REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Case 102 of 2007

PIL KENYA LIMITED.....APPELLANT

AND

JOSEPH OPPONG …….....RESPONDENT

(An appeal against part of a decision of the High Court of Kenya at Mombasa

(Khaminwa, J.) dated 15th September, 2006

in

H.C.C.C. NO. 446 OF 2001)

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JUDGMENT OF BOSIRE, J.A

This is a first appeal from the decision of the superior court (Khaminwa, J.) given on 15th September, 2006, in which she gave judgment to ***JOSEPH OPPONG***, the respondent, against ***PIL KENYA LTD***, the appellant in the appeal. Being a first appeal the Court is enjoined to reconsider the evidence, analyse it and come to its own conclusion without overlooking the conclusions of the trial court and bearing in mind that unlike that court, this Court does not enjoy the benefit of looking at and hearing witnesses testify as to fully assess their credibility: see, **Selles & Another v. Associated Motor Board company Ltd. and Others [1968] EA 123**. This appeal, as was stated in that decision, is by way of a retrial. This Court has to make due allowance for the foregoing aspects.

In the decision appealed from Khaminwa J. held that the respondent, a Ghanaian national, had shipped a container, TRIU 9468377, through his agents in Japan, **Afex & Associates Ltd**, to Uganda via Mombasa, and the said container was to be transported by the defendant's principal **PIL**, a Singaporean company, but that the defendant which received the container in Mombasa delayed in releasing it to the respondent with the result that he incurred loss and damages for which she gave judgment in his favour. Before I set out the main grounds of appeal it is important to set out the background facts in greater detail for a better understanding and appreciation of the issues involved in this matter.

The respondent was, in 2000, living in Japan where he was engaged in the business of purchasing and selling motor vehicles, motor vehicle parts and electronic goods. He would at times sell

some of those goods to various parts of Africa. He had a younger brother who had a Ugandan girlfriend by the name of ***Alice Kemigisha***. He wanted to sell part of his merchandize to Uganda but he could not do so because to do so he needed to have a Ugandan PIN No., which he did not have. Alice Kemigisha had one. The respondent decided to use Alice to consign some goods to Uganda. By arrangement he caused a container, **TRIU 9468377** (the container) to be shipped to Uganda via Kenya naming Alice Kemigisha (Alice) as the consignee. Afex & Associates Ltd, were the shippers of the goods aboard a ship owned by a Singaporean Company, PIL, to which the appellant were agents. The container, according to shipping practice, was given the status of *"house to house"*, meaning that upon arrival at Mombasa, it would attract demurrage charges.

The container arrived in Mombasa aboard **M.V. Budi Jeguh** on 18th March, 2000. By that date, however, certain developments had taken place and the respondent no longer desired Alice to be the consignee. He instructed the shippers to amend the bill of lading and name him as the consignee in place of Alice, which they did. **Joseph Oppong C/O Catherine Wambogu P.O. Box 3955**, **Kampala, Uganda**, was accordingly named as consignee. The shippers notified the appellant's agents in Japan. The shippers were also instructed to change the status of the consignment from house – house to pier – pier. The effect of this according to shipping practice, is to make the consignment not attract demurrage charges on arrival at the port of destination for a designated period. The consignee would only be required to pay the mandatory terminal handling charges, which according to the respondent, then stood at US $ 80. The respondent testified at the trial that the appellant's agents in Japan upon being notified of the change, sent a fax message to the appellant advising them not to release the container to Alice. Both ***Nirohanjinya Sinjihe*** and ***Margaret Shitsama***, who testified on behalf of the appellant confirmed they got information about the change of the consignee and status of the consignment. They received the correction advice on 24th March, 2000. It was also their evidence that they would be obliged to release the consignment to the consignee upon production of the bill of lading and other shipping documents and personal identification documents.

Evidence was tendered at the trial indicating that by a telex dated 6th March, 2000, the shipper had authorized the appellant to release the consignment to Alice without the presentation of the original Bill of Lading. When the change was communicated to the appellant a further e-mail was sent dated 31st March, 2000 instructing the appellant to:

"Please do reverse it to Mr. Joseph Oppong. His Ghana passport may serve as identification."

By an earlier telex sent on 30th March, 2000 the appellant was addressed as follows:

"EX VESSEL/VOYAGE: ACX ROSE V.069

SAILED: YOKOHAMA, JAPAN.

POL/POD: MOMBASA

B/L. NO: YOKMBA2K46

ORIGINAL CONSIGNEE: MESSRS KEMIGISHA ALICE

NEW CONSIGNEE: MESSRS JOSEPH OPPONG.

DEAR SIR,

THE ABOVE CAPTIONED CARGO WAS ORIGINALLY CONSIGNED TO MESSRS KEMIGISHA ALICE. HOWEVER, DUE TO THE NON-PAYMENT OF CHARGES, WE RECONSIGNED THE CARGO TO MESSRS JOSEPH OPPONG.

MESSRS JOSEPH OPPONG WILL BE IN KENYA WITHIN THE WEEK TO CLEAR THE CARGO AND WOULD BE GRATEFUL IF YOU WOULD ADVICE ON THE CURRENT POSITION.

REGARDS

KWASI KYEI

ALEX & ASSOCIATES."

The appellant through one ***Mark*** responded to confirm that the cargo had not been released.

In the meantime Alice approached the appellant as the original consignee and claimed the goods. The first time she did so, the consignment had not arrived. Later she returned with the original bill of lading, which according to the respondent had earlier been stolen from him by Alice. However, by this time the appellant had been advised about change both in the consignee and status of the cargo. For that reason the appellant refused to release the consignment to her. It was the appellant's case that had the change not been communicated to them they would have definitely released the consignment to her. ***Sinjhe*** testified as follows in that regard:

"The consignee was to approach us with documents of bill of lading and identification to enable us to release the goods."

When the appellant declined to release the consignment to Alice, it meant that it had accepted the telex and e-mail messages as authentic and which could be acted upon. The witnesses testified as follows on this aspect:

"We corrected the manifest to read Joseph Oppong. We expected consignee bill of lading so we could deliver the goods. The plaintiff had not produced any document."

In my understanding the change rendered the original bill of lading worthless. Alice could not use it to claim the consignment unless the instructions changing the consignee were revoked. As at the date of the judgment appealed against, the instructions had not been revoked. The respondent could not produce the original bill of lading because he did not have it, and he told the appellant's employees as much. He stated to them that Alice had stolen them.

So, both Alice and the respondent claimed the consignment each claiming to be the consignee. It was the appellant's case that because of that it would not release the consignment to either of them. Later there was a third claimant, ***Jeneby Taita***, who alleged that Alice had sold the consignment to him. The appellant's case was also that it could not release the consignment to this third claimant as well.

It was after the respondent was refused delivery of his consignment that he filed suit in a Kampala court. The Uganda suit, **High Court of Uganda Civil Case No. 390** of **2000** was against Alice and in it the respondent sought and obtained, *inter alia*, a preservation order that the consignment be kept in the Customs Bonded Warehouse of the Uganda Revenue Authority until further orders of the court or until the property would have been released to the respondent. The respondent obtained a preservation order on 13th June, 2000.

In the meantime Jeneby Taita filed a suit in Mombasa *to wit* **High Court Civil Case No. 260** of **2000** naming the appellant as defendant, and therein claimed the consignment as purchaser of the same from Alice and sought an order that the appellant release the consignment to him. He filed an interlocutory application in that suit seeking a mandatory injunction to compel the appellant to release the container No. TRIU 9468377, aforesaid. The application was heard by Waki J. (as he then was) but the learned Judge declined to grant the order and dismissed the application. Following the dismissal Jeneby Taita decided to and filed a notice of withdrawal or discontinuance of the suit on 14th November, 2000. A day later an application for the amendment of plaint to include the respondent as a party, was argued and orders granted.

I pause here to consider the effect of a notice of withdrawal or discontinuation of a suit.

O.XXIV rule 1 of the Civil Procedure Rules, provides that:

"(1) At any time before the setting down of the suit for hearing the plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall be a defence to any subsequent action."

The effect of a notice of withdrawal is to terminate the suit of course subject to costs to the opposite party. In this matter however, there was a dispute as to whether Jeneby Taita had indeed withdrawn the suit. His advocate, one Mr. Obura, later told the court that the letter giving notice of withdrawal of suit could have been a forgery. The advocates had, later, to apply to cease acting for Jeneby Taita, because he was unable to get him and the correspondence he sent to him remained unanswered. It should be noted that the letter giving notice of discontinuance of the suit was not by the advocate but allegedly by the party himself. The advocate was however proved wrong because Jeneby Taita, never pursued the case after his application for a mandatory injunction was dismissed by Waki, J.

The question I pose is whether after the notice of withdrawal of suit, there was a suit in existence in which orders other than orders on costs could be made either for or against the appellant" I will revert to this question later in this judgment.

The appellant and respondent later entered into a consent in Jeneby Taita's suit on 9th February,2001 as follows: -

"By consent the first defendant hereby agrees to release the container No. TRIU – 9468377 ACLA 0043 – 72 to the second defendant subject to the following conditions:

1. The second defendant shall pay to the first defendant, a sum of US Dollars 3000 or its equivalent – Kenya shillings as at the time of such payment.

2. The first defendant shall pay a deposit to the second defendant of Kshs. 190,000/= if the state of the container is house to house.

3. If the status of the container is pier to pier the second defendant shall pay the port handling charges, delivery order fee amendment charges, totaling Kshs.10,280/=

That is order by consent."

The first defendant was the appellant herein while the second defendant was the respondent herein.

The US $3000 stated in the consent is part of the money the respondent claimed in his suit which I shall shortly hereafter outline. The consent is not clear what that payment was to be for. Be that as it may, the respondent paid the money and the container was released to him.

In the meantime Alice also applied to be joined as a party in the aforesaid suit. In addition she sought an order that the consent order, above, be set aside, and an order staying its execution be granted. Hayanga, J. heard the application but declined to grant the orders setting aside the consent order or staying the execution of it. Later the respondent's costs were taxed at Kshs.1,100,000/=.

The respondent filed the suit from which this appeal emanates, on 6th September, 2001. The basis of his suit is set out in paragraph 8 of his plaint in which it is averred as follows:-

"8. The plaintiff states that due to non-compliance with the above stated instructions by the defendant, Alice Kemigisha purported to clear the container with fake documents which culminated in two suits being H.C.C.C 260 of 2000 in Kenya and Civil Suit No. 390 of 2000 in Kampala, Uganda."

In paragraph 9 of the plaint the respondent averred that delay in releasing the container resulted in the accumulation of demurrage charges, loss and damage. He then itemizes his claim as follows:

"(a) Expenses of the law suit in Uganda US $ 2,000

(b) Accommodation, travel and up-keep

Expenses US $ 8,234

(c) Law Suit in Kenya US $ 1,000

(d) Demurrage charges US $ 3,000

(e) Loss of profits for delay at

Kshs. 70,000/= per unit for four

Units. Kshs. 280,000

(f) Loss of monthly income at

US $ 1,000 while on business in

Japan."

In its written statement of defence the appellant, which was named as sole defendant, denied the claim, and on the main averred that as there were three parties claiming the container it could no release it to the respondent. Besides, there was a pending suit with the container as the subject matter, and it could not therefore release the container otherwise than had been agreed by consent of the parties to the suit. The appellant also averred that as it was not a party in the suit in Uganda, and it was also not the plaintiff in the suit in Kenya it was not liable to pay any costs to the respondent. The appellant also raised the doctrine of *res judicata*, because in its view Civil Suit No. 260 of 2000 was still pending and on that account the respondent was precluded from continuing with his suit.

Khaminwa, J. found as fact that the appellant indeed received instructions from the shipper to release the container to the respondent but which instructions the appellant ignored and thus breached its contractual obligation to hand over the container to the consignee. She also found as fact that there was unnecessary delay in releasing the container which made the respondent to incur expenses to secure its release. She therefore found the appellant liable to the respondent in damages. She accepted the respondent's figures on expenses incurred in prosecuting both the Uganda and Kenya suits and awarded the same. She declined to award any sum for loss of profits as in her view the respondent did not offer proof thereof. She also thought that the claim for loss of monthly income was too remote and so was the claim for general damages for breach of contract. The learned Judge however, awarded US $ 3000 which the respondent paid pursuant to a consent order in **Mombasa High Court Civil Case No. 260** of **2000** which the respondent said was paid as demurrage charges. It is against that decision that the appellant has come to this Court on Appeal.

In its memorandum of appeal, the appellant has raised 7 main grounds, namely: that the learned trial Judge erred in failing to hold that it was merely a transporter; that she erred in failing to hold that there was no privity of contract between it and the respondent; that she erred in failing to hold that the respondent should have but did not make his claim in High Court civil Case NO. 260 of 2000; that she erred in failing to hold that public policy and the rule of law required that the appellant keep the container until all pending disputes over the container were determined; that she erred in holding that the appellant was liable to the respondent for the legal expenses, accommodation, travel, upkeep expenses and demurrage expenses incurred by the respondent; that she erred in awarding a sum of money which was not prayed for without the plaint being amended and that she erred in her evaluation and assessment of the evidence and as a result came to a wrong decision.

There is no dispute that the appellant declined to release the subject container to the respondent. The respondent was the consignee according to the shipper. The appellant admitted it received instructions regarding the change in the consignee and status of the cargo. One of the main issues at the trial and in this appeal is whether there was a contract between the appellant and the respondent which obligated the appellant to release the cargo to the respondent. In my view there was no contract between the appellant and the respondent concerning the container. There was however a contract of bailment between the shipper and the ship owners to which the bill of lading is evidence. **Strond's Judicial Dictionary, 4th Edition** has a quotation from the case of **Mason v Lickbarrow 1 BI.H. 359**, in which Loughborough C.J, said:

"A bill of lading is the written evidence of a contract for the carriage and delivery of goods, sent by sea for certain FREIGHT. The contract, in legal language, is a contract of BAILMENT…… in the usual form of the contract, the undertaking is to deliver to the order, or assigns, of the shipper……. The indorsement of the bill of lading is simply a direction of the delivery of the goods."

While I hold that there was no privity of contract between the appellant and the respondent, strictly so peaking, it cannot be gainsaid that the appellant had a legal duty on the basis of the amended bill of lading to deliver the container to the respondent at the earliest possible time. The appellant declined to deliver the container as per the amended bill of lading and instead demanded an order of the court arguing that there were several claimants. The appellant was agent of the ship owner and it was obliged to do what the ship owner had covenanted to do, namely, deliver the cargo to the consignee.

In my view it was not open to the appellant to ask the claimants to obtain a court order to direct it as to whom it was to make delivery. The bill of lading was clear as to who was to take delivery. If at all it was in doubt then it was its duty to take out interpleader proceedings for the court to determine the

rightful consignee. The evidence tendered was clear that the original consignee was Alice. The bill of lading was then amended to show that the consignee was the respondent. There was no basis for doubt. So regarding the status of the appellant, it was a bailee with specific instructions.

As regards High Court Civil Case No. 260 of 200, the plaintiff was Jeneby Taita with the appellant as defendant. The respondent herein was not named as a party. I earlier stated that a notice of withdrawal of suit was filed on 13th November, 2000. By that date the respondent had not been made a party. It was on or about 15th November, 2000 that the respondent brought an application seeking to be enjoined as a defendant on the ground that he had an interest in the subject matter of that suit. The application was heard on 15th November, 2000, by a Commissioner of Assize, Mrs. Tutui, who granted it and directed that an amended plaint be filed. There is no evidence before this Court that it was ever filed. If, however, the notice of withdrawal was valid such an amendment did not arise as there was no suit in existence respecting which an amended plaint or amended defence could be filed. The order was made *ex parte*, and later, a Mr. Obura for the plaintiff lamented that he should have been but was not served with the order enjoining the respondent herein as defendant and directing the amendment of the plaint. A plaint could not properly be amended at the instance of a party who was not the plaintiff. The said advocate also asserted that the suit had not been withdrawn and any notice to that effect was a forgery. It later transpired, however, that the plaintiff disappeared. He was not answering his advocate's letters nor did he ever visit him thereafter. The notice of withdrawal was home made and I infer that it was indeed filed by the plaintiff personally. I say so advisedly. By his conduct he had no interest in the suit, with the result that his advocates had to formally apply for leave to cease acting for him. The plaintiff in that suit did not need the leave of the court to withdraw his suit nor was a court order necessary to give effect to the withdrawal. All that was necessary was for the plaintiff to file a notice of withdrawal before judgment. After judgment, however, the leave of the court was necessary.

Having come to the foregoing conclusion, it is my view that the superior court was in grave error to continue with the case without first ascertaining whether the notice of withdrawal of suit was valid or not. Besides, on 7th February, 2001 M/S. Musinga & Company, advocates, who were then on record for the plaintiff were granted leave to cease acting for the plaintiff. Yet on 9th February, 2001 Mr. Musinga is shown on record to have appeared and was party to a consent order which I earlier reproduced in which the respondent consented to pay US $ 3000 in order for the container to be released to him. As at the date the consent was recorded, there was technically no suit in existence. It is noteworthy that there is no bar in bringing a fresh suit. ***O.XXIV rule 4*** of the ***Civil Procedure Rules*** provides thus: -

"4. If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid."

The respondent's suit was not discontinued. The appellant's case here is that he should have made his claim in that suit and having failed to do so this suit is either *res judicata* or an abuse of the process of the court. ***O.XXIV rule 4***, makes it clear that the respondent's suit is not *res judicata*. Jeneby Taita, having either discontinued his suit or abandoned it there was no impediment to the respondent bringing his suit. At any rate it is my view that Jeneby Taita actually withdrew his suit and as at the date the respondent was enjoined in that suit it was not in existence. So the respondent had the right to bring his suit if he thought he had the necessary evidence to prove his claim.

Mr. Omondi for the appellant argued the appellant's grounds relating to damages and costs together. His submission was that the respondent did not offer any proof on his claim for special damages. Additionally, he submitted, the respondent did not pray for judgment on it. Furthermore it was his submission that costs relating to the suit in Uganda were recoverable in that suit and the respondent

did not adduce any evidence to show that the costs were not awarded by that court or that the expenses relating to that suit were not claimed there. Before I deal with those arguments I must first deal with the issue of liability.

The appellant had a legal duty of releasing the container to the consignee, who was the respondent. It did not do so. As I stated earlier, the appellant should have, but did not bring interpleader proceedings to determine the true consignee if it was in doubt. Instead it told the opposing claimants to get a court order and thus precipitated the three suits. The position would have been different if the appellant was not given instructions by the shipper on who was to take delivery. The shipper sent telex and e-mail messages which the appellant admitted it received through their agent in Japan and some directly. Having failed to act to those clear instructions it breached its legal duty as bailee.

I will now deal with the arguments on damages. The special damages were pleaded as I earlier on stated. The final prayer regarding those damages was couched in the following terms.

"REASONS WHEREFORE the plaintiff prays for judgment against the defendant for:

(i) The particulars of loss as specified in paragraph 9 of the plaint with interest thereon."

Mr. Omondi submitted that the prayer is vague and falls short of what is expected in pleadings. I do not agree with learned counsel. In my view the prayer specifically directs the reader to paragraph 9 of the plaint, which in my view clearly and sufficiently sets out what the respondent was claiming.

Regarding the claim of US $ 2000 which the respondent said he paid to his lawyers in Uganda, the respondent conceded that Alice was ordered to pay those costs. This is what he stated in evidence, under cross-examination.

"I paid to my Uganda lawyers USD. 2000. I have not gone back to check on case. Legal costs is determined as to who is to pay in that case. Costs in that case to be paid by Alice."

The trial Judge did not allude to this fact. In my view she improperly allowed that part of the respondent's claim. By allowing it the respondent will receive double benefit for the same claim. I would disallow that claim.

As regards the costs in the Kenyan case, *to wit* High Court Civil Case No. 260 of 2000, the respondent testified that he paid Kshs.75,000/= in legal fees, which on conversion comes to USD. 1000, according to the respondent. The appellant was granted leave by this Court to put in the copy of proceedings in that case. I have perused the same. The Deputy Registrar of the superior court taxed the respondent's bill of costs at Kshs.1,100,000 on 14th March, 2007. This was after the respondents had filed this suit but before judgment. That being so, the learned trial Judge should have, but did not, discount the claim of USD 1000. As apparently both awards were made against the appellant for the same purpose, viz, to compensate the respondent for loss he incurred in the case, both cannot stand. I would therefore set aside the award of USD 1000.

As regards, USD 3000 which was allegedly paid as demurrage charges, two aspects fall for consideration. The first one is whether the demurrage charges were payable" Two, who was supposed to pay the same" The respondent's case was that when the status of the cargo is pier to pier, no demurrage charges were payable within the first 21 days. ***Margaret Shitsama***, testified that indeed no demurrage charges were payable. She testified that storage charges were payable. But what are demurrage charges" These are agreed charges payable by the charterer of a ship for each day taken in

loading or discharging cargo beyond the times fixed for the operation. In **Lockhard v Falk (L.R. 10EX. 132**), it was held that the term is more applicable to delay in time after the expiration of a fixed time than delay after the expiration of a reasonable time. Be that as it may, the respondent was asked to and he paid an agreed sum of USD 3000 for delay in discharging the container. The delay according to him was necessitated by the refusal of the appellant to release the container to him. In my view the appellant improperly refused to release the container to the respondent within a reasonable time and these charges were thus incurred. I would hold that the respondent was properly awarded that figure.

There was an argument that the payment was pursuant to a court order. As I held earlier, there was no valid suit in which the consent order to pay the money would be made. The consent order was made without jurisdiction. The suit had been withdrawn. Besides the suit was necessitated by the conduct of the appellant.

The three awards I have dealt with above were the only ones the trial court awarded. The result is that this appeal succeeds in part and in the circumstances I would allow it in part, set aside awards made for legal fees for the Ugandan case and Mombasa High Court Civil Case No. 260 of 2000, but affirm the award of USD 3000. I would order that each party bear own costs of this appeal, but the appellant shall bear the costs of the suit in the High Court to be taxed if not agreed.

As my brothers Onyango Otieno and Nyamu, JJA have come to a different conclusion, this appeal is allowed on terms proposed by Onyango Otieno JA. It is so ordered.

Dated and delivered at Mombasa this 16th of October, 2009

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: BOSIRE, ONYANGO OTIENO & NYAMU, JJ.A.)

CIVIL APPEAL NO. 102 OF 2007

BETWEEN

PIL KENYA LIMITED ……APPELLANT

AND

JOSEPH OPPONG ……..……RESPONDENT

(An appeal against part of the decision of the High Court of Kenya at Mombasa

(Lady Justice Joyce Khaminwa) dated 15th September, 2006

in

H.C.C.C. NO. 446 OF 2001)

****

JUDGMENT OF ONYANGO OTIENO, J.A.

This is a first appeal from the decision of the superior court (Khaminwa, J.) in which the trial court; after full hearing, in a judgment dated and delivered on 15th September 2006, found for the respondent in this appeal Joseph Oppong and entered judgment for him against the appellant Pil Kenya Limited in the total sum of US Dollars 13,234. The learned Judge in the same judgment dismissed other claims which were made in the plaint, but were not proved. The costs were awarded to the respondent and interests on the amount of USD 13,234 was awarded at court rates.

The facts giving rise to that suit in the superior court were not in serious dispute and were briefly that the respondent, Joseph Oppong, a Ghanaian by nationality was, immediately prior to the incidents giving rise to the proceedings, residing in Japan and was engaged in business there. One of the businesses he was engaged in was buying and selling of motor vehicle components and electronic items within Japan as well as for export to Africa. While in Japan, and in the course of his business, he met one Alice Kamigisha, a Ugandan who was a friend of his brother. Alice made representations to him that there was ready market for his merchandise in Uganda. On her return to Uganda, the respondent forward a shipment of four units of electrical and electronic goods in a 1x40 feet container number TRIU 9468377 to be consigned to the same Alice in Uganda via Mombasa Port. The goods were shipped to Mombasa in the same container on M.V. Budi Teguh and was covered under the M.V. Budi Teguh Manifest – TPTGMBA 00124. The consignee was named as Alice Kamigisha of Uganda but the original bill of lading YOK MBA 2K 46 was surrendered in Japan and the appellant was later authorized to release the goods without the bill of lading. The appellant was a registered company in Kenya and was an agent of the shippers company in Japan. It was not denied that it was the company in Kenya with the responsibility of releasing the goods to the rightful claimant who would then be obliged to take the goods overland to Uganda. Before the cargo reached Mombasa, the appellant was advised not to release the cargo to Alice Kemigisha as the name of the consignee had been altered and the consignee was now the respondent Joseph Oppong and not Alice Kamigisha. This was because the respondent was not happy with Alice who had stolen his money when he came to Uganda before the goods arrived at Mombasa. Another alteration made and of which the appellant was advised was that the status of the container was also amended to read *"pier to pier"* and not *"house to house"*. The effect of the two amendments were that the goods would now be released to the respondent and not to Alice Kamigisha and the respondent would only pay USD 80 being mandatory terminal handling charge and not demurrage charges as the status of the container was now, on amendment *"pier to pier"* as opposed to *"house to house".*

The container arrived in Mombasa on 18th March 2000. It is necessary to state here that the request not to release the consignment to Alice was received by the appellant on 17th March 2000, one day before the cargo arrived in Mombasa. Alice approached the appellant claiming the goods and seeking the release of the container to her. She first did this before the ship arrived according to the evidence of Margaret Shitsama (DW2) who claimed to have substantially dealt with the matter. After the goods had arrived at Mombasa, Alice again approached the appellant seeking the release of the goods to her. She had documents that were purportedly original of bill of lading. She also had had identification documents. She was told that the goods would not be released to her as the appellant had instructions to change the name of the consignee and had acted on those instructions. Sometimes in April 2000, the respondent Joseph Oppong appeared before the appellant company. Margaret said in evidence that when respondent appeared first time, he had no documents i.e. he had no bill of lading yet he wanted the goods. That seems to be contradicted by an affidavit in record sworn by one Mark Dominic Joseph Lazaro in response to an application in High Court Civil Case No. 260 of 2000 to which I will later refer in which Lazaro stated that the appellant had also been instructed to release the cargo to respondent without presentation of the original bill of lading. Be that as it may, the respondent says in his evidence that when he claimed the goods, the appellant's Director advised him to seek an order of the Court for the release of the goods as Alice had already claimed the same goods and had presented original bill of lading in support of her claim. Although the respondent's position was that Alice had presented bill of lading stolen from him, he nonetheless went to Uganda, the original destination of the goods, and filed High Court Civil Case No. 390 of 2000 at the High Court of Uganda at Kampala against Kemigisha Alice. Apparently that suit was filed together with Misc. Application No. 457 of 2000. He obtained an interim order in that case. I feel that order is important for the decision of this suit I will reproduce it in this judgment. It read as follows:-

"INTERIM ORDER:

This application coming before me Hon. Ag. Judge Magezi and upon hearing from George Spencer Counsel for the applicant/plaintiff whereby the application seeks to preserve the status quo in the property in the container No. TRIU 9468377 ACLA 004372 of used automobile, electronics and electrical goods, including the container which is the subject matter in the main suit be preserved in a neutral place and upon perusing the court records herein.

IT IS HEREBY ORDERED AS FOLLOWS

1. That the property in the goods in container No. TRIU 9468377 ACLA 004372 of used automobiles, electronics and electrical goods, including the container which is the subject matter in the main suit be preserved in a neutral place i.e. in the hands of the shipping agents and or clearing agent until the final disposal of Misc. Application No. 457 of 2000 for a temporary injunction.

2. Costs of this application to be in the cause.

IT IS SO ORDERED.

GIVEN UNDER my hand and the seal of this Honourable Court this 19th day of 4. 2000.

REGISTRAR."

Although that order was extracted and sealed on 19th April 2000, the respondent, in his evidence stated that it was delivered on 15th April 2000. It is not clear how it was served upon the appellant, it

being an order made in a foreign country. However, two things are clear, these are that first it was the order the appellants had asked the respondent to seek before the goods could be released to him and secondly, appellant did not deny receipt of it. Indeed the appellant's position in the entire case was that it was one of the matters that militated against their releasing the subject goods to the respondent. In the affidavit sworn by Lazaro in another case I have referred to hereinabove namely HCCC No. 260 of 2000 it is stated that it was served on the appellant's office in Uganda under a cover of a letter dated 28th April 2000 by respondent's advocates. That service upon appellant's office in Uganda was in my view valid as it was an order made by Ugandan court and served upon appellant's office in Uganda. Thus, upto that point, the dispute over the proper claimant of the subject goods as far as Alice Kemigisha and the respondent were concern would appear to have been resolved vide that court order. But was it" Far from that. All that the order stated was that the goods were to be preserved in a neutral place in the hands of the shipping agents who was the appellants and or clearing agents until the final disposal of the application. The goods were still in Mombasa as the appellant did not take it to Kampala although Margaret accepts in evidence that the cargo was on transit to Kampala. It is not clear what the appellant did immediately that order was issued as Margaret's evidence is not clear on the same, but she talked of respondent approaching her without bill of lading and telling her Alice had stolen bill of lading and at one point saying they released the goods to Alice but at the same time saying she told Alice that respondent had cleared the goods. Whatever happened, as the respondent was still pursuing the release of the goods to him, another person came into the scene. This was one Jeneby Taita. Vide a letter dated 31st May 2000 addressed to the appellant by Taita's advocates, Taita stated inter alia as follows:-

"Our client has purchased an assortment of goods shown in Bill of Lading No. AF/KM/001 from one Kemingisha Alice who is listed as the consignee in the Bill of Lading.

Our instructions are that inspite of our client furnishing you with proof of purchase and other relevant documents in support of his claim, you have adamantly refused to release the said goods which are in container No. TRIU 9468377 ACLA 004372 to our client on the alleged strength of some interim order issued by a foreign court which is not however, validly attested.

Kindly note that the said alleged order cannot at all form your basis for detaining our client's goods as it has not complied with the relevant legal provisions of Kenya Law as to its enforcement locally and is therefore of no consequence.

We therefore hereby put you on notice that unless the said container is released to our client within 24 (twenty four) hours of delivery of this letter, our instructions are to commence legal proceedings against yourselves holding you liable to the continued illegal detention of our client's container and for any loss, theft and/or damage to the said container while it is illegally detained by yourselves and further for any costs and other consequences, without further reference to yourselves which please note."

That demand letter was followed by a suit in the High Court at Mombasa, HCCC No. 260 of 2000 together with an application filed on 6th June 2000 by Jeneby Taita against the appellant seeking mandatory injunction to compel the appellant to release the goods to Taita. That application came up ex-parte on 7th June 2000 for certification and for interim orders but the court (Waki, J as he then was) declined to certify it urgent. The respondent and Alice were not joined as parties to that suit by Jeneby Taita. That application was heard on 31st July 2000 and was, in a ruling dated and delivered on 6th October 2000 dismissed with costs to the appellant. But that was not the end of the matter for later the respondent in this appeal Joseph Oppong filed an application in that case seeking to be joined as a party in that suit. That was proper for only the application by Taita had been disposed of, the main suit was

still pending. On 25th November, 2000 the respondent was joined as a party too that suit. Thereafter Taita purported to withdraw from the suit. His advocates objected but later, when they could not trace Taita, they too withdrew from acting for him. That left the appellant in this appeal who was sued as the defendant and the respondent who came into the suit later as the claimant of the subject goods. On 9th February, 2001, the matter came up before court (Hayanga J.) and for some unknown reasons, Mr. Musinga advocate (as he then was) who had on 7th February 2001 been granted leave to withdraw from the case appeared together with the advocate for the present appellant and the advocate for the present respondent. On that day the learned Judge (Hayanga J) entered the following consent order:-

"By consent the first defendant hereby agrees to release the container No. TRIU 9468377 ACLA 0043-72 to the second defendant subject to the following conditions:

1. The second defendant shall pay to the first defendant, a sum of US dollars 3000 or its equivalent - Kenya shillings as at the time of such payment.

2. The first defendant shall pay a deposit to the second defendant of Ksh.190, - if the status of the container is house to house.

3. If the status of the container is pier to pier the second defendant shall pay the port handling charges, delivery order fee amendment charges totaling Ksh.10,280."

At the risk of repetition, the appellant herein was the first defendant in that suit and the respondent herein was the second defendant pursuant to the order dated 15th November 2000. One would have thought that consent order ended the matter as thereafter all that appeared as remaining was to exchange the payments and physical release of the goods to the respondent. Unfortunately that was not to be. The record shows that on 20th April 2001, Alice Kemigisha went to court apparently seeking to be joined in HCCC No. 260 of 2000 as third defendant and seeking after being joined to stop the release of the subject container. It is, noteworthy that on the same day 20th April 2001, Waki J. made the following order.

"Application may be heard during the vacation. Let it be served on the other parties for hearing interpartes on 24th April 2001. The states (sic) quo as at the time of service of that order shall be maintained until then."

That order of maintaining states quo was further confirmed on 24th April 2001, 26th April 2001 and 4th May 2001. Hearing of that application was finalized on 21st May 2001. In a lengthy ruling delivered on 30th May 2001, Hayanga J. who heard the application dismissed it with costs but the learned Judge also ordered that the application be struck out altogether. This was after the goods had been released as per consent order of 9th February, 2001. It is however important when one considers the next action in the scenario which has ended in this appeal.

On 6th September 2001, about four and a half months after the consent order of 9th February 2001, the respondent filed Civil Suit No. 446 of 2001, the subject of this appeal. In that suit, the respondent prayed for judgment against the appellant for:-

"(i) The particulars of loss as specified in paragraph 9 of the plaint with interest thereon

(ii) General damages

(iii) Costs of this suit and interest thereon.

(iv) Any other or further remedy that this Court may deem just to grant."

First prayer is not clear for the Court in that prayer was being asked to grant judgment for the particulars of loss and not special damages, but I am prepared to treat it as claim for special damages stated at paragraph 9 of the plaint. These were:-

"9. The plaintiff states that when so requested the defendant refused to release the plaintiff's container and thus causing the plaintiff to accommodate high demurrage charges occasioning the plaintiff substantial loss and damage.

PARTICULARS OF LOSS

(a) Expenses of law suit in Uganda…...

…..US$2,000.

(a) Accommodation, travel and upkeep expenses ……..US$ 8,234.

(b) Law suit in Kenya ….US$ 1,000.

(c) Demmurage Charges US$ 3,000.

(d) Loss of profits for delay at Ksh.70,000 per unit for units four … Ksh.280,000

(e) Loss of monthly income at US$1,000 while on his business in Japan."

The thrust of the basis for the claim was stated at paragraph 7 of the plaint and was that in compliance with the shipping practice and the contractual relationship between the respondent and the appellant; the appellant was under obligation to comply with instructions of the respondent's agents and thus it should have released the goods plus container to the respondent when requested by the respondent on 4th April 2000.

The appellant's defence to that claim was contained in a written statement of defence dated 1st October 2001. In that defence, the appellant stated inter alia that it was, throughout the transaction acting as clearing agent for Alex & Associates Limited, the shipper of the subject goods; that it was a stranger to the allegations on instructions to change the name of the consignee and changes as to the status of the container; that in any case and without prejudice to the above, the matters in dispute were sub-judice and the appellant could not have complied with any of the alleged instructions; that it was willing and ready to release the goods to the respondent upon conditions spelt out in the consent order of 9th February 2001; that as it was not a party to the suit in Uganda and not the plaintiff in the HCCC No. 260 of 2000 at Mombasa court, it was not liable to losses incurred in respect of those suits; that as HCCC No. 260 of 2000 was pending in court the respondent was barred and/or estopped from instituting that suit which was a subsequent suit to the civil matter No. 260 of 2000 which was then pending and was a previous suit and that the suit was scandalous, frivolous, and/or vexatious and an abuse of the due process of court.

The above were the pleadings and facts before the superior court. The respondent who was the plaintiff gave evidence as PW2 and called three other witness namely Patrick Chege (PW1) who gave evidence on behalf of Court Executive Officer and produced court file in respect of HCCC No. 260 of 2000 as exhibit 1, and Dekor Noor Ari (PW3 - wrongly referred to as PW2 in the records), a clearing and

forwarding agent and Managing Director of a clearing firm based in Mombasa. The name of the third witness called by the respondent was omitted from the record but he was also a clearing agent. The appellant called two witnesses - Nirohanjnya Sinjha (DW1) then appellant's assistant manager responsible for inward and outward documentation and Margaret Shitsama (DW2) then assistant Declaration officer with the appellant's company and to whose evidence I have referred hereinabove. The gist of the evidence of all these witnesses is summarized in the facts I have given above. I will however refer to certain aspects of that evidence particularly on the claimed losses later in this judgment. In considering the entire case, after full hearing, the learned Judge, noting that the parties did not frame issues for determination, held that the matter before her was a contract for transportation of goods by sea from Japan to the port of Mombasa Kenya and framed the issues as follows:-

- ***"Was the defendant bound to release the goods to the consignee at the port of Mombasa.***
- ***Who was the consignee of goods when they arrived at Mombasa"***
- ***Did the defendant release the goods to the lawful consignee"***
- ***If so, did the defendant cause delay in delivering the goods to the consignee, if so for how long was the delay"***
- ***Did the plaintiff suffer loss because of such delay"***
- ***What was the amount of loss and is the defendant liable to the plaintiff."***

I note at this juncture that the learned Judge of the superior court did not find it necessary to consider the effect of other claimants to the goods together with court cases and orders made by the courts in Uganda and Kenya upon the release of the subject goods. She did not also find it necessary to consider the defence that the case before her was barred by the operation of law as HCCC No. 260 of 2000 to which the appellant was a party and later the respondent was also a party had not been concluded and was a previous suit on the same subject matter namely release of the subject goods to the respondent and lastly she did not consider the legal effect of a consent order made on 9th February 2000 in HCCC No. 260 of 2000 upon the claim of USD 3000 later claimed in the suit before her. In my mind, those were some of the issues to be considered. If she considered them, then they were not framed and treated as issues arising from the pleadings, evidence, submissions and the law as then obtaining. Be that at it may, after full consideration of the issues framed by her, learned Judge found and held as follows on liability.

"It is to be noted that the defendant was acting on instructions from PIL Japan and there is evidence that defendant was instructed to amend the documents to read consignee Joseph Oppong of Kampala. The plaintiff went to collect his goods on 4th April 2000 after receiving instructions from his agent (Afox) in Japan. Despite this, the defendant insisted on the plaintiff producing a court order for the release of the goods to him. The correction advise was dated 24th March 2000 and it contained a noted "remark full set of original B/L was not amended. Please amend as above at yours." This message must have been received in Mombasa by defendant. However, when the plaintiff travelled to Mombasa to collect his goods, the defendant declined to release them. The defendant ignored instructions from Japan and chose to believe other parties who were also claiming the goods. The defendant therefore was in breach of contractual obligation to hand over the goods as it was bound to do."

And on the damages, the learned Judge of the superior court after full consideration of the claims by

the respondent and legal authorities cited to her made awards as follows:-

"In the circumstances of this case, I find for plaintiff and I enter judgment in the sum of:-

1. US$ 2000 per (a)

2. US$ 8234 per (b)

3. US$ 3000

Total US$ 13,234.

Other claims are not awarded and are dismissed."

The appellant felt aggrieved by that decision and came to this Court by way of this appeal. It filed fourteen grounds of appeal through its advocates Omondi Waweru & Company. These are, in a summary, that the learned Judge erred in holding that the appellant was transporter of respondent's goods from Japan to Mombasa; that there was no privity of contract between the appellant and the respondent; that the reliefs sought in the suit should have been sought in HCCC No. 260 of 2000 that the public policy and the rule of law demanded that the appellant should not have released the container, the subject matter in the suits until all the disputes over the same were determined by a court of law; that the court erred in holding the appellant liable for legal expenses, accommodation, travel and upkeep expenses and demurrage charges allegedly incurred by the respondent; that part of the amount awarded was not prayed for; that the legal expenses incurred in Uganda were awarded without proof of the same and without legal basis for awarding the same; that judgment awarded for accommodation, travel expenses and upkeep were awarded without proof of the same being availed and without further proof that if any were incurred, the same were incurred on account of the subject matter; that the award for demurrage charges were awarded despite the fact that that payment was made pursuant to a consent order entered by the court and that consent order had not been set aside; that the learned Judge of the superior court erred in holding that the respondent had no duty to mitigate his losses; that the learned Judge in her evaluation and analysis of the pleading and in failing to consider the evidence advanced by the appellant; that the learned Judge's decision went against the weight of the evidence, which if considered, the respondent's case should have been dismissed.

At the hearing of the appeal before us, Mr. Omondi, the learned counsel for the appellant, while not abandoning any of the grounds cited concentrated his submissions on the award of damages - special damages- which he said was improper as the alleged losses were not pleaded and proved strictly as required by law and some claims awarded were not pleaded. He however, submitted further that delay in releasing the container was not attributable to the appellant as immediately the goods arrived at the port of Mombasa, there were claims for the goods by other parties and that gave rise to court cases in Uganda and Kenya which resulted in several court orders which the appellant had to obey. Besides that, he submitted that the appellant, faced with those conflicting claims, had to be cautious. When asked by the court as to whether there was privity of contract between the appellant and the respondent, his submission was that there was no privity of contract between the appellant and the respondent because in evidence the respondent stated that the appellant was agent for a shipper and the respondent never alleged that he entered into any agreement with the appellant for contract of carriage of goods by sea as in any case, appellant was an agent for a disclosed principal.

Mr. Wameyo, the learned counsel for the respondent, on the other hand was of the view, that the awards were proper as the claims for special damages were each pleaded and proved by documentary

evidence all of which were admitted as no objections were raised. He referred the court to two affidavits sworn by two employees of the appellant in HCCC No. 260 of 2000 and submitted that the same affidavits clearly demonstrated that the appellant's failure to release the subject container is what necessitated the losses incurred by the respondent. He submitted by way of demonstration, that losses such as resulting in the filing of a case in Uganda were all as a result of the actions of the appellant in resisting the release of the goods and were therefore properly claimed and properly awarded. He thus urged the court to dismiss the appeal with costs to the respondent.

This is a first appeal as I have stated above. It is also a last appeal. I have the duty of deciding it both on matters of law and facts. I am duty bound to analyse and evaluate the evidence that is on record a fresh and reach my own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that - see the well known case of ***Selle and Another vs. Associated Motor Boat Co. Ltd*** (1968) EA 123.

First, on the question of whether or not there was privity of contract between the appellant and the respondent. In my mind, this was not a matter to be decided on contractual obligation between the appellant and the respondent as such. It is clear that the appellant was agent of the shipper in Japan and that the goods were sent by the respondent clearing agent in Japan through the shipper in Japan which undertook to release them to the consignee either in Kenya or Uganda. I say in either Kenya or Uganda because, the evidence on record is that the goods were originally destined to consignee in Uganda where respondent said he was convinced there was market for his goods. It is clear to me that there was privity of contract between the respondents clearing agent and the shipper which was appellant's principal. The respondent who was the consignee was agent of the clearing agent who had contract with the shipper which was appellant's principal. He could in my view enforce the contract between their two principals. In any event, I do not think one could stop a consignee from suing the carrier for goods short delivered or for delivering goods in physical condition that did not answer the description of the same goods in the bill of lading. If the respondent, being a consignee could successfully sue the appellant on those grounds, I do not see why he could not sue for non-delivery of goods or failure to deliver goods in time to him. Goods were to be delivered to the consignee who, according to the correction in the bill of lading, was the respondent and who was in any case the owner of the goods in the first place. That fact gave the respondent, the authority to demand the same goods and to sue for failure to deliver them or for refusal to deliver them if such refusal was deliberate and in breach of the terms in the bill of lading and *ipso facto* for deliberate delay in delivering them.

However, that said, in this appeal I feel there are other issues to be considered as is apparent from the memorandum of appeal I have cited above.

First, having considered the entire record, the evidence that was adduced by the witnesses and the judgment, I do not think matters raised in grounds No. 11, 12 and 13 of the memorandum of appeal are without merit and can be wished away. These grounds state in brief if I may repeat them, that the learned Judge failed to consider the evidence given and the submissions made on behalf of the appellant; that the same evidence and pleadings were not analysed and evaluated, and that the decision was contrary to the evidence that was before the court. In her entire judgment, the learned Judge never set out any evidence adduced on behalf of the appellant. All she did, as appears in the judgment was to set out in brief, the contentions of both respondent and appellant as stated in the pleadings and thereafter, the learned Judge set out the evidence of the respondent in brief which she stated as follows:-

"The plaintiff's evidence shows that the defendant refused to release the goods and

demanded a court order to order goods be released to him. The plaintiff further testified how he fought cases in Uganda (NO. 390/00) and Kenya (HCCC No. 260/01) and the goods were eventually released to him by consent order."

Having done so, one would have expected the learned Judge to also set out the appellant's evidence, at least in brief, before proceeding to analyse and evaluate the same, but that was not to be. Immediately after brief outline of the respondent's evidence as reproduced above, the learned Judge proceeded.

"Upon examining the evidence, it is clear that the defendant failed to accept the amendment to the name of consignee preferring to accept the name of Alice.

This was in breach of instructions received by defendant from Japan. Under the court agreement on 9th February, 2001, the plaintiff agreed to pay US$ 3000 which he paid. The goods were detained between 4th February, 2000 to 9th February, 2000 (sic) a period of 10 months."

This conclusion was reached without setting out the appellant's evidence as adduced by its witnesses and before framing issues which the learned Judge proceeded to frame thereafter. Whereas, I do not think it is necessary for every judgment to contain what each witness said in evidence as that would in some cases mean irrelevant evidence being included in judgment and in any case that would make judgments unnecessarily long and thus delay expeditious disposal of the matter, and whereas I accept that judgment in Civil case is proper if it complies with ***order 20 rule 4*** of the Civil Procedure Code, I do however, feel that where a court has decided to set out evidence of the parties to a suit, even if only briefly, it should, for purposes of apparent impartiality set out the conflicting evidence of both parties before analyzing and evaluating the same. In this case, it is clear that only the evidence adduced by the respondent was cited and relied upon.

Be that as it may, as I stated earlier in this judgment, this being a first appeal, I am duty bound to revisit the evidence afresh, analyse it, evaluate it and reach my own conclusion. In the case of ***Selle and another vs. Associated Motor Boat Company Ltd*** and other (supra) the predecessor to this Court stated:-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour by a witness is inconsistent with the evidence in the case generally Abdul Hamed Saif vs. Ali Mohamed Sholan (1955), 22EACA 270."

Thus, notwithstanding that omission by the learned Judge of the superior court, I am still bound to revisit the evidence afresh and come to my own conclusion, and I cannot at this juncture conclude that the omission by the learned Judge was fatal to the entire case for after I analyse and evaluate the evidence afresh I may come to the same conclusion or to a different conclusion.

The evidence on record is that the respondent was a business man based in Japan at the time when the subject container was given to the appellant's in Japan. The goods, were to be shipped to Uganda. The respondent in his evidence said he gave the appellant's consignment through his agent

Afox Associates based in Japan. He did this because Alice Kamigisha, a girl friend of his brother, had convinced him that the kind of business he was involved in was good in Uganda. He said in evidence at page 33 of the record.

"Consignee was Alice Kamigisha who is my younger brother's girlfriend. She introduced me to the business saying it was good in Uganda. I did not a PIN (sic) number in Uganda. I decided to use her name."

He went on to say that on 22nd February, 2000 he came to Kenya from Japan and Alice and another man Justus N'tuga from Meru collected him from the Airport, and he decided to travel with Justus to Uganda to clear the goods on 6th March, 2000. Alice collected them from the bus stop. All was well and Alice was apparently still the consignee. On 14th March 2000, Alice stole her money and documents including invoice and bill of lading. That was when events took a different turn. He read ill motive in Alice and started to turn tables on Alice. That is when he informed his agents in Japan and they decided to stop the release of the goods to Alice. It would appear that the original bill of lading which was in Alice's name was still held by Alice. The cargo arrived on 18th March 2000. Frantic efforts were thereafter made to change the name of the consignee and to inform the appellant not to release the goods to Alice and to further inform the appellant to release the goods without presentation of the bill of lading. Sinjha, (DW1) said in evidence that they received correction in the bill of lading to change the name of consignee from Alice to Oppong (respondent) on 24th March 2000. When those charges were going on, Alice approached the appellant and sought release of the goods to her. She had bill of lading. The appellant refused to release the goods to her and that was proper as there were reports received by the appellant that there could be another claimant of the goods. Margaret Shitsama said in evidence that Alice went to the ***"appellant's office after 24th March 2000 and having said the appellant refused to release goods to her she went on."***

"Sometime in April Oppong came to our office around that time. He talked to me he came to check for the consignment. I told him to produce documents he had nothing. No bill of lading but he demanded the goods to be released to him. I informed him Alice had already come. I asked him where the bills were. He said they were stolen by Alice and he was to go and find out where Alice was. He went away. He demanded to see my boss. He saw also my boss assistant Liner Management."

This part of Margaret's evidence was to a large extent supported by respondent's witnesses' evidence. Dekor Noor Ari (wrongly recorded as PW2) said concerning documents.

"At the time we went with Oppong he did not have documents as amended to reflect his name."

It cannot escape one's observation that all the above resulted into confusion as to whose claim to the goods was genuine. Alice claimed the goods and she had original bill of lading whether stolen from the respondent or not, and respondent had no documents except perhaps the amended bill of lading which was already surrendered in Japan and only notification of it sent to the appellant. That confusion was in my view caused by the respondent and it is not surprising that as a result of that confusion, the appellant declined to release the goods immediately to the respondent. In my mind, the appellant, being the special owner of the subject goods and as the goods were destined for Uganda but their release was being sought in Kenya, and as Alice had a clear bill of lading, whereas the respondent had nothing by way of documents except Email information from Japan sent to the appellant, the appellant had a duty to act cautiously should any case be filed against it by Alice. The respondent said that appellant told him to obtain a court order for the release of the subject goods. I cannot, in my view find that advice improper.

Indeed the respondent's witness stated at page 49 of the record concerning that action as follows:-

"If there is a court dispute court order would rule. The goods may not be released until the court dispute has been resolved."

I find that, the appellant acted properly in advising the respondent to seek a court order in view of the disputed claims on the subject goods. I find also that, to that effect the delay in releasing the goods upto 19th April 2000 when the Court order was extracted and purportedly served upon the appellant's branch in Uganda constituted an explained delay on genuine grounds.

How about the delay to release the goods thereafter" The Court order, was obtained in Uganda and was thus a foreign court order. The rules to make it effective in Kenya had to be followed. There is no evidence that that was done, but could the appellant ignore it" First, it must be considered that it was the appellant which advised that it be obtained, secondly, it must not be forgotten that the goods were originally destined to Uganda and lastly, it cannot be ignored that the respondent says he served the order upon appellant's branch in Uganda. Under those circumstances, if the appellant ignored the order, it would do so to its detriment as the branch in Uganda was rightly served with an order of a court that had jurisdiction there. Nay! The appellant could not ignore the order. What was the order" I have reproduced it hereinabove. It, in effect stopped the appellant from releasing the goods to either of the claimants. It ordered preservation of the subject goods in a neutral place until the final disposal of that matter i.e. Misc. Application No. 457 of 2000. There is no evidence on record as to when that matter was finally disposed of.

What is clear however, is that in between, Alice is alleged to have sold the subject goods to a third party Jenneby Taita, who before or on 6th June 2000 filed HCCC Civil Suit No. 260 of 2000 against the appellant in Mombasa Court. Apparently this was before the Uganda case was disposed of or before the orders obtained in Uganda for preservation of the subject goods were vacated. That suit by Taita also sought release of the same goods to Taita. One is bound to ask, could the appellant release the goods with that preservation order still operating and a new claimant in a court case already filed seeking the same goods. The obvious answer in my view is NO. As the respondent's witness said in the part I have reproduced above, the appellant was bound to wait for the outcome of the court case and in any event, it had to obey the preservation order served upon it through its branch in Uganda. The orders sought by Taita were dismissed but immediately thereafter, the respondent had himself joined as a party in that case. The effect of that was that the appellant and the respondent were thereafter reduced to the status of being the only two parties in that suit i.e. HCCC No. 260 of 2000. In my view, I do not with respect find the appellant liable to the respondent for delay in releasing the subject goods upto that time. That confusion prevailing that made it impossible to release the goods was originated by the respondent and he had only himself to blame.

The learned Judge of the superior court in her analysis and evaluation of the evidence on this aspect of the case found and stated as I have reproduced above that the appellant was to blame as it ignored instructions from Japan to release the goods to the respondent and chose to believe other parties.

With respect, I think that finding and conclusion ignored all the factors I have mentioned above. Defendant did not choose to believe other parties. It was faced with initially two claims to the goods one of which resulted in a preservation order and the other filed before the preservation order was vacated. To ignore those would have meant other possible problems to it including contempt proceedings. The learned Judge's findings and conclusion on that issue clearly resulted from the fact that the learned Judge did not set out evidence for both parties properly in her judgment and did not analyse and

evaluate the same. I find merit on these grounds of appeal.

The next aspect I want to deal with is as to whether the respondent was estopped from filing the suit for which this appeal was preferred. The record demonstrates as I have stated, that Taita sued the appellant in Mombasa HCCC No. 260 of 2000. The pleadings are not in the record although Patrick Chege (PW1) produced it in court as exhibit 1 and one would have expected the entire file together with pleadings to be in the record. However, from the reading of the proceedings in the record and the affidavits, it is clear that Taita sought release of the goods to him on grounds that he had bought them from Alice. He did not succeed at the interlocutory stages and he fizzled out of the case. In a notice of motion dated 14th November 2000, the respondent sought to be joined as a co-defendant in that suit, and on 15th November 2000 he was so joined. He was thus a party in that suit and the appellant was also a party in the same suit. The subject matter in that suit was the release of the subject goods. The respondent pursued that claim till 9th February 2001 when the consent order reproduced hereinabove was recorded. Indeed the consent order was on the release of the subject goods. At that time, it cannot be disputed that the respondent had known all along that the appellant had, according to him, breached the contract and that he had suffered as a result of the same breach. These were matters within his knowledge and were the reasons why he applied to be joined in that suit. He apparently did not proceed with that case any further and was content with the consent order releasing the goods to him on condition. It is not clear whether that suit has now been finally disposed but looking at the appellant's supplementary record of appeal, it would appear that the main hearing of that case has not commenced although the same may be rendered futile as the main dispute in that case seemed to have been over the release of the goods to Taita and once that was not done at interlocutory stages Taita did not pursue the matter any further. Alice applied to be joined and to stop release to respondent but that application never saw the light of day. That in effect meant that the main issue was reduced to a contest between the respondent and appellant as to the release of the goods. The consent order was recorded on 9th February 2001, in that case. The respondent waited until 6th September 2001 seven months later when he filed Civil Suit No. 446 of 2001 which gave rise to this appeal. The main cause of action in the suit is captured in paragraph 8 and 9 of the plaint and the claim for damages is based on the appellant's refusal to release the goods to the respondent. In my mind, by the time the respondent sought to be joined as a party in HCCC No. 260 of 2000 at Mombasa, his allegations that the appellant had breached its duty to release the goods to him had crystalised and he should have made his claims for such breach, if he was certain about it in that suit for by that time allegations had been made that the subject goods had been released to Alice who had sold them to Taita who was now claiming the release of the same goods to him. Breach if any by the appellant as alleged by the respondent was already complete and respondent should have made a claim based on it in that case. This was not considered by the learned Judge of the superior court. In my mind, had it been considered, a different conclusion might have been reached.

The last matter I find disturbing as concerns the learned Judge's decision concerns the award for damages. The learned Judge awarded in total a sum of US$ 13,234 to the respondent. In awarding that amount, the learned Judge stated:-

"I accept figures US$ 2000 and US$ 8234 as stated under particulars (a) and (b) and the demurrage charges US$ 3000. However, I find loss of profits not proven and the claim for loss of monthly income in Japan not proven but also too remote damage."

The award of US$D 2,000 was in respect of expenses of law suit in Uganda, according to paragraph 9 (a) of the plaint to which the learned Judge was referring in her judgment. The award for USD 8,234 was in respect of accommodation, travel and upkeep expenses and the award for USD 3,000 was in respect of demurrage charges paid to appellant in compliance with the consent order entered by both

parties on 9th February, 2000. She also ordered that the costs of law suit in Kenya i.e. In HCCC be taxed and paid to the respondent in the usual manner in that suit in addition to USD 13,234.

I will start by considering the award of USD 2,000. The respondent in his evidence stated as follows concerning that claim.

"I got court order in Uganda to put goods in neutral ground. Alice vs. myself to stop Alice from claiming goods. She was claiming the goods as owner. That is why I went to get a court order in Uganda. Phil Kenya not party to that case. I have claimed costs. I paid to my Uganda lawyers USD 2,000 (sic).

I have not gone back to check on the case. Legal costs is determined as to who is to pay in that case. Costs in that case to be paid by Alice."

My understanding of the matter is that respondent filed a suit in Uganda against Alice. He could have paid his lawyers in the case and court fee but if he succeeded and got costs as well in the case, he would file bill of costs and claim costs against Alice who was a party in that suit. We are not told that he did so. In fact he stated in his evidence that he had not gone back to check on that case. The bill of costs would be on party and party basis and eventually the respondent would get either the whole of his advocates fee or part of it together with court fees disbursed to him. There is no evidence as to what happened in that case as pertains to costs and I do not appreciate the ground for awarding that amount to the respondent. Indeed if that award stands then the respondent would stand to benefit twice as he will still have his claim for that cost against Alice who was the only party to that suit in Uganda. I would not have allowed it even if I were to dismiss the entire appeal on liability.

On the award for USD 3,000 being demurrage charges, I note that this was the amount paid pursuant to consent entered by the parties on 9th February, 2001. That award could only be made after setting aside the consent order. There is no order in the entire record setting aside that consent order. The principle regarding the law that guides the court in setting aside a consent order is now well settled. In the case of ***Flora N. Wasike vs. Destimo Wamboka*** (1982-88) 1 KAR at page 628, this Court held in part as follows:-

"It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misapprehension."

And in the case of ***Hirani vs Kassam*** **(1952) 19 EACA 131** the predecessor to this Court stated:-

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ….and cannot be varied, or discharged unless obtained by fraud, or collusion, or by an agreement contrary to the policy of the court ……or if consent was given without material facts, or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement."

When the learned Judge awarded this amount to the respondent, it amounted to setting aside the court order entered in HCCC No. 260 of 2000. The plaint in the HCCC No. 446 of 2001 did not seek setting aside that order in HCCC No. 260 of 2000 and did not plead fraud, mistake, misapprehension of facts etc, that would have been the requisites for setting aside the same consent order. Nor was there any proof or attempt to prove the same. I am aware that there was an amendment to the bill of lading to state that the status of the goods was changed from *"house to house*" to *"pier to pier"* which meant that

demurrage would not be charged, but by entering into a contract before the court to pay the amount of USD 3,000, the respondent was in my view waiving his rights under that provision and once the consent order was entered, he was caught up with it and if he wanted it set aside, he had to bring himself within the law and not merely ask for it as he did by way of statement in his evidence when he said he was challenging the consent in that case. That was not enough. In my view that award was not proper in law and I would not allow it.

The award of USD 8,234 was given for accommodation, travel and upkeep expenses. The record shows that a sizeable number of those claims clustered together under that claim was for telephone bills and travel expenses. Some of the travels were to go to Ghana to get money and return to Kenya. He said as to telephone bills that he had nothing to show when he telephoned. In my view, the trial court had a duty to meticulously ensure the proof of each of the receipts involved and its relevance to the case. The record does not show that this was done. Because of the decision I have come to , I do not think it necessary for me to go into that exercise as it would be futile much as I feel that if the exercise were undertaken the claim under this item might be considerably reduced.

In conclusion, for the foregoing reasons, I would, on my part allow this appeal. I do allow it with costs of the appeal and costs in the superior court to the appellant.

Dated and delivered at Nairobi this 16th day of October 2009.

J. W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: BOSIRE, ONYANGO OTIENO & NYAMU, JJ.A.)

CIVIL APPEAL NO. 102 OF 2007

BETWEEN

PIL KENYA LIMITED ..... APPELLANT

AND

JOSEPH OPPONG ..... RESPONDENT

(Appeal against part of the decision of the High Court of Kenya at Mombasa

(Khaminwa, J) dated 15th September, 2006

in

H.C.C.C. No. 446 of 2001)

****

JUDGMENT OF NYAMU, J.A.

This is an appeal from the judgment of the superior court at Mombasa (***Khaminwa, J***) dated 15th September 2006 in ***High Court Civil Case No. 446 of 2001.***

The background facts which gave rise to the case in the superior court, and thereafter to this appeal as per the pleadings and the affidavits filed by the parties are that the respondent, ***Mr. Oppong,*** a Ghanain citizen who at the time the suit was filed was residing in Japan and engaged in the business of purchasing and selling motor vehicles, motor vehicle components and electronic items in Japan and also exporting the goods to Africa and while in Japan the respondent consigned to a consignee a shipment of four units; electrical and electronic goods in 1x40 feet container number ***TRIU 9468377*** destined for market in Uganda.

The respondent gave the name of ***Alice Kemigisha*** of Uganda as the consignee of the shipment. The name of the shipper was ***Afex & Associates Limited*** and the ships name was ***M.V. Budi Teguh*** and the carrier was the appellant herein.

The goods the subject matter of the dispute arrived in Mombasa on 18th March, 2000 in container number ***TRIU 9468377*** and the goods were covered under the ***M.V. Geguh Manifest TP TEGMBAOO124***.

The original bill of landing number ***YOK MBA 2K 46*** was apparently surrendered in Japan. In its place, the shippers wrote a letter to the appellant on 6th March authorizing the appellant, as the carrier to release the cargo to the consignee without presentation of the original bill of lading as is the practice. The said letter further directed the appellant not to release any of the cargo to the original consignee namely ***Kemigisha Alice*** and that the name of the said consignee had been altered to that of the respondent, ***Mr. Joseph Oppong.*** At the same time the appellant's office in Japan was informed by the shipper that the original consignee ***Kemigisha Alice*** had not paid for the shipment and as a result the appellant was instructed by the shipper on 17th March, 2000 to suspend the release of the cargo to ***Kemigisha Alice*** and the same office made a correction to the manifest by amending the consignee's name to read ***M/s Joseph Oppong*** the respondent herein instead of ***Kemigisha Alice***.

By an email dated 31st March, 2000 addressed to the appellant by the shipper, it authorized the appellant to release the container to the respondent.

Immediately after the said instructions to the appellant as set out above, ***Kemigisha Alice*** the original consignee came to the appellant's office and laid claim to the cargo, by producing the original shipper's bill of landing and insisted that she was the owner of the cargo. This was on 14th April, 2000. However, the appellant explained to her that the appellant had not been authorized to release the goods to her because the shipper had indicated that she had not paid for the cargo and that the total cost of the shipment had been met by the respondent. About the same time the respondent also showed up at the appellant's offices in Mombasa and claimed to be the rightful cargo owner on the basis of the amendments contained in the manifest.

In the face of the conflicting claims by the original consignee and the respondent, the appellant then decided not to release the cargo to either party until they either resolved the dispute or served the appellant with a court order directing which party was the owner of the goods in the circumstances.

Following the decision by the appellant not to release the goods the respondent went back to Uganda and filed a suit against Kemigisha Alice claiming ownership of the goods.

The suit, ***High Court of Uganda (Kampala) Misc. 457 of 2000*** *was* filed on 19th April, 2000 and the respondent obtained an injunction order which directed that the cargo should be preserved in a neutral place in the hands of the shipping agents and or clearing agent until the final disposal of the case. The said order was served on the appellant's office in Kampala, Uganda and also transmitted to the appellant's office in Mombasa.

The appellant's position became even more complicated when on 31st May, 2000 the appellant received a letter from the advocates of one ***Jeneby Taita*** claiming ownership of the same cargo on the ground that ***Jeneby*** had purchased the goods from ***Kemigisha Alice***. The appellant's reaction to this additional claim was to draw the claimant's attention to the interim injunction order from Uganda and as a result it declined to release the goods to ***Jeneby***. In order to assert his right ***Jeneby Taita*** field suit – ***H.C.C.C. 260 of 2000*** in (Mombasa) against the appellant. Subsequent to this the respondent applied to be joined as 2nd defendant in the said suit. A similar application by **Kemigisha Alice** to be joined as the 3rd respondent was rejected by the High Court in Mombasa. The parties to the suit subsequently entered into a consent order in **H.C.C.C. No. 260 of 2000** and the goods were released to the respondent as per the terms of that order. However not withstanding the consent order, on 6th September, 2001 the respondent filed suit against the appellant, namely **H.C.C.C. 446 of 2001** which is the subject matter of this appeal. In the suit the appellant claimed substantial loss and damage on the basis that the appellant had refused to release the cargo to the respondent.

In a judgment dated 15th September, 2006 the superior court found the defendant/appellant liable in contract and at the same time held that in cases of contract, damages are not at large and only pleaded and proved damages may be awarded. The superior court entered judgment in favour of the respondent as follows

(a) USD 2000 or being lawsuit expenses in Uganda.

(b) USD 8234 being accommodation , travel and upkeep expenses for the respondent

(c) USD 3000 being demurrage charges

The court declined to grant loss in respect of the lawsuit in Kenya and also declined to award Kshs.280,000/= being loss of profits for four months and USD 1,000 being expenses the respondent had incurred while on business trip to Japan. The total amount awarded was USD 13,234 plus costs and interest at court rate.

Aggrieved by the superior court judgment the appellant filed this appeal on 11th June, 2007, relying on the following grounds:

1. The learned Honourable Judge erred in holding that the appellant was the transporter of the respondent's goods from Japan to Mombasa.

2. The learned Honourable Judge erred in not finding that there was no privity of

contract between the appellant and the respondent.

3. The learned Honourable Judge erred in not finding that the reliefs sought by the respondent in the superior court should have been sought in Mombasa H.C.C.C. No. 260 of 2000.

4. The learned Honourable Judge erred in not finding that the public policy and the rule of law required that the appellant should not release the container that was the subject matter of the suit in the court until all the disputes over the same were determined by a court of law.

5. The learned Honourable Judge erred in holding the appellant liable to try the respondent for the legal expenses accommodation, travel and upkeep expenses and demurrage charges allegedly incurred by the respondent.

6. The learned Honourable Judge erred in awarding judgment to the respondent for an amount that was not prayed for in the plaint without the plaint having been amended.

7. The learned Honourable Judge erred in awarding judgment for the respondent for legal expenses allegedly incurred in Uganda without any proof of such expenditure and without any legal basis.

8. The learned Honourable Judge erred in awarding judgment for the respondent for alleged accommodation, travel and upkeep expenses without proof that such expenses were actually incurred, and if they were incurred that they were so incurred in relation to the container that was the subject matter of the suit in the superior court.

9. The learned Honourable Judge erred in awarding judgment to respondent for the demurrage charges that the respondent had paid to the appellant pursuant to a Consent Court Order issued in Mombasa H.C.C.C. No. 260 of 2000 without the said consent order being set aside.

10 The learned Honourable Judge erred in holding that the respondent had no duty to mitigate his losses.

11 The learned Honourable Judge erred in not considering the evidence given and the submissions made on behalf of the appellant.

12 The learned Honourable Judge erred in her evaluation and analysis of the pleadings and the evidence adduced.

13 The learned Honourable Judge's decision was contrary to the weight of the evidence that was placed before her by the appellant.

14 The learned Honourable Judge erred in not dismissing the respondent's case in the superior court.

In his submissions and pleadings ***Mr. Omondi,*** the learned counsel for the appellant contended that the appellant was acting as a clearing agent for Afex & Associates Limited the shipper of the goods; that it was a stranger to the instructions given to the shipper by the respondent; it could not release the goods because it had received three conflicting claims in respect of the same goods and being the

agents at the port of discharge as carrier, they could only release them on the basis of a Court Order. Concerning the claimed loss the appellant denied liability thereof for loss or damage allegedly incurred by the respondent in Kenya and Uganda and drew the court's attention to the point that the appellant was not a party to the suit instituted in Uganda and the respondent was also not the plaintiff in the suit instituted in Kenya. Mr. Omondi also submitted that in the light of ***H.C.C.C. No. 260 of 2000*** where the respondent applied to be enjoined as the 2nd defendant, he was legally barred and or estopped by virtue of the consent order from instituting the suit, the subject matter of this appeal and that the suit did not disclose a reasonable cause of action against the appellant and further that the suit was scandalous frivolous and vexatious and an abuse of the due process of the court.

On behalf of the respondent ***Mr. Wameyo***, the learned counsel for the respondent submitted that the respondent while in Japan and in the course of his business met ***Alice Kemigisha*** who purported to have a ready market for the respondent's goods in Uganda and on this representation, the appellant caused to be consigned to her the goods the subject matter of this appeal and for this reason the respondent then gave the name of ***Alice Kemigisha*** as the consignee of the shipment. He added that it was not in dispute that he subsequently caused the shipper to amend the name of the consignee from ***Alice Kemigisha*** to his name which information was transmitted to the appellant's office in Mombasa Kenya and therefore there was a contractual relationship between the respondent and the appellant in accordance with the shipping practice and for this reason the appellant was under the obligation to comply with instructions of the respondent's agents and should have released the goods to respondent on 4th April, 2000 but the appellant refused to do so and as a result ***Alice Kimegisha*** purported to claim the container with fake documents which culminated in two suits, namely, ***H.C.C.C. No. 260 of 2000*** in Kenya and ***Civil Suit No. 390 of 2000*** in Kampala, Uganda. As a consequence of the refusal the respondent incurred demurrage charges and the loss and damage as claimed.

After re-evaluating the evidence as above and weighing the rival submissions of the parties and considering the relevant and applicable law, I would allow the appeal for the following reasons:

(1) When the respondent came to claim the goods in Kenya and the appellant refused to release them, the respondent made it clear to the appellant that he was going to file suit in Uganda, against the consignee ***Alice Kemigisha*** who had earlier claimed ownership of the goods from the appellant and a suit was indeed filed in Uganda in connection with the ownership of the goods. In the Uganda suit the respondent had contended that the consignee had not paid the purchase price of the goods. Apart from the interim order served on the appellant the outcome of the Uganda suit is still unknown. The interim order obtained directed the preservation of the goods with the carrier. The appellant did exactly that although it was not a party to the Ugandan case.

(2) Mr. Jeneby who claimed to have been a purchaser of the same goods form ***Alice Kimegisha*** immediately commenced suit against the appellant claiming inter alia the ownership for the goods. The suit was filed in the Kenya was ***H.C.C.C. No. 260 of 2000 Jeneby v. PILL (K) Limited.*** Thereafter the respondent subsequently applied to be joined as the second defendant and ***Alice Kimegisha*** also unsuccessfully tried to be enjoined in the same suit as the 3rd defendant Arising from this suit, a consent order was recorded with the apparent blessings of the respondent in these terms:

"By consent the 1st defendant hereby agrees to release this container No. TRIV-9468377AT LA 0043 – to the second defendant subject to the following conditions:

(1) The 2nd defendant shall pay to the 1st defendant a sum of US Dollars 3,000 or its equivalent in Kenya shillings as at the time of such payment.

(2) The 1st defendant shall pay a deposit to the 2nd defendant of Kshs.190,000 if status of the container is house to house;

(3) If the status of the container is pier to pier the 2nd defendant shall pay the port handling charges, delivery order fee and amendment charges totaling Kshs.10,280/=

(4) That is the Order of the Court By Consent"

Hayanga, J

1.02.2001

It is apparent that the consent order settled the matter in June 2001, resulting in the release of the goods and the payment to the appellant of USD 3,000. None of the competing claimants dispute the existence of the consent order and the ultimate resolution of the dispute as per the order.

(3) Since all the claimants of the goods came to the scene and almost simultaneously claimed the goods, the subject matter of the appeal, as a result of amendments to the bill of lading which amendments in turn were prompted by the respondent himself, he is clearly the author of his own wrong and in my view, it would unconscionable for him to benefit from his own wrong. Thus it is clear that faced with three conflicting claims the appellant made it clear to the respondent that it would be ready and willing to release the goods as per the court orders. The appellant was not served with any final order in the Uganda case. However, he did as per the consent order, release the goods to the respondent. It is significant that in the Kenyan case no blame was placed on the appellant.

I think that although the appellant was in a dilemma due to the conflicting claims, the ideal thing should have been to institute interpleader proceedings. However its intention to interplead which it had expressed in writing when the dispute first arose was, overtaken by the institution of the Ugandan case and the two Kenyan suits. It is significant to note that all the suits focused on the ownership of the goods and since the appellant did not claim ownership to the goods, interpleader proceedings would have been unnecessary.

(4) In the circumstances as described above I have been unable to find that the respondent has a cause of action against the appellant. As the original bill of lading was amended and therefore replaced on the instructions of the respondent and the appellant in the face of the conflicting claims considered it unwise to release the goods to any of the claimants, a demand letter from the respondents or an oral demand of the release of the goods could not with respect, constitute a contract upon which damages could be claimed. Furthermore even if one were to assume for the sake of argument that there was an agency relationship between the appellant and the respondent the loss and damages claimed do not spring from any agency relationship. Instead damages for breach of contract were claimed. If then the respondent had no contractual claim against the appellant since he was the author of his own wrong in having the bill of landing altered resulting in conflicting claims, what is the legal basis of the superior court's award of special and general damages outside a contractual relationship" Ordinarily, damages arise from either a contractual breach or a tortious breach. On the other hand the main claim in agency relationships against agents are secret profits and not damages.

It follows therefore since there was no proof of any contract or its breach the damages awarded in the judgment whether special or general damages were improperly awarded because they did not spring from any breach of contract. There was no tortious breach either. In my view, there was also no agency relationship in the circumstances.

A bill of lading in law is a contract between a shipper and a ship-owner. It constitutes the title to the goods and shows where the property in the goods is at any given time. When more than one consignee claims the goods on the strength of one bill of lading it cannot possibly be the fault of the person to whom the bill is addressed.

(5) A perusal of the pleadings, proceedings and the judgment of the superior court shows that the special damages were also not proved. There cannot be any basis or any linkage between the accommodation expenses incurred by the respondent in Kampala Uganda in respect of hotel accommodation with any alleged liability of the appellant. The respondent prosecuting a case in Uganda the genesis of which the respondent was the author cannot in logic, reason or law constitute the basis of any valid claim. He was in Uganda to prove that the consignee who came to Kenya to lay claim to the goods had not paid for them hence she had no right to claim them from the appellant. The same reasoning applies to claims b, c and d in the plaint.

Even if it is assumed for the sake of argument that the two parties had a contractual relationship, and I have found that there was none, there was no breach on the part of the appellant and the special damages and damages were not payable because they were too remote since the appellant was firstly not in breach or had nothing to do with the breach, or it had nothing to do with the events which gave rise to the goods being stuck in Mombasa. With respect, a court of law cannot just pluck both liability and damages from the air as the superior court did in this matter. The superior court did not properly direct itself or even attempt to analyse the legal relationship between the parties. Instead, it seriously misdirected itself on the applicable law.

(6) The other disturbing aspect of the respondent's claims is that in the superior court he had claimed that he had incurred special damages in the sum of US.14,000 to follow up a claim of US.9,700, which clearly placed him under a duty as plaintiff to mitigate the loss. For example, instead of incurring the expenses he could have placed another order of similar goods and still be left with surplus funds! He did not mitigate nor was this point addressed by the superior court at all although it was an important point of law in the circumstances. Again the appeal would succeed on this ground as well.

(7) The judgment the subject of this appeal attempts or purports to unravel a final order or decree in a suit filed and finalized in the same court whereas all the issues in the later case are deemed to have been raised and determined in the earlier suit. Small wonder in the judgment under challenge the court sallowed the claim of US.3,000 which is the amount given to the appellant in the consent order. I would disallow this claim on this specific ground as well. It was in my view improper for the superior court to have entertained another suit brought concerning the same subject matter and between the same parties or parties litigating under the same title. In the circumstances I find and hold that there was judicial estoppel or a res judicata bar as regards the institution of the suit the subject matter of the appeal.

To elaborate on the above concerns, perhaps a good starting point is to consider what a bill of lading is, in the first place, a task which was not unfortunately undertaken by the superior court. As stated above it is first and foremost a contract between a shipper and a ship-owner. **HILBURYS LAWS OF ENGLAND** (3rd Edition) Vol.35 pp 328-9 defines it as follows:

"A bill of lading is a document signed by the ship-owner or by a master or other agent of the ship-owner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship .....

It is "in the first instance an acknowledgment of the receipt of the goods specified therein as against the person actually signing it, it is not conclusive and may be controverted by evidence showing that the goods were never in fact shipped" (see HESKELL V CONTINENTAL EXPRESS LTD [1950] I AILL ER 1033) It is also "a symbol of the right of property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves and its transfer being a symbolical delivery of the goods themselves, has by mercantile usage the same effect as an actual delivery in the same circumstances".

Following the amendments to the bill of lading admittedly inspired by the respondent the original bill of lading no longer had the legal effect as analyzed above as it could not be used to claim possession of the goods. In the circumstances, I find that there was no contract between the parties. To fill the void created, the appellant as the final carrier was perfectly entitled to deal with the goods as directed by the court.

As stated elsewhere in this judgment, the superior court in its judgment did not at all touch on the issue of remoteness of the alleged damage. The alleged loss of was never in contemplation of the parties at the time the bill of lading was entered into. If this was properly considered it would have been evident to the court that there were two distinct questions for consideration. First, for what kind of damage was the plaintiff/respondent entitled to recover compensation. It is not every possible damage which qualifies for compensation in law. The case of **HADLEY VS. BAXENDALE** (1854) 9 Exch 341 defined the kind of damage which is the appropriate subject of compensation and excluded all other kinds as being too remote. Remoteness of damage is reserved for every case where the defendant denies liability for certain of the consequences that have flowed from his breach and whether the damage is too remote is a question for the judge.

Second, whether the kind of damage is sufficiently proximate as per the rule in **HADLEY V BAXENDALE** the question which arises is the measure of damages. Here, a plaintiff is entitled to full indemnity or in other words to *restitutio in integrum*, but only against the usual, not unusual consequences.

It is quite evident that legal costs in Uganda were matters between the parties to the suit or orders of costs by the Uganda court. Assuming that there was contract and a breach thereof and there is nothing in evidence to support this item as claimed and awarded by the superior court, it could not fairly and reasonably have flowed from the non-delivery of the goods nor was any such item in contemplation of the parties or their agents when the bill of landing was signed.

It was therefore a serious misdirection in law for the superior court to have awarded the Ugandan costs. There was no linkage of the costs in Uganda to the relationship in Kenya between the appellant and respondent. The costs could only have been awarded by the Uganda Court itself and there was no such order and the furthermore the appellant was not a party to that suit.

The other important point is that assuming that the appellant was in breach of contract the respondent would have had a duty to mitigate his loss by either having the conflicting ownership claims both in Kenya and Uganda expeditiously disposed of or to desist expending more money than the value of the goods the subject matter of the appeal. It is clear to me that it is the respondent who was to blame for triggering of the two conflicting claims by the two claimants. Thereafter he had a duty to mitigate any consequences from the loss. In the case of **BRITISH WESTING HOUSE ELECTRIC AND MANUFACTURING COMPANY VS. UNDERGROUND ELECTRIC RYS CO. OF LONDON** [1912] A.C. 673 at page 689 Lord Haldarne stated the rule on mitigation as follows:

"**The law imposes a duty on the plaintiff to take reasonable steps to mitigate the loss caused by the breach of contract, and debars him from claiming compensation for any part of the damage which is due to her neglect to do so."**

Since the appellant had the amended bills of landing in its possession including three conflicting claims and remained always ready and willing to hand over to the rightful consignee or owner, it had no liability in law in the first place and did not perpetrate any breach.

In the circumstances, I think, the only duty which the appellant had was to release the goods to the consignee as per the original bill of lading but this bill having been admittedly amended, that duty came to an end and the appellant became a party entitled to interplead or to await the determination of the ownership suits. Although the appellant did not institute interpleader proceedings against the claimants the effect of the Kenya suit and the Uganda case was the same since the appellant did not claim any ownership of the goods and was during the entire period ready and willing to release the goods as per a court order or by an agreement between the claimants upon payment of its charges. The appellant had therefore on the ground acquired all the attributes of an interpleader.

If a carrier is unable to deliver the shipment because of fault or mistake of the consignor or consignee, his liability if any is that of a warehouseman and he is entitled to storage charges provided he gives notice. No claim had been made against the appellant in its capacity as a warehouseman.

(8) In view of the final consent order entered into by the parties in ***H.C.C.C. 260 of 2000*** instituted in Kenya, the court's view is that all issues which the superior court was being asked to adjudicate upon in ***H.C.C.C. No. 446 of 2001*** were directly in issue in ***H.C.C.C. 260 OF 2000***. It is also quite clear that the issues were between the same parties or parties litigating under the same title. Consequently ***H.C.C.C. No. 446 of 2001*** was clearly res judicata. Alternatively ***H.C.C.C. No. 446 of 2001*** was in my view caught by judicial estoppel even if the issues raised were not the same, all the issues in the subsequent suit namely ***H.C.C.C. 446 of 2001***, could have been raised in the earlier suit ***H.C.C.C. No. 260 of 2000***, and if not raised they were deemed to have been raised under the doctrine of judicial estoppel or issue estoppel, because the earlier case is deemed to have dealt with all the critical issues. The suit, the subject matter of this appeal was therefore not sustainable in law and ought to have been dismissed on this ground as well. The consent order was final and binding on the parties including the respondent.

It is clear to me that the earlier consent order was approbated by the respondent in that the goods were released to him. In the result the subsequent litigation on matters which could have been raised in the earlier suit are deemed to have been finally covered by the final consent order in the earlier suit. The subsequent suit which sought damages after the goods were released pursuant to a consent order has no basis and ought to have been rejected by the superior court. I fully endorse what **Turner on ESTOPPEL BY REPRESENTATION** states at page 334:

"Where a litigant has taken the benefit, in whole or in part of a decision in his favour he is precluded from setting up in any subsequent proceedings between the same parties by way of appeal or otherwise that such decision was erroneous or, though correct as to the part which was in his favour, was, wrongly decided as to the residue".

(9) In the light what is stated in (8) above the institution of ***H.C.C.C. No.446 of 2001*** which is the subject matter of this appeal was is my view also an abuse of the court process and the suit ought to have been struck out on this ground as well. In addition, the institution of a suit which patently has no basis in law is an abuse of the court process and such a suit is unsustainable for this reason.

(10) All in all and with the above analysis in view, the respondent had no valid cause of action or any reasonable cause of action against the appellant. Surely whether the claim was grounded in contract, tort, agency or equity it must also have some basis in reason and logic.

In terms of causation the conflicting claims had their origin in the acts of the respondent and all the consequences which arose from those acts of the respondent including the coming into the scene of ***Alice Kemigisha*** or ***Jeneby*** claiming through ***Alice Kemigisha*** stop at the respondent's door! At this time and age substantial contributory negligence by a claimant must unravel all claims and disentitle him completely. To my mind the claim did not have any basis in contract, tort, equity or agency. Indeed where the claimant is the author of his own wrong in my view, it does not matter whether his claim was contractual, tortious or based in equity or agency.

There is evidence that Alice Kemigisha was not what the respondent says she was – that she forged the documents. There is evidence that she was a girlfriend of the respondent's brother as per the proceedings in the superior court. It follows that as an appointed consignee of the respondent the Kenyan suit could not reasonably be blamed on the appellant at all including the resultant delay in having the goods released.

It must also be pointed out that the interim order (and the fate of the Ugandan case has not been stated or disclosed as mentioned above) and which order was obtained at the instance of the respondent in ***Misc. Appl. No. 457 of 2000*** (Uganda) directed that the goods the subject matter of the suit be preserved until the final disposal of the case. Consequently the respondent cannot approbate and reprobate at the same time.

As regards the Ugandan case and the interim order preserving the goods in Kenya it is significant to point out that the interim order was served on the appellant's agent in Kampala and was therefore by extension binding on the appellant in Kenya, the appellant having been a disclosed principal in Uganda. The other reason why the interim order is binding on the appellant is that Uganda is a reciprocating nation under the Foreign Judgments (Reciprocal Enforcement) Act Cap 43 of the Laws of Kenya. It follows therefore, on this principle of reciprocity, the order could be enforced in Kenya against the appellant.

As the interim order, ordered the retention and preservation of the goods by the appellant and it obeyed the order, the respondent who was instrumental in obtaining the order cannot establish any liability on the part of the appellant. It follows therefore the order was equally binding on the respondent and in my view any contrary claim in Kenya against the respondent is barred under the doctrine of estoppel and also constitutes an abuse of the court process here in Kenya. The interim order also impliedly released the respondent from any liability. The respondent having chosen to go to court in Uganda and having disclosed to the respondent that he was going to obtain the necessary orders he cannot subsequently, in this claim, the subject matter of the appeal, be allowed to back out of that position by instituting a suit in Kenya. The appellant in the circumstances expected the respondent to act honestly and responsibly concerning the contents of the interim order and also not to bring any action against the appellant in the face of such an order. He clearly acquiesced in the appellant's decision to await the court orders.

I adopt as good law the principle established in the case of **PACOL LTD. & OTHERS VS. TRADE LINES LTD. & ANOTHER** (The Times, February 8, 1988) where ***Webster J***. held that in certain situations similar to the matter before this Court there can arise *"an estoppel by silence and acquiescence*".

Again, the respondent is caught by the species of estoppels established in the English Court of Appeal case **of ALMAGAMATED INVESTMENT AND PROPERTY CO. LTD. VS. TEXAS COMMERCE INTERNATIONAL BANK LTD.** [1981] 2 WLR 554, 3 WLR 565. The estoppels established in this case are a species of estoppels founded on general equitable principles not to allow a party to act in unconscionable manner. Surely the suit instituted by the respondent in Kenya after the Uganda Court's interim order (it being appreciated of course that there is still no final order in the Ugandan case) cannot also be allowed to prevail in Kenya because it is unconscionable and unjust for the respondent to have instituted the Kenyan case in the circumstances, and it is equally unacceptable for a Kenyan court to allow him to benefit from any such suit.

The respondent is for the same reasons caught by the principle if estoppel by record in view of the interim order and the final consent order obtained in the Kenyan case.

To sum up, I think the respondent is caught by a series of estoppels as set out in this judgment. The estoppels on their own, prevent him from recovering a cent and therefore this appeal must succeed on the strength of the estoppels.

On what basis can the respondent now turn around and blame the appellant for the consequential loss and damage"

In the circumstances of this appeal and in terms of reasoning, I adopt as good law the principle in the case of ***COMPANIA NAVIFRA MARO PA SA V BOWATERS LLOYD PULP AND PAPER MILLS*** [1955] OB 68, 98-9 where the court stated:

"Whether the damages flow from the breach in accordance with the ordinary law of damages for breach of contract. Were they the natural and probable consequences of the breach" If not, they are too remote ..... The question is one of causation, if the master, by acting as he did, either caused the damage by acting unreasonably in the circumstances in which he was placed, or failed to mitigate the damage, the defendants would be relieved from the liability which would otherwise have fallen on them."

Although I have held that there was no contract between the parties the above principle has its application in reason, common sense and logic in situations where one party is trying to blame the other party. I think that, a party who is guilty of substantial contributory negligence as the respondent was in this appeal, his conduct is capable of disentitling him of any claims in contract, tort, equity or agency. The label he gives to his cause of action is irrelevant. Where a plaintiff/claimant such as in this case is the author of his own wrong and it is clear that he is guilty of substantial negligence, what label he gives to his cause of action whether contractual, tortious, agency or in equity and so on is immaterial; in all these situations, his contributory negligence becomes a valid defence. In the circumstances described herein, it is clear to me that I need not categorize the labels because in the circumstances, he has no cause of action whatsoever.

I would allow the appeal, set aside the superior court's judgment, dismiss the suit and further award costs of the suit and this appeal to the appellant. It is so ordered.

Dated and delivered at Mombasa this 16th day of October, 2009

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR