

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 809 OF 2005

BUSHENYI COMMERCIAL AGENCIES LTD ::::::::::

PLAINTIFF

VERSUS

- | | |
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| 1. FREIGHT FORWARDERS KENYA LTD) ::::: | DEFENDANTS |
| 2. UGANDA RAILWAYS CORPORATION) 1 ST THIRD PARTY | |
| 3. KENYA RAILWAYS CORPORATION) 2 ND THIRD PARTY | |

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

The plaintiff sued the defendant and the two third parties for breach of a contract of carriage. The breach being constituted by the loss of 1758 cartons of “Tiger Head” Batteries.

The original claim of plaintiff was only against the defendant. The defendant however, later applied for third party notice to issue against the first and second third parties as the ones the defendant contracted and actually transported the cargo to Kampala-Uganda from Mombasa-Kenya. Third party notices having been issued and the two third parties having filed their pleadings, the plaintiff amended his plaint by bringing his claim also against the two third parties.

The established facts of the case, are that the plaintiff contracted the defendant to clear and forward three (3) containers of “Tiger Head” batteries containing 3,300/= cartons from the Port of Mombasa Kenya to Kampala-Uganda. The containers were loaded into wagons of the second third party (Kenya Railways Corporation) for transportation by road from Kenya to Kampala-Uganda. The second third party transported the cargo up to Kisumu and then, through a working arrangement between the first and second third parties, passed over the same to the first third party, Uganda Railways Corporation, who transported the same up to Kampala. On offloading the cargo at Kampala to be handed over to the plaintiff, it was found that 1,758 cartons of the cargo were missing.

The defendant, the first and second third parties denied responsibility for the loss. The plaintiff instituted this suit.

Three issues were framed for determination.

1. Whether the defendant handed over to the first and second third parties a total of 3,300 containers of Tiger Head batteries.
2. Whether the goods were lost in transit, and if so, whether they were lost by the first third party or the second third party.
3. Whether the parties are entitled to the remedies sought.

To prove the case, plaintiff called one witness. PW1 Ntebekaine Obadia, Managing Director of the plaintiff company. For the defendant, Mr. Samson Musyimi Kavoi, defendant’s representative in Uganda testified. The first and second third parties called no witnesses.

PW1, for plaintiff, testified that he bought the batteries from Hong Kong as per invoices exhibit P5 and Telegraphic transfer payments exhibit P6. At Mombasa Port, Kenya, on arrival of the Cargo by ship from Hong Kong, in January, 2003, the plaintiff contracted the defendant, to clear, forward and transport the Cargo to Uganda.

DW1, a defence witness, confirmed in his evidence to court that at Mombasa Port, Kenya, there was no any shortage of goods detected by the Defendant.

After clearing the plaintiff's cargo, the defendant, after all the parties concerned with the cargo had satisfied themselves that the tonnage of the cargo was correct and that the seals had not been interfered with in any way, contracted and submitted the cargo and the shipping documents to the second Third Party. Exhibits D5 (a) (b) and (e) were issued by the second Third Party confirming that there was no short landing of the cargo at all.

In answer to a question from counsel of the first Third Party, DW1 confirmed that the defendant contracted the first Third Party to transport the cargo from Kisumu to Kampala Railways goodshed. The same witness explained, later on, that the role of the second Third Party was to transport the cargo from Mombasa to Kampala jointly with the first Third Party. The witness stated:-

“The responsibility to transport is joint from Mombasa to Kampala for both Uganda and Kenya Railways”.

It would appear that by arrangement between the two third parties, with the knowledge and consent of the defendant, but without the participation of the plaintiff, the second Third Party transported the cargo from Mombasa up to Kisumu, and then passed over the same to the first Third Party who transported the cargo up to Kampala at the Railways good shed.

According to DW1, at Malaba, the cargo was taken over by the first Third Party from the second Third Party when the seals and doors of the wagons were intact.

However, on offloading the cargo at the Railways good shed, at Kampala, it was found that the tonnage of the cargo was lighter than the stated weight and on verifying the cargo it was found that on a tally sheet dated 03.01.03, cartons of batteries, 518 in number, were missing as per exhibit P2, then 632 cartons were missing as per tally sheet, dated 04.01.03, exhibit P3, and another 608 cartons were missing as per tally sheet dated 04.01.2003: Exhibit P4.

None of the two Third Parties led evidence that there was any interference with the cargo at Mombasa or Kisumu. At any rate from Mombasa to Kampala, the two Third Parties were jointly and/or severally responsible for the cargo.

Court therefore holds that it has been established, on a balance of probabilities, that the plaintiff contracted the defendant to clear, forward and transport 3,300 Tiger heads batteries from Mombasa – Kenya to Uganda. The defendant, for purposes of transporting the cargo to Uganda, contracted the first and second Third Parties, jointly and severally in Mombasa, to transport the cargo to Kampala-Uganda, by rail. The specifications of the cargo passed over to the two Third Parties is as per specification and quantities stated in exhibits P5 (a) (b) and (c) the invoices, D5 (a) (b) (c) (d) and the tally sheets exhibits P2, P3 and P4.

Court further holds that it is also established that the second Third Party transported the cargo by rail up to Malaba, handed over the same to the first Third Party who transported the same to Kampala Railways good shed. At handing over the same to the plaintiff, at Kampala, it was found that some cartons of the cargo were missing.

Court answers the first issue to the effect that defendant handed over to the first and second Third Party a total of 3,300 cartons of Tiger Head Batteries.

The second issue is whether the goods were lost in transit, and if so, whether they were lost by the first Third Party or the second Third Party.

The evidence of DW1 is clear that the contract to transport the cargo from Mombasa to Kampala was entered into by the defendant together with the second and first Third Parties jointly and severally. As already pointed out, DW1 stated so. He even explained that defendant handled the documents and containers through Mr. William Kaguma, resident representative of the first Third Party in Mombasa. This Mr. William Kaguma,

was involved at all stages of executing the contract of transporting the cargo from Mombasa to Kampala Uganda between the defendant and the two third parties.

On the evidence adduced, court holds that the two third parties were jointly and severally responsible for transporting the cargo from Mombasa to Kampala-Uganda. The fact that the second third party handed over the cargo to the first third party at Malaba, was an internal arrangement between them, and as such did not effect their joint and several liability as transporters of the cargo from Mombasa to Kampala-Uganda. It is thus immaterial to the plaintiff and the defendant to determine as to whether the loss of the cargo was in Mombasa or at Malaba.

The answer to the second issue is that court is satisfied that the cargo was lost while in transit from Mombasa, Kenya, to Kampala, Uganda, and that the first and second Third Parties, as joint contracted transporters are jointly and/or severally responsible for the loss as between themselves and the defendant.

The third issue is whether the parties are entitled to the remedies sought.

The plaintiff is entitled, as from the defendant, to the value of the cargo lost, by reason of the fact that defendant and/or Defendant's authorized agents and representatives, the first and second Third Parties, committed breach of the contract by failing to transport and deliver to plaintiff, the whole cargo to Kampala-Uganda.

Court is satisfied from the evidence of PW1 and DW1 and exhibits p2, P3, and P4: the tally sheets, and exhibits P5(a) (b) and (c) the invoices, that 1758 cartons of Tiger Head batteries were lost: and that the cost of each carton is US\$20.92. The total cost of cartons lost is that: $(1758 \times 20.92) = \text{US}\$36,777.32$. In accordance, and pursuant to, the answer of court of the second issue, plaintiff is awarded as against the defendant the sum of US\$36,777.32, or its equivalent in Uganda shillings at the obtaining rate of exchange of the Uganda shillings to the United States dollar. The defendant in turn, is entitled to be re-imbursed in the said sum due from defendant to the plaintiff, jointly and/or severally by the first and second Third Parties.

As to the counter-claim of the defendant against plaintiff, plaintiff admits being indebted to the defendant in the sum of US\$12,995.20 being for clearing charges of the cargo. Plaintiff however denies being liable to the defendant in the sum of US\$5745.99 incurred as demurrage charges for the period spent when the exercise of verifying the lost cargo was being carried out by Uganda Revenue Authority and police.

Court has already found that the first and second Third Parties are responsible to defendant for the loss of the cargo. It follows therefore that they are also responsible for the demurrage expenses incurred as a direct result of that loss. The defendant has to recover the demurrage expenses from the first, and second third parties and not from the plaintiff.

Accordingly Judgment is entered in the sum of US\$12,995.20 or its equivalent in Uganda shillings at the current obtaining rate of exchange of the US\$ to the Uganda shilling, for the defendant against the plaintiff. This sum of US\$12,995.20 is to be subtracted from the sum of US\$36,777.32 awarded to plaintiff as the value of the cartons lost. This leaves a balance of US\$(36,777.32 – 12,995.20) = 23,782.12. This is the sum defendant owes the plaintiff.

The first and second, third parties are hereby ordered jointly and/or severally to pay the demurrage expenses of US\$5745.99 to the defendant.

Plaintiff never pleaded for interest in his plaint. None is thus awarded. No evidence was also given by the plaintiffs witness to justify the award of general damages. None are awarded.

Accordingly judgment is entered for the plaintiff against the defendant:-

1. In the sum of US \$23,782.12 or its equivalent in Uganda shilling at the current obtaining rate of exchange of the US \$ to the Uganda shillings at the time of satisfying this judgment, being total cost of the cartons lost: US \$36,777.32 less

amount awarded to defendant on counter-claim as clearing charges US \$12,995.20 = US \$23,782.12.

2. The defendant's counter-claim is answered by being partly allowed as in number 1 above.
3. It is ordered that the first third party – Uganda Railway Corporation and the second third party – Kenya Railways Corporation – do jointly and/or severally re-imburse the defendant in the sum of US \$23,782.12 or its equivalent in Uganda shillings at the current obtaining rate of exchange of the US\$ to the Uganda shilling as at the date of satisfying this judgment, payable by the defendant to the plaintiff.
4. It is also further ordered that the first and second third parties jointly and/or severally pay to the defendant the sum of US \$574.99 demurrage charges.

The plaintiff is awarded the costs of the suit as against the defendant, and the first and second third parties are hereby ordered to jointly and/or severally re-imburse the defendant the costs of the suit the defendant is to pay to the plaintiff.

Remmy. K. Kasule

Judge

8th October, 2009