

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

HCCS NO. 862 -2017

KYAMUHUNGA TEA CO. LIMITED:.....PLAINTIFF

VERSUS

DAKS COURIERS LIMITED:..... DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT

Kyamuhunga Tea Co. Limited a Limited liability company hereinafter referred to as the Plaintiff brought this action against Daks Couriers Limited the Defendant hereinafter.

The Plaintiff claims special and general damages, interest and costs for breach of contract and negligence.

The background to this suit as discerned from the pleadings are as follows; the Plaintiff had tea herein after referred to as the Consignment to transport to Mombasa. It therefore sought and engaged the Defendant to provide the product forwarding and transporting services. To that regard they entered into an agreement **ExhP1**.

On the 21st of May 2017 the Defendant took delivery of the Consignment which was loaded on the Defendant's truck Registration number UAP 360X. The end value of the Consignment was USD 49,700.16 which at that time was equivalent to UGX. 180,958,289/=.

The Consignment must have been removed from the original truck and reloaded on another truck whose registration number as the Customs information at Malaba showed was UAZ 146B. It was cleared at Malaba border thus entering Kenya for Mombasa.

The Consignment seems to have disappeared after passing through Malaba Customs because it was never seen again. The Defendant had no answer and the search by the Plaintiff bore no fruits. Kenya Revenue Authority concluding that the consignment had been dumped in Kenya, charged the Plaintiffs a sum of UGX. 90,479, 141/= being a fine of 50% against the value of the consignment as provided for under Regulation 104 sub-regulation 22 of the East African Community Customs Management Regulations 2010.

The Plaintiffs were also saddled with VAT of 16% amounting to UGX. 21,055,733/= paid by the warehouse where the goods were detained.

The Plaintiff claimed she suffered financial loss and general damages because of the Defendant's breach of contract and negligence.

In her Written Statement of Defence, the Defendant denied any negligence and stated that she fulfilled her obligations under the Agreement with the Plaintiff. She contended that she sub-contracted the service to Global Turpco Holdings (Group) and InterTrac Group (E.A.O Logistics Limited) who were legitimately involved in the business of transportation. That she did the recruitment after due diligence and careful consideration.

The Defendant exhibited surprise to learn from Malaba Customs that the Consignment which was originally loaded on Truck UAP 360X was transferred to UAZ 146B and that it never reached the destination port.

It is important to mention at this stage that all the contentions and averments in the Written Statement of Defence remained unsupported by oral evidence because the suit was heard *exparte* since the Defendant and her Advocate for no apparent reasons stayed away on the date of hearing.

The issues as agreed upon by the parties were as follows;

- i. Whether or not the Defendants were in breach of the contract
- ii. Remedies.

From the Defendant's own admission in the Defence, there is no doubt that the parties entered into a product forwarding and transport service agreement. The Defendant admitted so in paragraph 5(1) of the Written Statement of Defence. She wrote;

“The Defendant and Plaintiff entered into an agreement for forwarding, delivering and transportation services the Defendant provided.”

That the consignment was handed over to the Defendant was also clearly admitted in paragraph 5(vii) of the Written Statement of Defence which read;

“The Defendant loaded the Plaintiff's goods on motor vehicle no. UAP 360X named “Consignment No. 30” at the Plaintiff's premises.”

It is worthwhile noting the salient features of the Agreement, **ExhP1** which were provided for in clauses 3, 4, 5 and 6. They provide;

“ 3. CLEARANCE TURNAROUND AND STATUS REPORT.

3.1 DAKS shall use its best endeavors to clear and dispatch the Products within reasonable time and in accordance with the Modus Operandi contained in Appendix C.

3.2 KTC will submit complete sets of necessary commercial documents as identified in Appendix C, upon loading of the Products at KTC's various/ nominated estates.

3.3 DAKS shall provide regular progress and status updates to KTC on Monday, Tuesday and Friday of each week and from time to time as may be necessary.

4. HANDLING OF GOODS.

4.1 DAKS shall handle the Products with utmost care from the time of collection from Shipper's estates until delivered to KTC's nominated warehouse.

4.2 DAKS shall ensure the apparent condition of each package is noted in the Shipper's delivery note before DAKS takes charge of such packages where the package shows evidence of having been tampered with.

4.3 DAKS shall be responsible for all damage to KTC's goods arising whilst in its custody and/ or control where

the same arise from either DAK's or DAK's transporter's negligent act or omission.

4.4 DAKS shall be responsible for all damage to the Products where such damage can be proved to have been caused by DAKS and/or its subcontractors.

4.5 KTC reserves the right to reject any container provided for loading the Product if it is judged to be unsuitable for the task due to contamination or damage. There will be no charge or cost to KTC arising from such rejection.

5. PERFORMANCE CRITERIA.

DAK's performance under this Agreement will be measured according to the following criteria;

Transit time FOT from estate to FOT Mombasa Warehouse is set to 7 days , with a 5-6 days target.

Loading at estate: within 24 hours of factory manager's request.

6. KTC's OBLIGATIONS.

KTC will;

6.1 Ensure that the Products will be safe for transport and handling provided the same is dealt with by DAKS in accordance with all reasonable instructions given by KTC and good industrial practices in transport, distribution and warehousing..”

On the issue of breach of contract the Defendant admitted having entered into contract to transport the Consignment to Mombasa and also agreed that she took possession of the goods but that instead of transporting them herself, she sought for and found subcontractors.

These subcontractors were InterTrac Group and Global Turpco Holdings. She said she found these subcontractors after due diligence. That since these were reknown transporters, they should bear liability.

I find this argument unsustainable because as a carrier he owed the Plaintiff a chain of duties. These included; carrying the goods he received from the Plaintiff, to follow the route they had agreed upon, to deliver the goods to the right destination and persons and more importantly to carry them safely.

Where the Defendant got possession of the Consignment, she had to deliver them and it did not matter whether he had taken due diligence to find a responsible subcontractor. The duty to deliver safely never left the Defendant at any time not even when she sub-contracted to other carriers.

Moreover Clause 12 of the Agreement, **ExhP1** prohibited any assignment or transfer of rights and obligations to any other party whatsoever without the written consent of the other. There is nothing in these proceedings to show that the subcontractors were agreed upon or even discussed by the Plaintiff and the Defendant.

In the instant case, the Defendant for purposes of financial gain undertook to safely transport and deliver. The failure can only be attributed to her. The sum total is that the Defendant is found liable for breach of contract.

Turning to remedies sought, the Plaintiff prayed for special damages under three heads;

- a) USD. 49,700.16 (UGX. 180,958,233/=) being the market value of the consignment as assessed by the professional market assessors.
- b) UGX. 90,479, 141/= being a fine of 50% on the value of the consignment under Rule 104 sub-rule 22 of the East African Community Management Regulations 2010 and;
- c) VAT of 16% UGX. 21,055,733/= paid by the Warehouse.

It is trite that special damages must not only be specifically pleaded but must be strictly proved; *Hajji Asuman Mutekanga vs Equator Growers (U) Ltd SCCA No. 7 of 1996*. Special damages however need not always be proved by documentary evidence. Cogent verbal evidence can also do; *Kampala City Council vs Nakaye (1972) EA 446, Gapco (U) Ltd vs A. S Transporters Ltd SCCA No. 7 of 2007*.

In the instant case, the Plaintiff claims that she lost a sum of USD 49,700 being the actual price of the Consignment. According to the testimony of PW1 Grace Samba Kalachu a representative from Africa Tea Brokers Limited the Consignment did not arrive which caused it to be removed from the catalogue.

ExhP5 shows the valuation of the tea that was lost. According to PW2 Michael Amai the auctioning of the tea took place on the 27th June 2017. The garden invoice of the Consignment Lot 30 of 2017 was withdrawn because the tea never arrived but since the grading of the tea was known, the value of the lost Consignment was based on the sale value of similar grades sold on the 27th June 2017.

This valuation as I said before was tabulated as shown in the valuation sheet **ExhP5**. It amounted to USD 49,700.16. This figure was not disputed and I find no reason to disbelieve the witnesses.

From the foregoing, it is evident the Plaintiff sustained a loss of USD 49,700.

The Plaintiff also claimed UGX. 90,479,141/= as a fine they incurred because of breaching the East Africa Community Customs Management Regulations 2010. This he said resulted from the loss of goods which was in transit. Regulation 104 of the East African Community Customs Management Regulations 2010 sub-regulation 4 reads as follows;

“(4) Goods in transit shall be conveyed by road or route approved by the Commissioner and the transit period in respect of the goods shall not exceed 30 days from the date of entry or any further period as the Commissioner may allow.”

Meanwhile sub-regulation 22 provides;

“(22) A person who diverts from the transit route specified and sub-regulation (4) commits an offence and shall be liable to a fine not exceeding 50 % of the value of goods and the goods which are subject of the offence shall be liable to forfeiture.”

Furthermore, sub-regulation 23 provides;

“(23) Where the goods in transit cannot be traced, the person referred to under sub-regulation 22 shall pay to the proper officer the penalty to the bond in addition to the fine.”

In the instant case, the goods were diverted from the specified transit route and were never sighted again. The 30 days within which they were expected to be delivered at the destination Mombasa soon expired thus triggering penalties under

sub-regulation 22 and the penalty of the bond under sub-regulation 23 of the East African Community Customs Management Regulations 2010.

Going by sub regulation 22 the Plaintiff was liable to pay not more than 50% of the value of the Consignment and a penalty bond equal to the VAT.

The Kenya Revenue Authority therefore raised a tax invoice on the grounds that the Consignment had been dumped in Kenya. It gave the Consignment a custom value of Ksh. 3,722,724/=. In this they came up with VAT of 16% of Ksh. 595,636/=: an Import Declaration Fee of 2% amounting to Ksh. 74,454/=: Railway Development Levy of 1.5 amounting to Ksh. 55,841/= and a fine of 50% of the Custom value based on Regulation 104 (22) amounting to Ksh. 1,861,362/=:

This brought the total tax payable inclusive of penalties to Ksh. 2,587,566/=:

It is however the evidence of PW2 that they entered into negotiations after which they were asked to pay Ksh. 300,000/= as a fine and VAT of Ksh. 599,636/=: Both these payments are supported by a cheque requisition form indicating paid on 24th November 2017 and an Equity Bank deposit slip showing payment of VAT in fulfillment of the sums specified in the Single Administrative Document (SAD) issued by Customs.

These sums of money paid by United (EA) Warehouses Limited was on behalf of the Plaintiff which at that time converted amounted to UGX. 33,899,823/=: It was re-imbursed to the Consignee Messrs United (EA) Warehouses Limited.

From the evidence on record therefore there is no doubt that the Plaintiff paid Ksh. 895,636/= equivalent of UGX. 33,899,823/= to Kenya Revenue Authority.

This sum must be re-imbursed by the Defendant.

The Plaintiff claimed UGX. 90,479,141/= as a fine of 50% on the value of the Consignment. There is no evidence on record either oral or documentary to show that this money was paid. The two Plaintiff's witnesses all agreed that the whole sum was reduced to Ksh. 300,000/= as a fine and Ksh. 595,636/= as VAT. That being the case, the claim of UGX. 90,479,141/= remains unproved leaving UGX. 33,899,823/= as the sum proved.

The Plaintiff also prayed for general damages. The settled position is that the award of general damages is in the discretion of court and as the law will presume to be the natural and probable consequence of the Defendant's act or omission; **James Fredrick Nsubuga vs Attorney General, H.C.C.S No. 13 of 1993, Erukana Kuwe vs Isaac Patrick Matovu & Anor H.C.C.S No. 177 of 2003.**

A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she should have been in had she or he not suffered the wrong; **Kibimba Rice Ltd v Umar Salim, S.C.C.A of No. 17 of 1992.**

There is no doubt that the Plaintiff suffered damages and loss. The Defendant deprived her of the use of the money, USD 49,700 the value of the tea and the UGX. 33,899,823/= which she was forced to pay as VAT and fines. Being a business entity she would must probably have re-invested this money for more profit.

Apart from the foregoing, the Plaintiff did not produce any evidence to show that her business was otherwise affected by this breach of contract by the Defendant.

When asked whether their turnover remained at US \$ 3,000,000, PW2 submitted that the turnover had remained undisturbed. Since the turnover had remained

undisturbed, one concluded that the breach of contract did not affect the usual business of the Plaintiff. Nonetheless, they were delisted from the sale on that occasion an act that was embarrassing and could have led to complete downfall and economic penalties in an international business such as this one.

Taking all the circumstances of the case into consideration, I find an award of general damages of UGX. 50,000,000/= appropriate in the circumstances.

The Plaintiff also prayed for interest at commercial rate. Interest is in the discretion of the Court. It is on the basis that the Defendant has kept the Plaintiff out of his money and the Defendant has had use of it himself; *Harbutt's Plasticine Ltd vs Wayne Tank and Pump Co. Ltd [1970] QB 447* wherein Lord Denning observed;

“An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money...”

In the instant case the Plaintiff lost USD 49,700 and soon thereafter UGX. 33,899,833/= in fines and VAT. This deprivation has been on since 21st May 2017. It was a business venture. Business ventures attract interest at commercial rate since real businesses rarely operate without bank loans.

After considering the circumstances of the whole case, I find interest in respect of the Dollars at 6% per annum and in respect of the Uganda Shillings at 22% per annum in respect of the special damages from date of filing till payment in full, 6% per annum in respect of the general damages from date of filing till payment in full.

The Plaintiff is also entitled to costs.

In conclusion judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

- a) The Defendant to pay USD 49,700 or its current equivalent in Uganda Shillings.
- b) Defendant to pay UGX. 33,899,833/=.
- c) General damages of UGX. 50,000,000/=
- d) Interest on a) if in Dollars at 6% per annum if in Uganda Shillings at 22% per annum and interest on b) at 22% per annum from date of filing till payment in full, Interest on c) at 6% per annum from date of judgment till payment in full.
- e) Costs of the suits

Dated at Kampala this 12th day of July 2019

HON. JUSTICE DAVID WANGUTUSI

JUDGE