

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**CIVIL SUIT NO 004 OF 2019**

**CHIEF DISTILLERS UGANDA LTD:..... PLAINTIFF**

**VERSUS**

**DAMCO LOGISTICS UGANDA LTD:.....DEFENDANT**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

By an agreement dated 4<sup>th</sup> June 2018, the plaintiff appointed the defendant its agent to freight forward its goods from Mombasa to Kampala. Plaintiff duly delivered shipping documents to the defendant to perform the services under the contract which was entered into by both parties.

The goods were packed in six containers of 40' x 5 and 20'x 1 respectively and required special care and skill both in transportation and handling and, in order to facilitate that process, the plaintiff obtained Uganda Revenue Authority permission to have the goods delivered direct to plaintiff's premises at Watuba and the letter giving the permission was given by the plaintiff to defendant.

Clause 3 of the Standard Trading Conditions provided that the defendant would perform the services with a reasonable degree of care, skill and judgment but the defendant, in breach of that provision, neglected and/or failed to deliver one of the containers, whose contents were destroyed on

its way from ICD Kampala to Watuba and plaintiff suffered loss and damage.

The plaintiff sought to recover the value of the bottling line which crashed off the truck and rendered useless at a cost of USD 210,000 and 18,050,000/= as hire charges for the crane which removed the crashed and damaged part of the bottling line.

The defendant in their statement of defence contended that under schedule 1 of the services and charges, the Defendant was to expressly provide freight forwarding services to the Plaintiff's goods from Mombasa to Kampala at the rate agreed upon and the scope of which expressly excluded local delivery to the Plaintiff's premises. The defendant denied ever being furnished with any communication or permission from Uganda Revenue Authority for delivery of the plaintiff's goods directly to the plaintiff's premises.

In preparing the forwarding documents from Mombasa to Kampala, the Defendant's agent made a mistake in relation to capturing the correct number of packages and the gross weight of the containers. Upon discovery of the said mistake it was rectified immediately through the Defendant's final clearing agent and no loss was occasioned due to the mistake. The said mistake was not in respect of movement or final destination of the containers as alleged.

On arrival of the containers at Kampala, the Defendant delivered the containers at Multiple ICD at Kampala pursuant to the terms of the letter of engagement and the Plaintiff's duly appointed agent. At the time of delivery of the containers at Multiple ICD, Kampala, the mistake as to the gross weight and the number of packages, had long since been rectified.

Whereas the Plaintiff requested the Defendant to transport the goods from Multiple ICD to the Plaintiff's premises, the Defendant did not enter into any contract with the Plaintiff to transport the goods from the Multiple ICD

to the Plaintiff's premises and was never remunerated for the said performance. The Plaintiff appointed an agent known as Boret International (U) Limited to clear and transport the Plaintiff's premises at Watuba, Wakiso. This was on account of the limited scope of the Defendant's terms of engagement. The agent, Boret International (U) Limited was at all times represented by Richard Oteker who was in copy of all the communications between the Plaintiff and the Defendant.

The Defendant, at the request of the Plaintiff and out of courtesy only offered to avail its clerk to assist the Plaintiff's agent, with checking the trucks being used for local delivery and to escort them to the Plaintiff's premises. The Defendant's clerk was not called or involved on the day when the container in issue ultimately got involved in an accident.

The particular truck that was involved in the accident was obtained and sourced by the Plaintiff's appointed agent. For which the Defendant was neither consulted for advice nor took responsibility for. Throughout the course of transporting the Plaintiff's containers from Multiple ICD to the Plaintiff's premises at Watuba, Wakiso, the sole obligation of performing the transportation service with reasonable skill and care and Judgment lay with the Plaintiff's appointed agent, Boret International (U) Limited.

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

1. *Whether the plaintiff's suit is bad in law?*
2. *Whether the defendant was negligent in the provision of services and/or breached the contract for provision of services*
3. *Remedies, if any?*

The plaintiff was represented by *Mr. Byamugisha Albert* whereas the defendant was represented by *Mr. Kunta Kinte Joachim*.

The parties led evidence of one witness each and thereafter filed written submissions. This Court has considered the same in writing this Judgment.

## DETERMINATION OF ISSUES

*Whether the defendant was negligent in the provision of services and/or breached the contract for provision of services*

The defendant delivered the plaintiff's cargo to an ICD because of its negligence in preparing the forwarding documents, namely the *WT8* and the *T1* for the movement of the goods from Mombasa to Watuba, Wakiso wrongly so that they did not match the Bill of Lading for the goods, which prevented plaintiff's clearing agent from clearing the goods as they arrived in Kampala.

The **Standard Trading Conditions** referred to above provide *inter alia*,

### **"Obligations of Company**

13. The company will perform the services with a reasonable degree of care, skill and judgment"
  - a. the defendant, because of the delay thus caused and for its own convenience, permitted the goods to be offloaded at the inland container depot (ICD) in Kampala while well knowing that the goods were to be delivered and offloaded at plaintiff's factory at Watuba aforesaid and permitting the trucks on which the goods were transported to return to Mombasa while the nature and sensitivity of the goods required the specialised transport those trucks would provide up to Watuba;
  - b. the defendant also failed and/or neglected to amend the wrongly prepared documents promptly so that the goods, which were on their Mombasa trucks in Multiple ICD near Ntinda in Kampala, could be cleared for transportation to Watuba without delay, even after being specifically required to do so by the plaintiff;
  - c. the defendant failed to follow plaintiff's instructions concerning the sensitivity of the cargo and plaintiff's demand that the

- defendant take special care in delivering the goods to the plaintiff's factory without any damage;
- d. having permitted the trucks on which the goods were transported to return to Mombasa before the delivery of the goods at Watuba, the defendant neglected and/or failed to obtain suitable transport for one of the containers with the result that the truck provided overturned and plaintiff's goods it was carrying were damaged;
  - e. defendant's lack of care, skilled judgment as well as its breach of its contractual obligations caused the bottling line equipment of the plaintiff to crash off the truck to Watuba and it got seriously damaged and became useless;
  - f. defendant's lack of care, skilled judgment in performing the services and/or breach of its contractual obligations resulted in its failure to deliver one of the containers safely to destination;

This evidence was not challenged during cross-examination. In **Habre International Co Ltd v Kassam and others [1999] 1 EA 125** at 138, Karokora, JSC. said that:

*"It is trite law, see Kabenge v Uganda Court of Appeal criminal appeal number 19 of 1977 (UR) and Sowobiri and another v Uganda Supreme Court criminal appeal number 5 of 1990 (UR) where the then Uganda Court of Appeal and the Supreme Court respectively held that:*

*"Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination it must follow that he believed that the testimony given could not be disputed at all. Therefore, an omission or neglect to challenge the evidence-in-chief on a material or essential point by cross-examination would lead to the*

inference that the evidence is accepted subject to its being assailed as inherently incredible.”

The loss of plaintiff’s goods arising out of the defendant’s breach of contract was not excluded.

The defence counsel submitted that the parties entered into a binding contract on the 4<sup>th</sup> day of June 2018. A copy of the engagement letter appears at page 7 to 12 of the Plaintiff’s trial bundle. In the said ‘terms of engagement’ agreement, it was properly and clearly set out under clause 1 and 2 where the services and charges were to be provided in accordance with schedule 1. Under schedule 1 of the contract the services were for transportation from Mombasa to Kampala and included KPA Port Wharfage and Shore Handling, trucking, bond fees, clearance (transit only) and empty container return to Mombasa. Additionally the said schedule 1 clearly provided that the said services did not include **Local Delivery**, ICD Charges and Local Clearance.

PW 1 admitted that the agreement signed between the parties was the ‘terms of engagement’ dated 4<sup>th</sup> June 2018. The said agreement clearly spelt out the scope of the services to be delivery of goods from Mombasa to Kampala and expressly excluded the local delivery from its scope. It was also confirmed by PW 1 that the normal practice was to deliver the goods at the Inland Container Depot (ICD) for verification and clearance.

On the other hand DW 1 confirmed that the goods were delivered to the Multiple ICD in Kampala safely in fulfillment of the agreement between the Plaintiff and the Defendant. It is our submission that the Defendant satisfactorily performed its obligations and duties under the contract. PW 1 also testified that he appointed a clearing agent at the border and he appointed him personally. It was also PW 1’s testimony that the goods got damaged after leaving the ICD and on their way to the Plaintiff’s premises in Watuba, Wakiso. It is therefore our submission that the delivery of the

goods to Watuba, Wakiso was outside the scope of the agreement between the Plaintiff and the Defendant.

In the instant case, the performance of the contract was governed by the Terms of Engagement dated 4<sup>th</sup> June 2018, schedule 1 and the standard trading conditions. The said terms, schedule 1 and standard trading conditions are in the Plaintiff's trial bundle at pages 7 to 15. The mentioned documents were provided at the time of signing the contract, the Plaintiff was aware of the documents and the clauses; they formed part of the contract between the parties and the parties were bound by them.

Whereas the Plaintiff seeks to rely on the emails from and to Richard Oteker of Boret International Limited wherein the Defendant's officials were in copy and an alleged request to the Defendant to continue with transportation of the consignment to the Plaintiff's premises in Watuba, Wakiso, it does not amount to a contract. As earlier submitted for a contract to exist there must be an offer and acceptance and consideration for the performance of forbearance. In the instant case there was no acceptance of the offer to perform the services and the Defendant was never paid any consideration for performance.

It is therefore our submission that transportation of the goods from multiple ICD in Kampala to Watuba Wakiso was outside of the scope of services within the parties' contract and there was no enforceable contract for the Defendant to provide services for transportation of the consignment from multiple ICD in Kampala to Watuba Wakiso.

Without prejudice to the above, the appointment of Boret International (U) Limited as an agent by the Plaintiff to transport the goods to its premises excluded the Defendant's liability to the Plaintiff. Under clause 38(a)(i) of the Standard Trading Conditions which formed part of the conditions it provided that:

*"38. Exclusions of liability*

*(a) Except insofar as otherwise provided by these conditions, the Company shall not be liable for any loss or damage whatsoever arising from:*  
*(i) the act or omission of the Customer or any person (other than the Company) acting on their behalf."*

As earlier demonstrated, PW 1 testified that he personally appointed a clearing agent to clear the goods and transport the goods to Watuba, Wakiso. DW 1 on the other hand corroborated PW 1's testimony in paragraphs 9, 10, 13 and 14 of the witness statement. DW 1 testified that the Plaintiff appointed Boret International (U) Limited represented by Richard Oteker who was charged with the duty and responsibility of transporting the consignment from the Multiple ICD to the Plaintiff's premises in Watuba, Wakiso. This particular fact was never rebutted in cross-examination but was confirmed by the Plaintiff's witness.

### ***Analysis***

The defendant sent the terms of engagement on 4<sup>th</sup> June 2018 and noted as follows; "We are pleased that you have selected Damco as your freight forwarder for the Mombasa to Kampala transportation service" as per PE2. The schedule clearly showed that; Charges are Mombasa to Kampala and Services are Mombasa to Kampala.

After the agreement was executed the plaintiff through a request to Uganda Revenue Authority wanted the consignment to be delivered to Watuba-Wakiso.

The above evidence is contrary to what the plaintiff's counsel has submitted that there was a deliberate wrong preparation of the bills of lading not to reflect Watuba-Wakiso as the destination for delivery of the consignment.

**Sec. 33 (1) of the Contracts Act 2010** which states that



*“ the parties to the contract shall perform or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act or any other law”* which provision gives the parties room to dispense from the mode of performance of a contract as long as it is allowed under the Act.

**Section 67 of the Contracts Act 2010** which states that

*“Where any right, duty or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of the dealing between the parties or by usage or custom would bind both parties to the contract”.*

The said variation must be agreed upon between the parties and once it is denied by one of the parties, then such variation cannot stand in the eyes of court unless proved against the party in denial. The law takes an objective rather than a subjective view of the existence of agreement and so its starting point is the manifestation of mutual assent by the parties to one another.

Agreement is not a mental state but an act, and as an act, it is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done. *See Makubuya Enock v Songdoh Films (U) Ltd & Another HCCS No. 349 of 2017*

The parties to any contract and the court are bound by the terms or conditions in a contract, whether parole or written, between contracting parties. The courts lack the power to add or subtract from the terms of contract of parties and parties thereto are not allowed to unilaterally alter them. This has acquired the sobriquet and mantra of sanctity of contract which is expressed in the maxim, *pacta sunt servanda*, which means the non-

fraudulent agreement of parties must be observed. *See Golden Const. Co Ltd v Stateco (Nig) Ltd (2014) 8 NWLR (pt 1408) p. 171.*

The plaintiff in his evidence clearly shows that he appointed a clearing agent and the responsibility of the defendant ended upon delivery to Kampala-No Local Delivery. The plaintiff's agent Boret International (U) Limited was responsible for the delivery of the consignment to Watuba-Wakiso.

The court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract on their own terms as long as is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitute the contract are invariably the guide to its interpretation. When parties enter into a contract, they are bound by the terms of the contract as set out by them.

The court's duty in interpreting contracts made by the parties and not rewriting them for the parties "*A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved*" *See; National Bank of Kenya v Pipe Plastic Sankolit (K) Ltd & Anor [2001] EA.*

The plaintiff's contention that the agreement signed on 4<sup>th</sup> June 2023 was altered through emails is unsatisfactory in many respects, is materially inconsistent with the admitted documentary evidence, and is irreconcilable with the inherent probabilities of having agreed to deliver the consignment to Watuba-Wakiso. The consignment was involved in an accident while in the hands of the plaintiff's agent Boret International (U) Ltd. An agreement of variation of an existing contract must itself possess the characteristics of a valid contract such as offer, acceptance and consideration. The said

emails sent by the plaintiff staff to the defendant could not be interpreted as a variation to the agreed terms of delivery of the consignment to Watuba-Wakiso as contended by the plaintiff.

The sum effect is that the plaintiff has failed to prove his case against the defendants. The defendant was not in breach of contract or negligent in provision of services as contended by the plaintiff.

The plaintiff's suit is dismissed with costs to the defendant.

I so order.

***SSEKAANA MUSA***

***JUDGE***

***24<sup>th</sup> April 2023***