



REPUBLIC OF KENYA



**KENYA LAW**  
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**Embrio Enterprises Limited v Kenya Revenue Authority (Civil Case  
523 of 2013) [2023] KEHC 17951 (KLR) (Civ) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17951 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE 523 OF 2013**

**AN ONGERI, J**

**MAY 24, 2023**

**BETWEEN**

**EMBRIO ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**KENYA REVENUE AUTHORITY ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case Embrio Enterprises Limited (hereafter referred to as the plaintiff company) sued Kenya Revenue Authority (hereafter referred to as the defendant only) seeking the following remedies;
  - i. Kshs.17,000,000.00 being the value of the loss of a consignment which was lost while in the custody of the defendant.
  - ii. Kshs.2,000,000.00 being the expenses incurred in travelling and incidental losses incurred in following up the lost consignment.
  - iii. Ksh.70,000,000.00 in respect of loss of business.Total 89,000,000.00
2. In its plaint filed in court dated 16/12/2013, which was amended on 30/10/2015 the plaintiff company averred that it is a limited company incorporated in Uganda Kampala, Uganda while the defendant is a statutory body established by an Act of Parliament ([Cap 469](#) Laws of Kenya) having its head office in Nairobi Kenya.
3. Further, that on or about 10/3/2013, the plaintiff company imported 200 metric tons of sugar from Thailand which was destined to their Kampala offices for onward transmission to Juba, Southern Sudan.



4. The plaintiff company further stated in the plaint that after the consignment was inspected by SGS (Thailand) Ltd, it was loaded into 4000 bag of 50kgs each which were then put in Eight (8) containers of 20 foot each.
5. Upon arrival at the port of Mombasa, the plaintiff company's clearing agent Westin Enterprises Limited lodged the import declaration forms and processed the clearing consignment after paying the requisite port charges.
6. Further that the consignment was then allowed to leave the port of Mombasa under customs escort to border point after the defendant valued the goods at ksh.17,000,000 and a transit bond of the amount was issued.
7. On or about 31/3/2013 after the plaintiff hired trucks to ferry the consignment to Kampala, Uganda, the defendant's officials issued an order for the seizure of the goods using Form 39 and all the trucks were seized and held at Mombasa municipal parking at Changamwe being in the custody of the defendant as the defendant allegedly carried on investigations of the consignment.
8. The plaintiff company stated in the plaint that the same night the consignment was seized, the trucks were removed from the above stated parking and taken to unknown destination where the consignment of sugar was removed and the trucks were found abandoned within Mombasa.
9. The matter was reported to the police and the plaintiff company incurred further incidental costs of ksh.2,000,000 in following up this matter and loss of business of ksh.70,000,000 hence the filing of this suit.
10. The defendant filed a defence in 2014 which was amended on 16/2/2016 in which they denied the plaintiff company's claim.
11. The defendant further stated in their amended defence that the sugar was recovered from the port on 28/5/2013 in four trucks as follows

Container No. Truck Registrstion No.

1.

PCIU3118620 KBL 377 A/ZD 3363

2.

PCIU3174367 KBL 377 A/ZD 3363

3.

PCIU2514966 KBR 698 H/ZC 1556

4.

PCIU1066173 KBR 698 H/ZC 1556

5.

PCIU2542910 KAN 910 R/ZB 9040

6.

PCIU2717794 KAN 910 R/ZB 9040

7.

PCIU2829069 KAY 394 Q/ZB 9016



8.

PCIU2953399 KAY 394 Q/ZB 9016

12. Further, it is averred in the amended defence that they received intelligence information that the sugar consignment imported by the plaintiff company was in the process of being dumped into the local market without paying the requisite customs duties.
13. The defendant further averred in their amended defence that investigations were commenced and three of the trucks were recovered but the 4<sup>th</sup> truck registration no. KAN 916R/ZB 9040 has not been traced to date.
14. Further, that one of the trucks, registration no. KBR 698H/ZC 1556 was transferred to Kilindini on 3/6/2013 vide notice of deposit of goods in a customs warehouse (F89 no. 197608) and was closed pending investigations.
15. The defendant further stated in the amended defence that on 4/6/2013, truck registration no. KBL 377A/ZD 3363 which was one of those that had left the municipal parking on the night of 31/5/2013 was recovered at Mazeras Area along Mombasa road by the defendant's officers and it had already emptied the sugar consignment and it was escorted to Kilindini customs warehouse and deposited vide notice of goods deposited in warehouse (F69 196516).
16. The defendant denied that the trucks were under the Escort of the defendant's customs officers when they disappeared.
17. The hearing of this case proceeded by way of viva voce evidence. The plaintiff called two witnesses while the defendant called one witness.
18. PW 1 Wilfred Githua Kinyanjui, one of the Directors of the plaintiff company adopted his statement dated 11/7/2016 as his evidence in chief. In it he indicated that on or about 9<sup>th</sup> April 2013 the plaintiff imported 200 metric tons of sugar which was designed to the plaintiff's offices in Kampala and thereafter to Juba Southern Sudan. The consignment was duly loaded into 4000 bags of 50kgs each which were then put in eight containers of 20 foot each.
19. Upon arrival at the port of Mombasa, the Plaintiffs clearing agent, Westin Enterprises Ltd lodged Import Declaration Forms and processed the clearing of the consignment after paying the requisite port charges. The Plaintiff's clearing agent also made a requisition to the Defendant on 28th May 2013 that the sugar consignment being sensitive cargo should be on transit under Defendant's Customs Escort.
20. The Defendant accepted the request by the Plaintiffs clearing agent and upon payment of the requisite fees, the Defendant put the Plaintiffs said sugar consignment under escort of the Defendant's customs officers whose duties were to ensure that the Plaintiffs said sugar consignment were at all times on transit under the Defendant's customs escort.
21. On 28<sup>th</sup> May, 2013, the Plaintiff's clearing agent processed the gate passes for the sugar consignment which was allowed to leave the port Of Mombasa in four trucks under customs escort to the border point after the Defendant valued the goods at Kshs. 17,000,000 and a transit bond of this amount was issued
22. On or about 31<sup>st</sup> May, 2013, the Defendant's officials without an explanation issued an order for the seizure of the sugar consignment using Form 89 and all the trucks were seized and held at Mombasa Municipal Parking at Changamwe. On 1<sup>st</sup> June 2013 the plaintiff received news that on the night of 31<sup>st</sup>



- May 2013 some of the seized trucks containing its sugar consignment were removed from the customs warehouse and taken to an unknown destination.
23. On 1<sup>st</sup> June 2013 after failing to get any explanation from the defendant regarding the loss of the sugar consignment, the plaintiff reported the theft to the Mombasa port police station and thereafter attempted to trace the missing trucks. The plaintiff found one truck abandoned along Mombasa-Nairobi Road emptied of its consignment.
  24. PW1 also produced a bundle of documents including the CR12 form for the plaintiff company. PW 1 blamed the defendant for the disappearance of the consignment.
  25. In cross-examination, PW1 said they had contracted Westin Agents to clear the goods. He said he did not know the names of the drivers of the trucks and further that the defendant was to deliver the consignment to Uganda.
  26. PW 2 Josephat Wecholi Ekina, a director of Westin Enterprises limited also adopted his written statement dated 23/10/2018 as his evidence in chief. He stated that at the port of Mombasa he lodged the import declaration forms with the defendant and processed the clearing of the consignment after payment of the requisite port charges, fees and meeting of the required conditions. He also took out a transit bond issued by First Assurance Company Limited. He also made a requisition to the defendant on or about 28<sup>th</sup> May 2013 that the consignment being sensitive cargo should move under customs escort. The defendant accepted and put the consignment under the escort of customs officers Maurice Muraga and Stephen Musyoki.
  27. The consignment was thereafter seized without any reason and held at the Mombasa municipal parking at Changamwe allegedly pending investigations under F89 No 196514 dated 31<sup>st</sup> May 2013. Later they received news that on the same night the trucks were removed from the municipal parking and taken to an unknown destination where the sugar was removed from the trucks.
  28. When he visited the yard he found KBR 698H/ZC1556 at the yard with two containers intact and the other trucks were not there. He reported the loss of the consignment under police Abstract No. OB/18/1/6/2013. The truck that had been found at the municipal parking was towed to Kilindini by customs officers and detained under F89 197608 dated 4<sup>th</sup> June 2013. The remaining two trucks have not been found to date.
  29. He indicated that the defendant has purported to accuse his company Westin Enterprises Limited for failing to exercise due diligence however no charges were brought against it under the [Kenya Revenue Authority Act](#) or under the East African Community Customs Management Act. That once Form 89 was issued by the defendant the seized consignment was under the control of the defendant. That it was the duty of the defendant to seal the yard and ensure the security of the consignment.
  30. In cross-examination PW 2 said he is the one who procured the trucks. He said seizure notices were put on the trucks. He also said the trucks disappeared at night. He said there was one truck which had a flat tyre that did not leave the yard.
  31. PW 2 also said he traced one of the trucks registration no. KBL 277A at Mazeras. He said the containers were empty. He said another truck KBR 698H was also recovered with two containers intact and it is still at the port with the goods.
  32. PW 2 said he did not recover anything from the owners of the trucks. He said even the owners of the trucks disappeared.



33. PW 2 said his licence was suspended after the consignment disappeared and he filed a suit against the defendant but his licence was reinstated before the case was over.
34. PW 2 maintained that the defendant was in control of the consignment when the trucks disappeared. He said the seizure notice stated “pending investigations.”
35. PW 2 also said the purpose of custom escort is to prevent dumping of goods in the country.
36. The defendant called one witness DW 1, Joseph Njugi Mwangi who adopted his stated dated 1/11/2018 as his evidence in chief. He stated that he is an employee of the defendant’s Investigation and Enforcement Department. A consignment of 8 x 20 ft. containers containing refined Thailand sugar were imported. The consignment was declared as being in transit to Kampala Uganda *vide* T810 entry 2013 MSA 4103261 on 14<sup>th</sup> May 2013 and released on 15<sup>th</sup> May 2013. The consignment was covered by Bond No. PCSB05358/13 guaranteed by First Assurance Company Limited. The guarantor however disowned the bond in writing through a letter dated 13<sup>th</sup> June 2013.
37. On 30<sup>th</sup> May 2013 information was received at the Office of Senior Assistant Commissioner, investigations and Enforcement Department that the consignment of sugar was in the process of being dumped into the local market and that it was within the Changamwe area. On the same day at around 2p.m accompanied by the inspector Mathew Muhia they proceeded to Changamwe Municipal yard where they found 3 trucks parked with 6 containers still intact. One truck registration number KAN 9210/ZD 9040 was missing.
38. He issued notice of goods deposited in a customs warehouse of the three trucks they found at the yard and left the notice with Mbero Kendi Lillian. On 1<sup>st</sup> June 2013 accompanied by inspector Mathew Muhia they visited the yard at around 8.00 am and found that 2 trucks had been allowed to leave without any authority of the commissioner of customs services. The management of the yard were unable to give satisfactory explanation for the release of the 2 trucks. They proceeded to close the yard pending investigations into what had prompted the release of the trucks by the night shift.
39. On 4<sup>th</sup> June 2013 they recovered truck registration No. KBL 377A/ZD 3363 at Mazaras Area along Nairobi- Mombasa Highway with two empty containers numbers PCIU3118620 and PCIU3174367. The contents of six of the eight containers did not leave the country but were dumped in Kenya contrary to the provisions of the East African Community Customs Management Act, 2004. The other two were seized and detained in Kilindini.
40. In cross-examination, DW 1 confirmed the consignment landed in Kenya and was loaded onto trucks. He said he could not recall the name of his boss.
41. DW 1 also said in cross-examination that the goods were at the Municipal yard when they were removed. He said the two trucks which left were KBS 377A and KAY 394Q. He said he is the one who issued TF89 1965614 dated 31/5/2013.
42. DW 1 also said the customs bond was a forgery by the plaintiff company with the help of the Agent Westin Enterprises Limited.
43. The parties filed written submissions as follows; the plaintiff submitted that it is not in dispute that on or about 9<sup>th</sup> April 2013 the plaintiff imported one shipment of 200 metric tons of refined sugar from Thailand. The consignment was destined for Uganda and ultimately South Sudan. The declared value of the sugar consignment was Kshs. 12,870,033 and that the said consignment was secured by way of a Transit Bond which was verified by the defendant.



44. The plaintiff submitted that PW2 testified that all the 4 trucks were released at the gate of the port after following due process and under custom seal, escort and control as the consignment was sensitive. The trucks left the port of Mombasa and headed to the municipal parking yard to make preparations before takeoff. The plaintiffs were astonished that the defendant issued a seizure notice dated 31<sup>st</sup> May 2013 to the entity manning the changamwe municipal parking yard. The seizure was done in the absence of the plaintiff or the plaintiffs clearing agent and the reason for seizure was simply stated as “Pending Investigations”.
45. It was the Plaintiff’s argument that the elaborate procedure in Section 214 and 215 of the *East African Community Management Act 2004* was not followed by the defendant. That therefore the effect of the seizure notice was that the consignment was placed under customs control.
46. It was the plaintiff’s submission that it was further astonished to learn that the fourth truck Reg KAN 910R was never seized nor did it arrive in the yard from the port. That further there was no legal or factual basis to seize the three trucks which were under custom seal and escort of the defendant’s own customs officers. That it can be inferred therefore that the whole thing was orchestrated by the defendant’s custom officers who as a first step rerouted the fourth truck registration No. KAN 910R.
47. The plaintiff argued that the defendant’s witness Mr Joseph Njugi attempted to pass the blame to the municipal yard and the drivers of the trucks, however no civil, criminal or tax-related actions has been brought and no evidence of adverse criminal action against the entity manning the yard namely Mbero Kendi Lilian c/o Summit Love lines Co. Ltd Parking Services.
48. As a result, the plaintiff suffered loss of Kshs. 12,870,033 being the declared C.I.F Value of the sugar consignment. The plaintiff also lost the benefit of a contract dated 29<sup>th</sup> January 2013 valued at USD 1,020,00 (Kshs 89,393,106) which the plaintiff had with Hejar Senina for Trading & investment Ltd for the supply of 4 shipments of the refined sugar. The plaintiff also paid Kshs. 818,153 being the Re-Marshalling, Storage, Extra Storage Charges and Northern Corridor Levy and Kshs. 510,000 to First Assurance Co. Ltd to obtain the Transit bond. In the end the plaintiff lost a total sum of Kshs. 103,591,292.11 which it is claiming from the defendants with costs.
49. The defendant in its submission argued that the plaintiff has not proved its case to the required standard. That DW1 indicated the trucks and goods were in the physical custody of the municipal parking yard. That should have called the truck owner and the drivers as witnesses to support its claim that the defendant was in charge in the execution of their duties.
50. It was the defendant’s submission that it was not responsible for providing logistics services as the truck owners and drivers are contracted by their clearing agents or owners. That additionally, no document was adduced to imply KRA’s liability as the defendant had no control of the said Changamwe Municipal yard and the officer found at that yard namely Mbero Kendi Lilian was not the defendant’s officer.
51. On the value of the loss, it was the defendant’s submitted that the defendant only took possession of one truck with 2 loaded containers being; KBR 698H/ZC1556. As for the other three, one was never found at Changamwe Municipal Yard; KAN 910R/ZD9040 and one was recovered with two empty containers at Mazeras; KBL 377A/ZD3363 and one that left the Municipal yard that was never recovered; KAY 394Q/ZB9016.
52. The defendant argued that the plaintiff was statutorily required to pursue a claim for release of the consignment in Kilindi Customs Warehouse if indeed that believed that the defendant was on a



- mistaken fact of dumping. Neither did the clearing agent, the plaintiffs agent attempt to secure the release for onward transit as intended.
53. I have carefully considered the evidence adduced in this case together with the submissions of both parties. It is the duty of the plaintiff company to prove his case to the required standard in civil cases which is on a balance of probabilities.
54. The issues for determination in this case are as follows;
- i. Whether the plaintiff company proved its case to the required standard.
  - ii. Whether the Defendant had justifiable reasons for seizure of the plaintiff's goods which were on transit.
  - iii. Whether the plaintiff company is entitled to the remedies it is seeking against the defendant.
  - iv. Who pays for the costs of this suit?
55. On the issue as to whether the plaintiff company proved its case against the defendant, I find that there is evidence that the plaintiff company contracted Westin Enterprises Limited to clear their consignment which was on transit from Thailand to Kampala.
56. There is evidence that the said consignment was seized by the defendant on suspicion that the goods were destined to be dumped in Kenya.
57. There is evidence that the goods were lost on 31<sup>st</sup> May 2013 while in the custody of the Defendant.
58. PW 2 reported the loss of its consignment to the Changamwe police station on 1st June 2013 through OB No. 18/1/6/2013. However, the defendant and the police did not taken any action to date to investigate and bring culprits (defendant's employees) to book.
59. There is undisputed evidence that the consignment was lost while being held at the Mombasa municipal parking at Changamwe allegedly pending investigations under F89 No 196514 dated 31<sup>st</sup> May 2013.
60. There is also evidence that the same night the trucks were removed from the municipal parking and taken to an unknown destination where the sugar was removed from the trucks.
61. I find that the Defendant's evidence that intelligence reports disclosed that the sugar was to be dumped in the country was not substantiated.
62. There is evidence that the seized sugar was taken away and that no investigations were conducted as alleged.
63. PW 2 testified that when he sought to know from the persons manning the Changamwe municipal parking yard how the trucks could have left the yard after the seizure notice had been issued, he was informed that the trucks left the yard under the escort of the police past the yard gate.
64. The defendant said in their evidence that one Agnes Chepkemai recommended that the following employees of the defendant be charged with the diversion and loss of the consignment namely: Thomas Kupondo Lichuma (Customs officer), Kenneth Ochieng Ochola (Customs officer, Sylvester Mwamba (customs officer), Stephen Alfred Musyoki (customs escorting officer), and Caroline Atieno Olela (customs officer).
65. There is therefore evidence that the sugar disappeared while in the custody of the agents of the Defendant and that no one was charged in court for loss of the same.



66. There is evidence that one truck was recovered at Mazeras empty but the driver or the owner were not called as witnesses.
67. I find that the allegation by the Defendant that the customs bond was a forgery is not an issue in this case.
68. The bond simply guarantees that Customs will collect all import duties, taxes, fines or penalties from the surety company, if they cannot collect them from the importer.
69. The issue of the bond would be raised if the payment guaranteed was not paid or if the said payment was under dispute and where the principal decides to execute the bond (of the amount in dispute) instead of paying in cash.
70. I find that the Plaintiff company has proved to the required standard that their goods got lost while in the custody of the Defendant.
71. On the issue as to whether the Defendant had justifiable reasons for seizure of the plaintiff's goods which were on transit, I find that no investigations were done by the Defendants since the goods were carted away the same night they were seized.
72. I therefore find that the Defendant did not have a justifiable reason to seize the goods.
73. There is evidence that the goods were in the Defendant's customs warehouse when they disappeared.
74. Section 2(1) of The *East African Community Customs Management Act, 2004*, say;  

“Customs warehouse” means any place approved by the Commissioner for the deposit of unentered, unexamined, abandoned, detained, or seized, goods for the security thereof or of the duties due thereon.”
75. On the issue as to whether the plaintiff company is entitled to the remedies it is seeking against the defendant, the plaintiff submitted that it lost the benefit of a contract dated 28th January, 2013 (signed on 30th January 2013) valued at USD1,020,000 (Kshs.89,393,106) which the plaintiff had with Hejar Senina for Trading and Investments Ltd a company based in the Republic of South Sudan for the supply of 4 shipments of Thailand refined sugar at USD 255,000 per shipment (with the first shipment having been lost under custody of the defendant).
76. The plaintiff further submitted that in total, by the defendants wrongful, illegal and unjustifiable actions, the plaintiff lost the total sum of kshs.103,591,292.11 which the plaintiff claims from the defendant together with costs.
77. The plaintiff's testimony was the declared value of the sugar consignment was Kshs. 12,870,033 and that the said consignment was secured by way of a Transit Bond which was verified by the defendant.
78. The plaintiff's claim for 17,000,000 which includes VAT for the consignment is not justified since there is no evidence that the plaintiff company paid VAT as alleged.
79. I find that the plaintiff company is entitled to the value of the sugar which was Kshs. 12,870,033 only.
80. The defendant is also not liable to pay the travelling expenses of Kshs. 2,000,000 incurred by the plaintiff in following the lost consignment since the plaintiff had an agent in Kenya who was responsible for clearing and forwarding the goods.
81. The special damages also claimed for loss of business of Kshs. 70,000,000 were also not proved to the required standard and the same are not be payable.



- 82. The law requires that special damages be specifically pleaded and proved.
- 83. I also find that loss of profits was not a foreseeable damage and the same is barred by the doctrine of remoteness of damages.
- 84. I find that the Defendant is not responsible for loss of profit which the plaintiff company anticipated to make from the contract with 3<sup>rd</sup> parties.
- 85. I accordingly enter judgment in favor of the plaintiff against the Defendant in the sum of Kshs. 12,870,033 with costs for the suit and interest for the said amount at court rates from the date of loss of the consignment (31th May 2013) until payment in full.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2023.**

.....

**A. N. ONGERI**  
**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

