

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

HCT - 00 - CC - CS - 225 - 2006

SWAIBU KATONGOLE PLAINTIFF

VERSUS

SPEAR TOURISM AND CARGO (U) LTD DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T :

The plaintiff a businessman brought this suit against the Defendant cargo company for the loss of his shipped goods, damages and interest on the amounts.

The case for the Plaintiff is that in September 2005 the Plaintiff wanted to import goods from Dubai in the United Arab Emirates. He then contacted the Defendant company on how to go about the said importation. The Defendant company allegedly put the Plaintiff in touch with its sister company operating in Dubai called M/S Spear Tourism & Cargo L.L.C to assist the Plaintiff. The Plaintiff then traveled to Dubai and got in touch with M/S Spear Tourism & Cargo

L.L.C. He gave his goods to the company in Dubai and paid for the freight at the Defendants office in Kampala for which he was issued a receipt. The goods never arrived in Uganda as the container in they were placed was first stolen and when recovered did not have the Plaintiff's goods. The Plaintiff therefore holds the Defendant liable for this loss as the Dubai and Kampala companies are related and have the same directors. The Defendant however denies liability and avers that the contract of carriage was done with M/S Spear Tourism & Cargo L.L.C Dubai which is a different corporate body from themselves and therefore the suit against them should be dismissed.

The Defendants at first did not attend court and their first Counsel with leave of court withdrew from representing them. The court allowed the case to proceed ex parte and framed the issues for trial. Subsequently they engaged another Advocate who represented them at the trial.

The issues for trial were the following:-

- 1- Whether or not the Defendant was in breach of the contract of carriage of goods from Dubai to Busia.

- 2- Whether or not the Plaintiff is entitled to the special damages claimed.
- 3- Whether or not the Plaintiff is entitled to damages for breach.

Mr. S. Musoke appeared for the Plaintiff while Mr. E. Muhwezi appeared for the Defendant.

Issue No. 1: Whether or not the Defendant was in breach of the contract of carriage of goods from Dubai to Busia.

Mr. S. Katongole testified that he dealt with the Defendant company which referred him to their sister company in Dubai to handle the shipping transaction. He testified that it was one Aziz of the Defendant company who referred him to another Abbas Kaliisa of Spear Tourism & Cargo L.L.C in Dubai. The Plaintiff testified that he believed that Aziz and Abbas were brothers. He further testified that Aziz gave him a business card (Exh. P.4) which was printed on both sides. One side had Abbas Kaliisa as Managing Director of Spear Tourism & Cargo L.L.C with the contact details in Dubai while the flip side had three other companies one being in Uganda and called "Spear Tourism & Cargo Uganda L.L.C".

The Plaintiff testified that he traveled to Dubai and met up with Abbas Kaliisa who agreed to ship his goods to Uganda. The Plaintiff testified that they agreed on freight charges of US\$1440 and a small loan from Abbas of US\$100 bringing the total to US\$1540. In this regard the Plaintiff obtained an invoice for the amount Exh. P.1. The Plaintiff however did not pay the invoice in Dubai but he paid it at the Defendant's offices in Kampala in the names of the Dubai company Exh. P.2. The receipt was signed one Abdul Musiitwa based in Kampala.

The Plaintiff then testified that he kept checking with Aziz in the Defendant company as to when his goods would arrive. However, the goods never arrived. He was told at one stage that the container in which the goods were in had been stolen. When the said container was recovered the goods were missing. The Plaintiff testified that he had bought goods in Dubai worth US\$17,300- (for which he had receipts), paid freight of US\$1,440- paid for an air ticket of US\$790- and a visa fee of US\$100.

He testified that the Defendant company was equally responsible as it was a related company to the one in Dubai and shared the same directors.

Counsel for the first Plaintiff submitted that the two companies namely; Spear Tourism & Cargo Ltd and Spear Tourism & Cargo L.L.C were essentially the same company. He further submitted that under Section 11, 14 and 15 of the Civil Procedure Act the Plaintiff was at liberty to sue any one of them. Counsel for the Plaintiff submitted that according to the invoice given to his client the goods were to be shipped from Dubai to Busia in Uganda but this did not happen.

Counsel for the Defendant submitted that the two companies were different. He further submitted that there was no evidence of the shipping contract in writing and that no suit could be brought against the Defendant according to Section 3 of the Contract Act. He referred me to the case of

Kisugu Stone Quarries Ltd V Administrator General SCCA

No. 10 of 1998 (unreported)

that an invalid contract cannot be enforceable by court.

He further submitted that according to

Tororo Cement Co. Ltd V Forkina International Ltd SCCA No. 2

of 2001.

for one to succeed in action for breach of contract the Plaintiff must disclose a cause of action against the Defendant. However, in this case Counsel for the Defendant submitted that the Plaintiff had failed to show that he enjoyed a right that the Defendant had violated.

I have perused the pleadings, the evidence and the submissions of Counsel in this case. It appears to me that the dispute revolved around a contract of carriage is an invoice Exh. P.1 dated "15 - 9 - 05" with the description

" 1 stuffed 6 feet 20ft container TC. P/OU Bolts, Bearings & Jacks. TRLU 2029274 240 x 6"

No Bill of Lading or other equivalent document was adduced in court. All the evidence shows that the Plaintiff handed his goods to one Abbas Kaliisa the Managing Director of Spear Tourism & Cargo L.L.C in Dubai with the understanding that the goods would be delivered in Busia Uganda. There is also the issue of which company the Plaintiff was dealing with; was it Spear Tourism & Cargo (U) Ltd the Defendant in Uganda or was it Spear Tourism & Cargo L.L.C of Dubai? The two companies are clearly different legal entities. However, the evidence also shows that the two companies work

closely together, share the same directors and issue one business card with both companies on it to their customers. Actually the card some what erroneously refers to the Uganda company as “*Spear Tourism & Cargo L.L.C (sic)*”.

The Plaintiff testified that he paid his invoice at the Defendant company’s offices in Kampala Uganda and was issued a receipt for the Dubai company by them.

The Defendant company chose not to adduce any evidence to explain all of this to the court. Instead Counsel for the Defendant relied on the legal principle of separate legal existence between the two companies and therefore the argument that no cause of action had been made out against the Defendant company. In other words he has relied upon the defendant company’s “*corporate shell*”. This of course must be very confusing to the Plaintiff (as it is to the court) who at all material times knew he was dealing with the same company only to be denied by closest one to him when he suffers a wrong or loss. Should the Plaintiff then suffer this loss himself and be without remedy simply because the other company is in Dubai in the United Arab Emirates? I say; no, that in my view is not looking to the justice in the matter. Equity will not allow it especially where

the Defendants do not provide a plausible explanation. There is the maxim of equity that states

“...Equity will not suffer a wrong to be without a remedy...”

Clearly the two companies are playing the Plaintiff between themselves so that he appears to be without remedy which in my view is a fraudulent trading practice. This is therefore a perfect case for lifting the veil of incorporation. The learned author L.C.B. Gower in his book “Gower’s Principles of Modern Company Law 4^{ed} at P. 112 states that the judiciary has refused to apply the logic of the principle of Salomon’s case where it is flagrantly opposed to justice. He goes on to write

“...in cases where the veil is lifted, the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies... (emphasis mine)”

I find that the latter example given of ignoring the separate personality in favour of the economic unity to be relevant to this case. There is little doubt in my mind that the company in Uganda and that in Dubai worked as one economic unity and I according so

find. I therefore agree with Counsel for the Plaintiff that the Plaintiff has a cause of action against the Defendant company and can therefore sue it; as has been done.

The cause of action of failure to deliver the goods as contracted lies in principles of the contract of bailment. On the onset I do not agree with the submissions Counsel for the Defendant that there is no written contract. To my mind the contract can be deduced from documents such as the invoice and the receipt that adduced in evidence at the trial. Of course they are not perfect but again they are sufficient for that finding to be made; which I do. To my mind again the Defendant company put itself in the position of a freight forwarder. The authors Leo D'Arcy and Others in their book "Schmitthoff's Export Trade" 10ed 2000 Sweet and Maxwell at page 605 write as follows

"...A forwarder may act as a principal or as an agent. Historically, forwarders acted as agents on behalf of their customers but the practice has changed and in modern circumstances they often carry out others services, such as packing... or in container transport, the groupage or consolidation of parcels of various customers into one container.

Often they act as carriers. It follows in law, they may qualify more often as principals than as agents...”

This is exactly what the Plaintiff testified that Abbas Kaliisa undertook to do that is to load his goods in a container with other peoples and charges him for the space. The learned authors of Schmitthoff (supra) at page 606 further writes

“...The forwarder, when acting as an agent will often charge a commission and when acting as a principle an all-in price...”

The evidence before court shows that the Defendants charged an all-in price of US\$1540- which is consistent with them acting forwarders who are principles. This means that the Defendant entered into a contract for services with the Plaintiff.

The learned writers of Schmitthoff (supra) at page 607 them make the following important observation which is relevant to this case

“...If a dispute involving the forwarder as carrier cannot be resolved by reference to the provisions of international convention applying to the particular mode of transport... It may become necessary to resort to the common law concept of bailment because the carrier, who has possession of the owner’s

(bailor’s) goods, is undoubtedly the bailee of those goods. A bailment arises if a person (the bailee) has possession of another person’s (the bailor’s) goods by consent of the latter and undertakes to deal with them as directed by the bailor...”

In this case the mode of transport (C.I.F fob or C & F etc) was not provided for. Therefore the law applicable is the law of bailment. Here the bailor (that is Plaintiff) directed that his goods be delivered to Busia in Uganda which was not done for which I find that the Defendant company is in breach of the contract of carriage of goods.

Issue No. 2: Whether the Plaintiff is entitled to the special damages claimed?

The Plaintiff according to paragraph 5 of the plaint claims the following special damages

- a) The cost of goods
(as per receipt tendered in evidence)..... US\$17,300
- b) Shipping costs..... US\$ 1,540
- c) Air ticket US\$1,000
- d) Demurrage chargesUg.Shs.40,000/=
per day since
December 2005 to-date.

It would appear on the evidence before me that the Plaintiff did spent the US\$17,300- on the goods he gave the Defendants to ship but they failed to deliver. I according do award the Plaintiff the sum of US\$17,300 as prayed for.

As to the shipping costs of US\$1,540- the evidence of the Plaintiff is clear this sum includes a loan of US\$100 which he was to pay back. I accordingly only award him the sum of US\$1,440- as his shipping costs.

As to the air ticket of US\$1000- again the testimony of the Plaintiff is clear he only spent US\$790 on the air ticket. I therefore award him US\$790-.

There is no evidence that the Plaintiff incurred demurrage charges so I award him none.

All in all I award as special damages

- a) Cost of goods lost.....US\$ 17,300-
- b) Shipping costs.....US\$ 1,440-
- c) Air ticket.....US\$ 790-

Issue No. 3: Whether or not the Plaintiff is entitled to damages for breach?

Based on my findings it is clear that the Defendant was in breach of its bailment conditions. Counsel for the Plaintiff however did not state what quantum of damages should be awarded. Since this was an international transaction I will award US\$100- as general damages.

Other remedies

I hereby also award the Plaintiff interest of 3% p.a. on the special damages for the date of filing until payment in full and 3% on the general damages from the date of this judgment until payment in full. I also award the Plaintiff the costs of the suit.

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Geoffrey Kiryabwire

JUDGE

Dated: 07/04/08