7th May 2012 per the activity report. These containers, 6 in number, were delivered.

Under the same terms and rates, the Plaintiff again imported goods in 2 containers namely; MSKU 887467 and No. CLHU 4804190. It fully paid the Defendant to transport them to its premises in Kampala. The Defendant transported the goods upto Kampala, but claiming that the Plaintiffs still owed it USD 10,080 as demurrage incurred on the previous transaction of transporting the 6 containers, detained them as a lien, and demanded that the money be paid before they could release these containers to the Plaintiff.

It is on the basis of the foregoing that the Plaintiff filed this suit. In its defence, the Defendant gave reasons for detaining the goods. It said it retained the goods because it had incurred costs of USD 10,080- in the earlier transaction of the 6 containers by way of demurrage that had accumulated because of the delay of returning the containers to Safmarine, who had shipped them.

The Defendant relied on certain clauses in their agreement dated 26th March 2010. It said that although it was an express provision that the Plaintiff was to deliver the relevant documents pertaining to importation 3 days before the arrival of the vessel at Mombasa, the Plaintiff did not. It explained that it strongly stated that although the vessel in the case of the 6 containers arrived at Mombasa on the 31st March 2012, it was not until the 3rd April 2010 that the Plaintiff delivered the documents to them. That this on its own was a delay that contributed to the late return of containers to Safmarine.

It also said that the Plaintiff delayed in confirming payment of freight which he only did on the 12th April 2012; which also therefore delayed the acquisition of trucks. The Defendant only obtained trucks for allocation on the 23rd and 24th April 2012, loaded the goods 3 days later on 27th April 2012 and 28th April 2012 and the last truck left port in Mombasa on 28th April 2012. Due to these delays, the Defendant contended, the delivery of goods to Kampala was obviously delayed and only arrived in Kampala on the 7th May 2012.

The Defendant further contended that it is these delays that caused the late return of the containers to Surfmarine on 2nd June 2012 and

as a result, demurrage was incurred to the sum of USD 10,080- which the Defendant attributed to the Plaintiff.

Furthermore, that having demanded for payment for the demurrage and the Plaintiff refusing to pay, the only alternative was to detain the Plaintiff's cargo in containers No. MSKU 8878467 and CLHU 4804190.

By way of counterclaim the Defendant claimed for the outstanding demurrage costs in the sum of USD 10,080-. The Defendant alleged that as a result of the delay of the Plaintiff in handing over the full set of complete clearing documents within 3 days before arrival of the vessel, further delay in confirming payment of freight charges, the Defendant incurred additional demurrage costs in the sum of the USD \$ 10,080- which was fully communicated to the Plaintiff who ignored, neglected, failed or refused to pay. Consequently the Defendant has suffered loss inconvenience and damages for which the Plaintiff is held liable.

The Defendant therefore sought for USD\$ 10,080-, interest thereon at 25% per annum from 7th May 2012 until payment in full, general damages for breach of contract and costs of the suit.

The issues for determination by this court, as agreed by both parties are:

1. Whether the Defendant lawfully with held the Plaintiff's containers and customs documents?
2. Whether the Plaintiff owes the Defendant USD\$ 10,080- in demurrage?

3. What remedies are available to the parties?

On the first issue, whether the Defendant lawfully withheld the Plaintiff's containers and customs documents, the Defendant claimed that demurrage had accrued because of the delays caused by the Plaintiff which led to the extended detention of the containers. That this resulted in the late return of the containers to the shipper.

To find out whether the Plaintiff caused the delay of the return of the containers, the answer lies in the Activity Report supplied by the Defendant, the contract of 26th March 2010 and the Detention Invoice issued by Safmarine, the shipper.

From the activity report, it is not in doubt that the goods arrived at Mombasa on 31st March 2012. It is also clearly shown in the activity report that the goods departed Mombasa on the 28th April 2012 and arrived in Kampala on 7th May 2012.

Evidence is abundant and undisputed from both the Plaintiff's and defendant's witnesses, that the containers were received back by Safmarine on 2nd June 2012.

DW 1 testified that the Plaintiffs delivered to them the documents for the cargo on the 3rd April 2012 in breach of their agreement on 26th March 2010 which amongst others provided that the full set of complete documents be delivered 3 days before arrival of the vessel. Indeed clause 6 provided for handing over a full set of complete clearing documents within 3 days before arrival of the vessel i.e. two in number properly endorsed original bills of lading, packing list,

commercial invoice and certificate of incorporation. There is no doubt from the evidence which remains undisputed that the Plaintiff handed over the documents 3 days after the arrival of the ship.

Counsel for the Defendant submitted that the Plaintiff should have handed over the papers 3 days before the docking of the vessel. The contract however, provided for handing over documents **within** 3 days before arrival of the vessel which in my opinion is quite different from doing the act 3 days before.

The issue that stands out is whether the belated hand over of documents by 3 days caused the extended detention of the containers.

In his evidence, DW1 stated that apart from handing over the documents late, the Plaintiff delayed in confirming payment of freight charges and therefore they could not requisition for allocation of trucks in time. He said that it was not until the 12th April 2012 that the Plaintiff confirmed that freight charges had been settled in Kampala.

The Plaintiff's reply was that failure to confirm payment of freight charges could not have been the cause of the delay because in the first place, even after confirmation was made, it was not until the 18th April 2012 that they got the allocation of trucks. In my view, this position of the Plaintiff is buttressed by the provision of the very agreement they entered into. According to the agreement of 26th March 2010, payment of the freight of goods would only arise on delivery of the goods at the Plaintiff's premises.

Clause 9 of the agreement provides that *“payments to be made in our Kampala office upon delivery of cargo”*

That being the agreed position, the issue of confirmation of payment before the Defendant could obtain allocation of trucks or transport the cargo to Kampala did not arise and therefore cannot be relied on as a reason for the delay.

Furthermore, even after confirmation on the 12th April 2012, there was no allocation of trucks until the 18th April 2012 6 days later. Worse still, although the trucks had been obtained on the 18th April 2012, the Defendant did not load until the 23rd and 24th April 2012, 5 days later. Surprisingly enough, it was not until the 27th and 28th April 2012, 3 days later that the trucks left Mombasa.

In a letter dated 6th September 2012, Counsel for the Defendant also gave another reason for the delay in loading the trucks attributing it to the holidays that are normally held in remembering the crucifixion of Jesus Christ. He wrote:

‘Owing to the Easter weekend of 20th - 23rd April 2012, the trucks were allocated on 23rd and 24th April 2012 and the same were loaded and left the port on 27th April 2012’

During cross-examination, DW1 owned the contents of this letter in a bid to confirm that the Easter holiday contributed to the delay in loading the trucks.

I have had occasion to look at the calendar of 2012 and it is my finding that there was only one Easter holiday and this holiday was

from 6th - 9th April 2012. To therefore say that there was an Easter holiday from 20th - 23rd April 2012 and that this holiday caused delay in loading trucks that had been allocated for the Defendant's transportation of the cargo is not only misleading but totally unsupported. The Easter holiday therefore could not have caused the delay. The other aspect for consideration is the gap between the arrival of goods in Kampala and the return of the goods to Mombasa.

In their evidence the Plaintiff stated that they received the goods on 7th May 2012, that they offloaded and returned the containers on the same day. This is supported by the activity report which shows the arrival of goods on 7th May 2012. The Defendants are also agreed that the goods arrived on 7th May 2012 and through mail emanating from Scott Robertson, the Marketing and Development Manager of the Defendant, there is no doubt that the containers left the premises of the Plaintiff on the same day. The foregoing means that from that day upto the 2nd June 2012, the containers were in the possession of the Defendant. Indeed when the Plaintiff was notified of the demurrage that had accumulated, it explained that it was not liable, and in a meeting with Scott Robertson, it was made clear that the responsibility fell upon the Defendant. This was communicated to the head office by Mr. Scott.

He wrote in Exhibit 12;

“During a meeting with Mr. Edward today, he is asking that we negotiate on the USD\$ 10,080- on the 6 containers. He feels that the delay in returning the containers cannot be held accountable against his company. These containers were delivered on the 7th May 2012 and then directly returned, however, the Safmarine invoice has the dated

return on the 2nd June 2012, a full 26 days later allowing for the 6 days to return to Mombasa, this is 20 days over and above what he should be responsible for.”

By Scott's letter, one clearly sees that only 6 days were required to return the containers to the shipper. That the Defendant kept them for 26 days as if to confirm its style of delays as seen earlier in this judgment, the resultant demurrage cannot be borne by the Plaintiff. Even if there was evidence that prior to the delivery of the cargo in Kampala, the Plaintiff had caused delays, he would still have been liable only from the 28th April 2012 - 13th May 2012. I say from 28th April 2012 because that is when the free time from accumulating demurrage or detention expired. I say they could only pay upto 13th May 2012 because those would be the 6 days after the release of the containers by the Plaintiff, which would be the period within which the containers would arrive in Mombasa if taken immediately.

The court will however, not go into this because it is the court's finding that the Defendant had no reason to delay looking for transport as soon as the documents were given to it since confirmation of payment was not one of the terms of the agreement.

Furthermore, the delay can only be attributed to the Defendant themselves because they stayed away from loading the trucks for a whole week by giving themselves an Easter holiday that had long passed as early as the 8th April 2012.

There is no explanation as to why the trucks stayed in Malaba for over the agreed 72 hours, having arrived there on 30th April 2012

only to leave on 5th May 2012. At no point therefore can one attribute the delays on the Plaintiff.

More so, there is completely no explanation by the Defendants of the delay to return the containers after they had been released by the Plaintiff, which took 26 days instead of 6 days.

It is in this regard therefore, taking into account all the circumstances of the case, that this court finds that the delay which led to the accumulation of demurrage of USD\$ 10,080- was occasioned solely by the Defendant; who having caused the demurrage and therefore responsible for the consequences thereof could not execute a lien on the Plaintiff's goods in respect of a cost that had been caused by the Defendants themselves.

It is therefore my finding that the Defendant withholding of the Plaintiff's goods was unlawful. It is also in that regard that I find the counter claim by the Defendant devoid of any evidence to support it and I accordingly dismiss it with costs.

On the second issue, whether the Plaintiff owes the Defendant USD\$ 10,080- in demurrage, I have already held herein above that the demurrage was caused by the Defendant's fault and I therefore find that the Plaintiff does not owe the Defendant USD\$ 10,080- and part thereof.

The last issue is one of remedies. Amongst the prayers for the Plaintiff were special and general damages. Special damages must not only be specifically pleaded but must also be proved.

In the body of the plaint, the Plaintiff does not claim special damages and in the premises, none are awarded save that the Defendant having caused the delays themselves and this court having found that the Plaintiff is not liable for the detention charges arising out of the late return of containers to the shipper, the Defendant shall be liable for all the demurrage and detention charges that accrued in respect of the two containers that they brought into the country on the 7th May 2012, from that date till they are handed over.

As to general damages, it is the law that general damages are compensatory in nature and are intended to make good to the sufferer as far as money can do so, the loss he/she has suffered as the natural result of the wrong done to him.

Okello James V Attorney General HCCS 574/2003. This principle is well enunciated in **Hadley V Baxendale** (1854) EWHC J70, where this Lordship dealing with such damages wrote:

“Where the parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, and the possible breach of it.”

General damages are awarded at the discretion of court and are always as the law will presume to be the natural consequence of the Defendant’s act or omission. **James Fredrick Nsubuga V Attorney**

General HCCS 13/1993 **Katakanya & Others V Raphael Bikongoro** HCCA 12/2010.

In the assessment of the quantum of damages, courts are guided mainly, by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach. **Uganda Commercial Bank V Kigozi [2002]** EA 305.

The damages envisaged in such a situation are those sums in which the circumstances fall to be paid by reason of the breach of duty or obligation as imposed by the contract. **Hall Brothers SS Co. Ltd V Young** [1939]1 KB 748.

In the instant case, from 20th May 2012 when the Defendant brought the Plaintiff's goods to Kampala, it deprived the Plaintiffs of their trade goods and therefore must have affected their income. The Plaintiff is a business company whose stock was the basis of survival in the business world. When the Defendant retained the trade goods, they ought to have known that loss would be occasioned. In the premises one can safely hold, which I hereby do that the Plaintiff suffered loss and must be recompensed

In his evidence, PW1 testified that the goods were intended to manufacture scholastic material, books and files. That because they were withheld, they failed to make 832 books of A4 size, 36,125 files and lamination of book covers and lever arch covers leading them to great loss. That if the Plaintiff had got the goods and continued in the usual manufacture stated above, they would have reploughed the

money seven times over which was not the case thus leading to great loss.

The Plaintiff has given several figures of the money it was likely to get but none of this was supported by receipts or documents to illustrate that this was money it would have earned in the ordinary course of business.

This being the case, the court is left with more or less, its discretion to fall back to. **Bhadeba Habit Ltd V Commissioner General URA** [19977 - 2005]1 KL 202.

Considering that the Plaintiff was deprived of its goods for two years now, even when court had ordered that they be returned, taking into account the inconvenience suffered, time lost, and value of the goods, it is my view that an award of general damages of 80,000,000/= is appropriate and the Plaintiff is so awarded.

It is also ordered that the Defendant shall bear the costs of this suit.

In the sum total judgment is entered in favour of the Plaintiff as follows:

- a) The Defendant hands over the goods in containers No. MSKU 8878467 and CLHU 4804190 with all relevant customs documents.
- b) The Defendant pays all the demurrage and detention arising from the delayed return of containers to Mombasa and that which accrued in respect of the two containers mentioned in (a) from 7th May 2012 till hand over.

- c) General damages of 80,000,000/=.
- d) Costs of the suit.

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David K. Wangutusi
JUDGE

Date:

02/09/14

9:15am

- Mr. John Magezi of Defendant present
- Plaintiff absent and unrepresented too.
- Juliet Kamuntu - Court Clerk

Court: Ruling delivered on request by Hon. Justice David
Wangutusi

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Opesen Thadeus
ASST. REGISTRAR

Date: 02/09/2014