Case Number:	Civil Suit 52 of 1997
Date Delivered:	14 Oct 1997
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Ruling
Judge:	
Citation:	MITCHELL COTTS FREIGHT (K) LTD v ROADMASTER INDUSTRIES (U) LTD [1997] eKLR
Advocates:	-
Case Summary:	Sale of goods-demurrage-plaintiff seeking an amount being a sum incurred by way of demurrage for late return of containers
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 52 of 1997

MITCHELL COTTS FREIGHT (K) LTD..... PLAINTIFF

-VERSUS-

ROADMASTER INDUSTRIES (U) LTD.....……...EFENDANT

RULING

M/s. Mitchell Cotts Freight (K) Ltd., filed through theiradvocates M/s. Omondi Waweru & Co., Advocates, a suit against theDefendants M/s. Roadmaster Industries (U) Ltd., on the 4th ofMarch, 1997.

The Plaintiff sought against the Defendant a sum of US $36,010 being a sum incurred by way of demurrage for late return of containers. Previously on the 11.1.95 the parties entered into an agreement that:-

"The Defendant would appoint the Plaintiff as a Clearing& Forwarding agent.

That the purpose of clearing consignment on through billsof lading at the Port of Mombasa are in transit throughKenya by rail or road to Kampala, Uganda."

The Defendants were thereby bound to pay the Plaintiff onaccount of Defendant all the ports and related charges includingdemurrage of the containers.

The Defendants had incurred demurrage charges for unreturnedcontainers on time that amounted to US $ 36,010.2

It is this claim that the Plaintiff sues against includinginterest at banks rate.

As the Defendants were situated outside the jurisdiction ofthis court the Plaintiff successfully applied for leave to servesummons outside this jurisdiction. On the 18.3.97 M/s. Aboo & Co.Advocates entered appearance on behalf of the Defendant and fileddefence on the 2.4.97. In brief what the defence stated was thatthe Plaintiff failed to give a discription of the containers; thatthe agreement was never executed as it lacked the company seal, assuch it was not binding. That this court had no jurisdiction tohear this suit. That the freight was pre-paid and payments made tothe Plaintiff's principal shipping company. This was inclusive ofthe returning charges. If the Plaintiff had thus paid US $ 36,010then it was so paid without their authority and/or knowledge. Theydenied the claim.

The Plaintiff immediately filed a notice of motion seeking for prayers of summary judgment that was dated the 22.7.97 and filed on the 28.7.97. The application was filed under Order 35 r.l & 2 of the Civil Procedure Rules. I believe this should have been Order

35 r.(1) and (2) C.P.R.

2)(1) In all suits where a Plaintiff seeks judgmentfor-

a) a debt or liquidated demandwith or without interest, or

b).....

where the Defendant has appeared the Plaintiff mayapply for judgment for the amount claimed, or part thereof and interest,or for recovery of the land or rent ormesne profits.

(2) The application shall be made by motionsupported by an affidavit either of the Plaintiff or ofsome other person who can swear positively to the factsverifying the cause of action and any amount claimed.

(3) .....

The Respondent/Defendant filed grounds of opposition andreplying affidavit whereby they strongly opposed the saidapplication.

The arguments put forward by Mr. Waweru are that the partieshad entered into an agreement which included the payment by thePlaintiff on behalf of all ports and other relevant chargesincurred by the Defendants. . . .

It also stated that if no container is returned on time thedemurrage would be charged.

As the Defendants have now failed to pay for the demurragethat has amounted- to US $ 36,010 on account of cargo and goodscleared on behalf of the Defendants they should be made liable topay.

A bundle of invoice was annexed to the application reflectingthe exact amount of demurrage that had been incurred and on whatcontainers. The same was forwarded to the Defendants. They failedto respond to the. demands made for payments.

The shipping company known as the UNICORN notified theDefendants on the said claim.

The advocate then relied on the case of Zola & Others -v- RaLl Brothers Ltd. & Another, 1969 E.A. 691, whereby Order 35 enables a Plaintiff to obtain a quick summary judgment.

(The case actually dealt with the issue of anaffidavit deponed to under Order 35 r.2 C.P.R.and if it was made by a person who couldpositively swear to the facts verifying thecause of action).

City Printing Works (K) Ltd., -vs- Bailey, 1977 KLR 85, whereby the Defendant must show he has a defence. This must be shown in the pleadings.

(The case actually dealt with the issue where the "defendant advances a defence which is reasonable, or plausible and bona fide, theJudge must allow him unconditional leave todefend where however the proposed grounds of defence as a sham he has a discretion if hegrants leave to defend, to impose conditionson the defendant."

Further, the advocate stated just because the Defendant'sdirector signed the agreement, it meant there was an authority tohave the agreement signed.

I believe the advocate was bringing out the argument on the validity of the agreement. He relied on the case of H.L. Bolton (Engineering) Co. Ltd. -vs- T.J. Graham & Sons Ltd., whereby the court held per cunan

"The state of mind of directors and managerswho represent the directing mind and rule of acompany and control what it does is the stateof mind of the company and is treated by thelaw as such."

As such a company can. only, work through the directors. If thedirectors signed the agreement then it should be treated as theintention of the company.

Indeed he tried to prove this by relying on the case ofFreeman & Lockyer (a firm) -vs- Buckhurst Park Properties (Mangal)Ltd. & Another, whereby K & H formed a firm to buy and resellproperty. K instructed a firm of architects to act on the firm'sbehalf to develope an estate. The work was executed. When thearchitects claimed their fees - the amount which was not in disputethe Judge entered judgment against K & H as a firm stating thatthe architects did not have to inquire whether there was authorityor not for K to appoint them or K's action amounted to him takingthe role of a managing director although not actually appointed.

The case of Hely Hutchson -v- Brayhead Ltd & Another, (1967)1 QB 549 followed the same line of findings as the F_reeman &Lockyer case above.

As to the issue of jurisdiction the advocate for the Applicantrelied on the case of Ruby General Insurance Co. Ltd. -vs- GeneralLand and Insurance Agencies Ltd., 1963 E.A. 154.

This was a case where the Plaintiff appointed the Defendantagents in Tanganyika (as it was then) all commission remunerationmade was forwarded to their Mombasa offices. The offices wereclosed down and the Defendant forwarded the proceeds of thebusiness to Kampala.

The Defendant failed to make payment. The Plaintiff sued inKampala, the Defendant raised the issue that the court had nojurisdiction to entertain the claim it was held:-

"i) the fact that after the closure of thePlaintiff's Mombasa office the Defendantforwarded all business to the Plaintiff'sKampala office and made payment by cheque tothat office was cogent evidence of a course ofdealing from which it could be properlyinquired that the parties had agreed thatKampala was thereafter to be the place atwhich the Defendant would complete performanceof its obligations under the contract and makepayments to the Plaintiff.

ii) the court had jurisdiction to entertain the suit. "

The advocate for the Applicant relying on the above casestated that the court had jurisdiction to entertain the said case.

The Civil Procedure Advocate S.15 explanation (3)(U) applied.

I must state at this juncture, that Section" 15 of the CivilProcedure Ordinance explanation (3) (U) applies to subordinatecourts. See the case of RIDDLESBARGER & ANOTHER -VS- ROBSON &ANOTHER, 1958 E.A. 375 "held i.e. S.15 of the Civil ProcedureOrdinance applies only to subordinate courts." The principlesraised though have been noted.

In reply to this application the advocate for the Respondentat the end of his addresses when asked to give a comment on thecase law that had been raised by the Applicant and referredextensively to this court stated:

"I do not need to refer to authorities

I am not responding to the authorities on ,jurisdiction."

It is unfortunate that the advocate for the Respondent hadnothing to say on authorities that had been served on him inadvance and touched on his arguments. .

The advocate for the Respondent relied on two major points in opposing the application for summary judgment. This is on:

i) Jurisdiction and on

ii) The summary procedure.

i) On jurisdiction he stated that the suit should have beenfiled in Uganda. The reasons being that it was difficult todetermine whether the document was signed in Uganda or not.

The freight transported was pre-paid was an argument putforward under the heading of jurisdiction. It is unclear what theadvocate may have meant here. Perhaps I would understand it tomean that as the freight was pre-paid, no payment was incurred inKenya and thus no jurisdiction over the matter occurred in Kenya.

As to the summary procedure, the advocate, for the Respondentprayed for leave to defend unconditionally the claim made againstit as there are triable issues. He went further to question theApplicant's documents as filed. Looking at the documents they arereferring to MITCHELL COTTS LTD whilst the Plaintiffs are MITCHELLCOTTS FREIGHTS.

It thus means that invoices have no relationship at all to theDefendants. There was a time, the Defendants know as Road MasterIndustries are referred to as Road Master Cycles (U) Ltd. These are two and different and distinct companies.

There is also Lenicorn Shipping who is not party to the suit.

Documents filed do not even refer to the Defendant nor arethey copied to the Defendant when written.

There seems to be a claim of US $29,316 and yet a claim of US$36,010 - this is a discrepancy.

The parties should therefore appear and explain thesediscrepancies.

When the advocate was asked whether he made application toapply for further and better particulars on the allegeddiscrepancies he admitted that the Plaintiff/Applicants hadsupplied him with the documents in advance and in good time.

My task as this movement is to consider whether the Applicantsprayer for summary judgment should be granted or not.

From the documents supplied by the Applicants this is anagency agreement that had been entered into. There seem to be anagreement entered into in India with Mitchell Cotts Kenya Limited.The Defendants were notified that Mitchell Cotts Freight (K) Ltd.,Mombasa was a seperate entity from Mitchell Cotts Kenya. That anywork done would be seperate and distinct from Mitchell Cotts KenyaLtd. This seems to have been understood from the agreement enteedinto. The, actions of the parties clearly shows that work was doneon behalf of the Defendant by the Plaintiff.

I would rule that this court has jurisdiction to entertainthis cause although the Ruly General Insurance Co. Ltd. Case reflects that the intention of the parties inferred that anagreement occurred at a particular place and that Section 15 of theCivil Procedure Rules dealt with subordinate courts. Riddlesbarger& Another -vs- Robson & Others case.

I would rule that the High Court of Kenya has inherent powersto bear the jurisdiction of this country. The issue ofjurisdiction would have answered if the suit was "filed in thesubordinae courts where the place of the contract was not made orperformed or performance completed or where in performance of thecontract any money to which the suit relates was expressly orimpartially payable."

In this situation the suit was not filed in the subordinate courts but in the High Court.

Payments if any would have been made to the Plaintiff inKenya.

As to the summary Judgment in the case of Camille -vs- Aminmohamed Merali. (1966) E.A. 411, 419 the dictum of Spry, J.A.stated:-

"The general rule is that leave to defendshould be given unconditionally unless thereis good ground for thinking that the defences„ put forward are no more than a sham and itmust be more than mere suspicion."One would wonder why the Defendant/Respondent had not earlieron Requested for further and better particulars to the plaint and to the documents they seem to have been given to their advocates.Many for these questions that arose as discrepancies were broughtup in this application and that could have been easily been clearedif so made.

Is the defence a sham and a mere suspicion"

I find that it falls short of such classification. I believethat the issue of accounting has to be dealt with extensively andin this particular instance there are triable issues.

I hereby decline to grant the orders sought and give leave tothe Defendant to defend their case.

I order that the costs be in the cause. I would thank Mr.Waweru for the authorities supplied to this court.

Dated this 14th day of October, 1997 at Mombasa.

M. ANG'AWA

JUDGE