

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

5 **CORAM: BYAMUGISHA, NSHIMYE&ARACH-AMOKO JJA**

CIVIL APPEAL NO.94/2010

BETWEEN

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UGANDA RAILWAYS CORPORATION::::::::::::::::::APPELLANT

AND

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1. BUSHENYI COMMERCIAL AGENCIES
2. FREIGHT FORWARDERS KENYA LTD
3. KENYA RAILWAYS CORPORATION::::::::::::::::::RESPONDENTS

20 *[Appeal from the judgment and orders of the High Court of Uganda at Kampala
(Kasule J) dated 8th October 2009 in HCCS NO.809 2005]*

JUDGMENT BYAMUGISHA, JA

25 This is a first appeal from the decision of the High Court in the exercise of its
original jurisdiction.

The facts as pleaded and accepted by the trial judge are not in dispute. The
second respondent was contracted by the first respondent to clear and forward
three containers of batteries containing 3300 cartons of Tiger Head batteries.
30 The containers were loaded on railway wagons belonging to Kenya Railways
Corporation in Mombasa for transportation to Kampala by rail. The Kenya
railways transported the containers to Kisumu. At Kisumu, they were handed
over Uganda Railways, the appellant herein. On offloading the cargo at Uganda
Goods Shed it was found that 1,758 cartons were missing.

35 The first respondent filed a suit against the second respondent for breach of
contract. He claimed the sum of US\$ 36,780 or its equivalent in Uganda
Shillings and costs of the suit.

The second respondent filed a written statement of defence in which it denied
40 breach of contract. It averred that it was agreed under clause 3 of the terms and
conditions of the second respondent that the goods and containers are cleared
and forwarded at owner's risk with no liability to the second respondent.

The second respondent counter-claimed from the first respondent the sum of US
\$18,741.19 being clearing and forwarding services fees and container
45 demurrage charges.

The first respondent filed a reply in which it denied knowledge of the terms and
conditions under which the goods were cleared and forwarded by the second
respondent.

The second respondent sought and was granted leave to issue third party notice
50 against Uganda Railways Corporation and Kenya Railways Corporation seeking
indemnity or contribution in the event of the court finding it liable.

The first respondent amended the plaint and the third parties filed written
statements of defence although they should have entered appearance in
accordance with *rule 15(a) of order 1*.

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Three issues were framed for court's determination.

1. **Whether the defendant handed over to the first and second their 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**
60 **lost by the third party** or the second third party.
3. **Whether the parties are entitled to the remedies sought.**

The learned trial judge answered the first issue in the affirmative. On the second issue he found that the there was loss of goods in transit and he held the
65 appellant and Kenya Railway Corporation jointly liable for the loss. He then entered judgment for the plaintiff against the defendant in the following terms:

1. **The defendant to pay the sum of US\$ 23,782.12 or its equivalent in Uganda shillings at the current obtaining rate of exchange of the UD\$ to the Uganda Shillings at the time of satisfying the judgment, being**
70 **the total cost of the cartons lost: US\$ 36,777.32 less amount awarded to defendant on counterclaim as clearing charges**
US\$12,995.20=US\$23,782.12.
2. **The defendant's counter-claim is answered by being partly allowed.**
3. **It is ordered that the first third party-Uganda Railways do jointly**
75 **and/or severally reimburse 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 at the date of satisfying this judgment, payable by the defendant to the plaintiff.**

80 **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.**

5. 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
85 **defendant are to pay to the plaintiff.**

The first third party was dissatisfied with the above orders and it filed the instant appeal. The memorandum of appeal filed on its behalf by M/S Kwesiga & Katarikawe Advocates has 4 grounds:

90 **1. The learned trial judge erred in law and fact by failing to properly assess, scrutinize and evaluate the evidence adduced and thereby prejudiced the appellant by:**

95 **(i) ignoring the first and second respondent's evidence that the appellant had done exactly what was sub-contracted to be done.**

(ii) ignoring and/ or refusing to consider the uncontroverted investigations report findings that the goods were not lost in Uganda.

100 **(iii) ignoring and or refusing to consider the uncontroverted**

evidence that the seals and hinges on the containers were intact in Kampala.

- 105 **2. The learned judge erred in law and fact by holding that William Kaguma, the appellant's manager in Kenya, was involved in all the stages of executing the contract of transporting the cargo in issue from Mombasa to Kampala.**
- 110 **3. The learned trial judge erred in law and fact by failing and/ or refusing to resolve the earlier agreed issue of whether the goods were lost by the first third party or the second third party.**
- 115 **4. The learned trial judge erred in law and fact by ordering that the defendant is entitled to be reimbursed jointly and severally by the first third party and the second third party of the entire sum due to the plaintiff.**

It was the appellant's prayer that the appeal be allowed. The decision of the High Court be revised with the order that the suit against the first third party be dismissed. The appellant be granted the costs of this appeal and of the suit in the High Court.

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Both counsel filed written submissions. Counsel for the appellant argued grounds one and two of the appeal together. He contended that the evaluation of

evidence was not properly done with effect that the conclusion was erroneous.

Learned counsel pointed out the testimony of DW1 at pages, 95-6, 98 and 100
125 of the record of appeal. On these pages the witness testified that when the
hinges and seals were examined, they were found intact. He further stated that
when the police established that the goods were not stolen in Uganda, they
allowed the goods to be cleared.

Learned counsel further submitted that the witness stated that the appellant did
130 exactly what was subcontracted to be done.

On the tally sheets which were presented to show the contents of the containers,
learned counsel submitted that there were no tally sheets at the point of
departure at Kisumu to show the contents of the containers. He claimed that the
same method of ascertaining the load of the containers at the point of departure
135 should have been used on arrival at the goods shed in Kampala.

On a point of law, learned counsel submitted that the respondents failed to
provide any receipt of what goods were handed over to the appellant as is
required by section 58(3) (b) of the Uganda Railways Corporation Act. In the
absence of such receipt the appellant suffers no statutory liability.

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On failure by the trial judge to determine whether the goods were lost by the
first or third party learned counsel submitted that the learned judge erred to
order the 2nd respondent be reimbursed jointly by the 1st third party or second
third party of all the sums due to the 1st respondent. Learned counsel further

145 submitted that it is the duty of the trial court to determine all the issues framed
by the parties. He cited the case of *Bakaluba Peter Mukasa v Nambooze Betty
Bakileke-Election Petition Appeal No 04/09(SC)*. Counsel contended that
failure by the trial judge to resolve the issue of who was responsible for the loss
of the goods in transit prejudiced the appellant.

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Counsel for the second and third respondents filed joint submissions. They
submitted that the trial judge properly evaluated the evidence on record. They
pointed out that although the goods were not lost in Uganda and seals and
hinges on the containers were intact at Kampala the trial judge found that the
155 responsibility to transport the goods was joint from Mombasa to Kampala for
both Uganda and Kenya railways. They stated that this piece of evidence was
never challenged by the appellant during cross-examination and therefore the
trial judge was right to hold the appellant and the third respondent liable jointly
for the loss of the goods. They also supported the trial judge's orders in which
160 he decreed that the appellant and Kenya railways Corporation reimburse the
second respondent the sum of US\$ 23,782.12 or its equivalent in Uganda
Shillings payable by the latter to the first respondent.

Learned counsel further submitted that leave to issue third party notice was
165 sought from court. They conceded that although no directions were sought from
court under *order 1 rule 18 of the Civil Procedure Rules*, this was an

irregularity which did not occasion any miscarriage of justice. According to counsel, the anomaly was taken care of by the scheduling conference where areas of agreements and disagreements were ironed out and each party was
170 aware of the case it would meet at the trial. They cited the case of ***Kabu Auctioneers & Court Bailiffs v Muljibhai Co.Ltd & Another – Civil Appeal No.19/09(SC)*** where Tsekooko JSC observed under order x11 of the Civil Procedure Rules, a trial court holds a scheduling conference to sort out agreement and disagreement between or among the parties so that evidence is
175 produced only on contested issues. Learned counsel claimed that a scheduling conference was held in the instant appeal and therefore it catered for any requirement under *Order 1 rule 18* of the Civil Procedure Rules which had not been followed at the trial.

180 Learned counsel for the appellant made a brief reply and emphasized that third party proceedings are strictly adopted to seek indemnity or contribution. He stated that the right to indemnify arises from a contract express or implied. He pointed out that there was no contract between the appellant who was a subcontract and the second respondent or the first respondent.

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I will commence consideration of the issues by determining whether failure by the trial judge to determine all the issues framed for resolution caused a miscarriage of justice. Issue No 2 in the scheduling memorandum was whether

the goods were lost in transit and if so whether they were lost by the 1st 3rd party
190 or the 2nd 3rd party. There was no dispute on the evidence as a whole that 3300
cartons of tiger batteries were imported by the first respondent. When the
containers were opened at Kampala railway goods shed it was established that
1, 758 cartons were missing. The cartons were transported by Kenya Railways
from Mombasa to Kisumu. They were handed over to Uganda Railways for
195 onward transportation to Kampala. There was evidence given by Kavoi(DW1),
a representative of the second respondent resident in Uganda to the effect that
the transportation of the goods from Mombasa to Kampala was a shared
responsibility between Kenya railways and Uganda Railways. The learned trial
judge relied on this evidence to find as he did that this shared responsibility
200 made both carriers liable for the loss.

With due respect to the learned judge, the evidence adduced at the trial did not
support that finding. Had he evaluated all the evidence properly he would have
come to a different conclusion and found that the testimony of Kavoi and
205 Ntebekeine exonerated the appellant.

Before I determine the remedies which the appellant is entitled to, I shall deal
with the failure by the second respondent to seek directions under rule order 1
rule 18 of the CPR. The rule in question states:

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***“If a third party enters appearance pursuant to the third party notice, the
defendant giving the notice may apply to the court by summons in chambers***

215 *for directions, and the court, may upon hearing of the application, may if*
satisfied that there is a proper question to be tried as to the liability of the
third party to make a contribution or indemnity claimed in whole or in part
order the question of such liability, as between the third party and the
defendant giving the notice, to be tried in such manner, at or after the trial of
the suit, as the court may direct, if not so satisfied, may order such judgment
as the nature of the case may require to be entered in favour of the defendant
220 *giving the notice against the third party.”*

The provisions of this rule were considered in the case of *Sango Bay Ltd v*
Dresdner Bank (No.3) [1971] EA 307 which was to the effect that the party
applying for third party proceedings has to satisfy court that there is a proper
225 question to be tried as to the liability of the third party. It was further held that
the party applying has to show and satisfy court that it has a right of indemnity
against the third party. The indemnity has to be based on contract.

The requirement for directions is to enable court determine whether there is a
contract express or implied to indemnify between the party applying and the
230 third party.

In the instant appeal, counsel for the first and second respondent submitted that
the omission to apply for directions was an irregularity which was cured by the
scheduling conference. According to them the scheduling conference enabled
235 all the parties to put their respective cases across and they were represented at
the trial and as such there was no injustice caused to any of the parties.

I have perused the record of appeal. The parties filed a scheduling
memorandum in which certain facts were agreed upon and the issues for
determination were framed. For purpose of clarity I will reproduce the
240 scheduling memorandum. It stated:

245 ***“The defendant was contracted by the Plaintiff to clear and forward three (3) containers of batteries containing 33000 cartons of Tiger Head batteries. The containers were loaded onto wagons belonging to Kenya Railways Corporation in Mombasa for transportation by rail to Kampala. While offloading the containers in Kampala, it was established that 1,758 cartons were missing although the seals on the containers were intact. The plaintiff did not pay the defendants clearing and forwarding service fees and container demurrage charges.*”**

ISSUES

- 250
- 1. Whether the defendant handed over to the 1st 3rd party and the 2nd 3rd party a total of 3,300 cartons of Tiger Head batteries.***
 - 2. Whether the plaintiff’s goods were lost in transit and if so whether they were lost by the 1st 3rd party or the 2nd 3rd party.***
 - 3. Whether all the parties are entitled to the remedies sought.”***

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The scheduling memorandum was silent about indemnity or contribution of the third parties.

260 The second respondent’s witness (DW1) gave evidence but did not allude to any indemnity and how it arose. The trial court ordered the appellant and Kenya Railways Corporation to reimburse the second respondent the sum of US\$ 23,782.12 payable to the first respondent, costs of the suit and demurrage charges. These orders were made in absence of any evidence to prove indemnity. These orders caused injustice in my view.

265 As for the remedies, in view of my finding that the appellant was not liable for the loss of the goods, it goes without saying that the orders of the trial judge in

which he ordered the appellant to reimburse the second respondent jointly and severally with Kenya Railways Corporation would be set aside.

The appeal would be allowed with costs to the appellant against the second
270 respondent in this court and the High Court.

Since the other members of the Coram agree, the appeal is allowed with costs both here and in the High Court against the second respondent.

275 **Dated at Kampala this...14th....day of...December...2012**

C.K.Byamugisha
Justice of Appeal

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JUDGMENT OF A.S.NSHIMYE, JA

I have had the benefit of reading the lead judgment of Hon C.K.Byamugisha, JA.

I agree with her reasoning and orders proposed therein.

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Dated this14th ...day ofDecember...2012

A.S.NSHIMYE

290 **JUSTICE OF APPEAL**

JUDGMENT OF M.S.ARACH AMOKO, JA

I had the benefit of reading in draft the judgment prepared by Hon.
295 C.K.Byamugisha, JA.

I entirely agree with the reasoning and conclusions. I also agree with the proposed orders.

Dated at Kampala this ...**14th** ...day of**December...2012**
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M.S.ARACH AMOKO
JUSTICE OF APPEAL