



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 451 OF 2001**

**CHARLES MUTUKU T/A ROCHAM ENTERPRISES.....PLAINTIFF**

**VERSUS**

**KENYA PORTS AUTHORITY.....DEFENDANT**

**JUDGMENT**

1. Through a plaint dated 14<sup>th</sup> August, 2001, the plaintiff Charles Mutuku T/A Rocham Enterprises brought this suit. It was filed on 11<sup>th</sup> September, 2001 against the defendant, the Kenya Ports Authority. The plaint was amended on 9<sup>th</sup> March, 2012. The plaintiff claimed to have been contracted by M/s Rughani Brothers, as a clearing and forwarding agent sometime in July, 1998 in respect of commodities contained in container No. MLCU-225942-1 which was carried on board motor vessel Olive Bank in voyage 0225. The plaintiff further claimed that the contract was for it to facilitate trans-shipment of the said container and its contents to the consignee M/s Azhar Al Khaleej of P. O. Box 15062, Deira, Ubaï Jebel Ali Port. It was averred that the customs department declined to permit the trans-shipment of the said container as a result of which the plaintiff entered into an agreement with Rughani Brothers and purchased the merchandise.
2. The plaintiff stated that the container which had 128 bales of Indian Dyco polyester and viscose blended fabrics arrived at the Port of Mombasa on or about 18<sup>th</sup> July, 1998 and was moved by the defendant and/or its agents to a customs bonded warehouse under Ref No. CT/1599/9/98. It was further claimed that the plaintiff's container got lost with the 128 bales of fabric due to negligence on the part of the defendant or its agents.
3. The plaintiff's prayer was for damages against the defendant as follows-
  - (i) General damages for breach of contract and special damages;
  - (ii) Accrued demurrage together with the value of the goods and container to be assessed at the hearing;
  - (iii) Any other relief this Honourable court may deem just and fit to grant; and
  - (iv) Special damages as prayed for and particularized in paragraph 10 of the plaint.
4. The defendant filed a statement of defence on 1<sup>st</sup> October, 2001. It later amended the said statement on 3<sup>rd</sup> April, 2012 and filed the same on 5<sup>th</sup> April, 2012.
5. The defendant admitted that motor vessel Olive Bank arrived at the Port of Mombasa on or about 18<sup>th</sup> July, 1998. The defendant denied any negligence and breach of contract on its part and that of its employees and put the plaintiff to strict proof thereof.
6. The defendant averred in the amended statement of defence that it would raise a preliminary objection about the plaintiff's suit being time barred under the provisions of Sections 62, 65 and 66 of the Kenya Ports Authority Act, Cap 391 Laws of Kenya.
7. The defendant also pleaded that in law no suit shall lie against it in any court of law for any loss or damage to cargo. The defendant prayed for the suit to be dismissed with costs.
8. Three (3) witnesses testified in support of the plaintiff's case. PW1 was Charles Mutuku Kioko. He introduced himself as a Director of Rocham Enterprises which is based in Nairobi. It was his evidence that he was approached by some shippers in October, 1998 to assist in trans-shipment of a 1x20 foot container which had textile material. He indicated that he was instructed to forward the container to Dubai. That he paid Kshs. 567,560/= to NOTCO (K) Ltd (NOTCO) which was the shipper for it to trans-ship the container to Dubai.

9. His evidence was to the effect that NOTCO was to liaise with the customs to allow the above to happen but customs declined to have the container trans-shipped and advised that the goods be converted to home use. That NOTCO informed him that he should undertake local clearing for the Kenyan market. He further stated that the shipper advised NOTCO to change the consignee to read Rocham Enterprises and that the goods once cleared would belong to the plaintiff, as the consignee of the goods.
10. PW1's evidence was that he sought to see the container which he was to clear but it was nowhere to be found in the defendant's premises (KPA). The plaintiff demanded the trans-shipment charges it paid as the container was no longer destined for Dubai. He stated that on 1<sup>st</sup> February, 1999 NOTCO acknowledged receipt of his letter seeking a refund of the amount he had paid for trans-shipment of the container and told him that it was investigating the loss of the container and that it was claiming the full replacement value of the container in the sum of USD 4,000. That NOTCO further informed the plaintiff that customs would be claiming unpaid duty and sales tax as the container had been changed to home use. PW1 indicated that one Benjamin Mwangela (PW3) of their Mombasa office was handling issues of the lost container.
11. PW1's evidence was that he wrote a letter to KPA dated 15<sup>th</sup> February, 1999 about the missing container No. MLCU-225942-1. He further indicated that in the said letter he informed the Managing Director, KPA that the said container reached the Port of Mombasa on 18<sup>th</sup> July, 1998 and was transferred from the container terminal on 23<sup>rd</sup> September, 1998 but it could not be traced.
12. PW1 testified that they received a letter dated 20<sup>th</sup> March, 1999 in which KPA stated that goods once transferred to the customs warehouse are deemed to have been delivered to the owners. He indicated that on 10<sup>th</sup> June, 1999, he wrote a reminder to KPA and gave them 14 days to respond or he would institute legal proceedings but he received no response. He further indicated that on the same day he wrote to the Commissioner of Customs, Nairobi informing him of the lost container.
13. PW1 stated that the container was never traced. He testified that in the plaint, he had not given the total claim of the goods but he had given a breakdown of the cost. He stated that the goods were 128 bales of textile material, Indian dyed viscose as reflected on the invoice. He also claimed USD 9,459.33 for trans-shipment and USD 5,000 being the cost of the container. He stated that his total claim was USD 81,886.31, at an exchange rate of Kshs. 76 to the US Dollar.
14. PW1 testified that once a container was taken to a customs warehouse, the final release at the gate was determined by KPA. He further stated that when the requirements for the goods are not met, Kenya Revenue Authority gazettes them for auction and even then, a gate pass must be obtained from KPA.
15. It was PW1's evidence that when they wrote to KPA, it did not respond to them to state that the goods were auctioned. He indicated that if the goods were cleared, KPA would indicate who cleared the goods and give the gate pass number as KPA mans (guards) their gates and the goods within their premises. PW1 expressed the view that if anyone else was to release the goods from KPA, there would be no accountability.
16. PW1 contested the defence raised by KPA that once goods are transferred to the customs warehouse, they cease to be in their custody. He indicated that KPA was the final determinant of all the processes that take place at the Port of Mombasa and they are responsible for the goods therein.
17. PW1's testimony was that at the time he was to clear the said goods, he was at the prime of his life but he missed an opportunity because of the loss of the goods in the container. He prayed for compensation of the goods, the cost of trans-shipment, the value of the container, costs of the suit and any other relief that the court deems necessary.
18. He relied on all the documents filed by the plaintiff as per the list of documents filed on 29<sup>th</sup> May, 2012. He indicated that the cost of the 128 bales of textile fabric as per the 3 invoices contained in his supplementary list of documents was USD 67,279.18. Apart from what he had stated earlier, in his evidence, PW1 also sought compensation for demurrage from 1998 which would be equivalent to the cost of a new container at USD 5,000. He also prayed for compound interest since he lost his goods in the year 1998. He also prayed for any other relief that this court may deem just and fit to grant.
19. PW2 was Joseph Mwangi, a Legal Manager at SOCOPAO Limited which was formerly Delmas Kenya Limited and previously known as NOTCO Kenya Limited (NOTCO). He stated that he joined the company in the year 2013 as the Legal Manager. He indicated that the department he was heading kept records of matters in dispute, claims and issues that need to be communicated to clients.
20. He recounted that they kept a file relating to this matter and that NOTCO was the Shipping Line for all Cargo Movers then. He testified that the container No. MLCU-225942-1 was destined for Sears, Rwanda as the consignee.
21. He stated that on 26<sup>th</sup> November, 1998 NOTCO received a message from the shipper's agents for trans-shipment of the consignment to another company known as Al- Haj in Dubai and that the cost of trans-shipment was to be paid by the plaintiff, Rocham Enterprises. PW2 stated that NOTCO wrote to the plaintiff to inform them of the foregoing and the cost of trans-shipment.
22. He further stated that the plaintiff paid Kshs. 567,560/= for trans-shipment but Kenya Revenue Authority (KRA) refused to approve trans-shipment and said that the goods must be used locally.
23. It was PW2's evidence that on 6<sup>th</sup> January, 1999 they received a telex (sic) indicating that the new consignee of the goods was the plaintiff. The clearing process was to commence but the container could not be found at the port. PW2 indicated that the documents they received formed part of the plaintiff's bundle of documents.
24. PW2 indicated that NOTCO dealt with the plaintiff as the appointed agent of the shipper and as an appointed consignee of the goods. He

testified that they handled the telex they received for trans-shipment of the cargo and a telex (sic) for the change of the consignee. PW2 referred to various documents which included a fax instructing the change of consignee to the plaintiff, the cheque paid to NOTCO by the plaintiff in the sum of Kshs. 567,560/=, a letter from NOTCO to the plaintiff informing it of the money payable for the trans-shipment, a letter informing NOTCO of trans-shipment of cargo to a company in Dubai known as Azhar – Al Khaleej Trading, and a letter from the shipper confirming the trans-shipment details as given to them by the shipper's agent.

25. PW2's evidence was that they carried out the instructions to the extent of the request for trans-shipment which was rejected by the Kenya Revenue Authority (KRA). He stated that it was not possible to change the manifest as the goods were not available. He further stated that there was communication addressed to the plaintiff to the effect that the goods could not be traced at the Port of Mombasa.

26. It was the testimony of PW2 that goods are released from KPA after KRA makes entries and that it was possible to convert the goods in issue for local use but they could not be found. He indicated that there would be a paper trail if the goods were to leave KPA to a customs warehouse as there is a document known as "Goods Deposited in Customs Warehouse" which is form 89, that is akin to a receipt of acknowledgment of the goods. He indicated that he did not see any such receipt in the file.

27. PW2 further testified that even when goods are in a customs bonded warehouse, KPA has to approve release of the same but there was no indication of the goods in issue having left KPA.

28. In cross-examination, PW2 indicated that the goods were discharged on 24<sup>th</sup> July, 1998 when the ship arrived at the Kenya Ports Authority. He indicated that there was no customs entry in 21 days and the goods were received at the Kilindini customs warehouse on 24<sup>th</sup> September, 1998. He further stated that regulation 221 of the East Africa Harbours Regulation of 1970 states that once goods are received at the customs warehouse, KPA is not liable. He also stated that KPA has no role when the container is at a customs warehouse.

29. On being re-examined, PW2 indicated that document No. 6 on the plaintiff's list of documents is a Form for "Goods Sent to Customs Warehouse". He explained that it originated from KPA and was not the same as Form 89 which is generated by KRA. He stated that Form 89 is an acknowledgment of goods deposited in the customs warehouse. He clarified that goods at KPA may be in actual and physical possession of KPA but could be legally and constructively in the hands of KRA. PW2 stated that in the absence of documents which show that the goods left KPA, they would be deemed to be in its physical custody.

30. In addition, he stated that goods are kept at a customs warehouse to protect the interest of KRA as duty needs to be paid on imported goods and that port charges are also levied on goods in a customs warehouse. He also said that the plaintiff could not have taken control of the goods without going through legal processes. He explained that clearance includes delivery and the process would be incomplete if the goods were unavailable. He further stated that if the goods left the KPA area, it must have given a gate pass.

31. In PW2's view, the plaintiff had a right to claim for trans-shipment of the goods from KPA, as part of the work done, such as lodging C10, which is a form that authorizes changes being made on the manifest concerning destination, consignees and others. He also stated that the entire process was rejected by the fact that the goods were not available at the KPA.

32. PW3 was Benjamin Mwangela who was previously employed by the plaintiff in Mombasa, as the Branch Manager. He indicated that he worked for the plaintiff from the year 1997 to 2004. He testified that he handled the consignment in issue at the time of trans-shipment of the cargo to Dubai. He also stated that NOTCO was to initiate the trans-shipment. He indicated that NOTCO gave them an invoice for the costs of the trans-shipment and the plaintiff made a payment of Kshs. 567,560/=. He referred to the invoice and receipts produced by PW1 to attest to the foregoing.

33. It was PW3's evidence that NOTCO later informed them that KRA had declined to allow trans-shipment of the goods. He stated that the plaintiff came in as the consignee of the goods as KRA said the goods could be cleared for home use. PW2 testified that before the plaintiff could lodge documents to clear the goods, he went to look for the container but he could not trace it. He indicated that he could not lodge the documents to clear the goods for home use.

34. With regard to document No. 6 on plaintiff's list of documents, he indicated that it is a form which is filled when goods have not been claimed for 21 days from KPA. He explained that KPA fills the said form to ensure that goods are transferred elsewhere within KPA to safeguard the interest of KRA in collection of duty. He stated that KPA was to ensure that the container was available for clearance. He further stated that there was no indication that the container left KPA.

35. PW3's testimony was that they wrote to KPA informing them that they had tried to trace the container to no avail and that they would be held liable. He stated that KPA through a letter appearing as document No. 5 on plaintiff's list of documents responded by stating that once the container had been transferred to a customs warehouse, it was under the custody of KRA. He indicated that PW1 wrote to KRA as per document No. 7 on the plaintiff's list of documents. He further stated that the goods have never been traced for conversion to home use. He indicated that KPA has the responsibility to ensure that goods lie safely at the port.

36. In cross-examination, PW3 stated that they had not produced any documents to show that the plaintiff paid for the goods reflected in the 3 invoices. He indicated that document No. 4 on the plaintiff's list of documents was a letter he wrote to KPA stating that the container was moved to a customs warehouse on 23<sup>rd</sup> September, 1998. It was received on 24<sup>th</sup> September, 1998 as per document No. 6 on the plaintiff's list of documents which is a Form for goods sent to customs warehouse.

37. On being re-examined, PW3 stated that they tried to look for the container in the area it had been transferred to, but it could not be traced within the KPA premises, which was being manned by KPA security. He stated that the responsibility for the container lay with KPA as it is the one which issues gate passes after KRA has collected warehouse rent and after other charges are paid to KPA. PW3 further stated that it would not have been possible to collect goods from KPA without paying their charges and that it had control over the goods. He also indicated that no other claimant apart from the plaintiff was claiming the goods in issue.

38. KPA called 2 witnesses in support of its case. DW1 was Dzenko Abdalla Mohamed, an Assistant Superintendent of Shipping. His evidence was based on the processes of KPA in so far as clearance of cargo is concerned. He explained that the personnel who dealt with the issue before this court had either retired or they were dead.

39. DW1 testified that in this case, there was no documentation which was prepared by the clearing agent or owner of the cargo. He indicated that container No. MLCU-225942-1 was transferred to the customs warehouse as no documentation was lodged with KPA within 21 days of its arrival at the Port of Mombasa. His evidence was that a Form known as "Goods Sent to Customs Warehouse" was filled and signed by the clerk who transferred the container to the said place from the container yard. He indicated that the then Superintendent of the Container Section also signed the Form and stamped it. He stated that the container in issue was received by a customs warehouse clerk who is an employee of KPA.

40. He explained that once a customs officer signs and stamps the "Goods Sent to Customs Warehouse" Form and the cargo is handed over to him, KPA's liability ends there. He stated that if such cargo is not dealt with, in 3 months, the container is stripped of the cargo by KPA on the request of the Customs Authority.

41. He further stated that according to the documentation he had, the container in issue was not stripped. It was the evidence of DW1 that at customs warehouses, the Customs Authority had customs preventive services which provided security for goods stored at the customs warehouse.

42. DW2 gave evidence that once goods were deposited at the customs warehouse, the Customs Authority was in charge of everything and gate pass D which was a KPA document would be prepared by customs officers which would enable the goods to leave the customs warehouse. He further stated that a letter would be written addressed to all the relevant offices such as the CID office at Kilindini and the port security gate.

43. He further indicated that once the goods were received at the customs warehouse, KPA's liability ended there. He stated that KPA issues gate pass A for manifested and documented cargo. He indicated that he had not seen any document showing that the cargo in issue was cleared.

44. On being cross-examined, DW1 stated that he did not deal with the container in issue in the year 1998 as he was then a docker doing manual handling of cargo. He indicated that Mr. Ngokho who had since retired, handled the container. DW1 further stated that he relied on the Form for "Goods Sent to Customs Warehouse" and that he went to see Mr. Mwanzia who was in charge of the said section. DW1 pointed out that he could not see all the relevant documents relating to the consignment in issue as they had been taken to the archives. He further stated that the Customs Warehouse Clerk, Saumu (DW2), was instrumental in the movement of the container. He agreed that the customs warehouse was within the port area and said that security was handled by customs protective service.

45. He indicated that goods placed under customs warehouse are released by the Customs Authority who also issue gate passes. He stated that KPA keeps all records of goods that exit the port. He could not tell if the goods in this case ever left the port or if gate passes were issued by KPA or customs officers, or if they were stripped from the container and sold in an auction. He did not know where the goods went to and that the letter that the plaintiff sent to KPA was written 7 months after the alleged loss of cargo.

46. On being re-examined, DW1 stated that KPA had no role to play in offering security in the customs warehouse area as it was the responsibility of the KRA to safeguard the goods. He added that if the goods were lost at the customs warehouse area, KRA was required to do its own investigations.

47. DW2 was Saumu Abdallah Hassan. She stated that either in the year 1995 or 1996, she was deployed to the conventional cargo department as a Clerk. She testified that on 24<sup>th</sup> September, 1998 she was allocated work by Mr. Ramadhan (now deceased), to receive containers for which customs duty had not been paid. One of them was container No. MLCU-225942-1 a 1x20 foot container. DW2 indicated that it was taken to the customs warehouse by a clerk, whose name she could not recall. She also indicated that she wrote on the "Goods Sent to Customs Warehouse" Form her check No. 555826 which is her personnel number. She also signed the documents. She stated that the Customs Warehouse Clerk also signed and stamped the said documents after he received the container.

48. DW2 could not recall if the KPA security officers used to safeguard the containers at the customs warehouse. She stated that KPA security officers would patrol different areas but they would go to the customs warehouse only if they had something to do in the offices there. She indicated that containers at the customs warehouse would at times be stripped. She testified that once goods were in the customs warehouse, they were in the custody of KRA and not KPA.

49. On being re-examined, DW2 said that KPA security have no access to the customs warehouse as they patrol areas outside the said warehouse.

50. Counsel for the plaintiff filed written submissions on 25<sup>th</sup> January, 2019 while Counsel for the defendant filed hers on 4<sup>th</sup> March, 2019. Counsel for the plaintiff filed supplementary submissions on 20<sup>th</sup> May, 2019.

51. In the plaintiff's written submissions, it was stated that the plaintiff became the consignee after M/s Sears failed to pay charges for the shipment of the cargo to Rwanda. It was submitted that the plaintiff was approached to trans-ship the goods Azhai Khaleej Trading in Dubai as per the letters dated 5<sup>th</sup> November, 1998 and 21<sup>st</sup> November, 1998 from Rughani Brothers. The charges for trans-shipment were specified as Kshs. 567,560/- as per the letter dated 27<sup>th</sup> November, 1998 from NOTCO to the plaintiff, which requested for trans-shipment of the goods to Dubai and that the said amount was paid vide a cheque. It was submitted that after customs declined to approve trans-shipment and directed that the goods be cleared for home use in Kenya, Rughani Brothers agreed to sell the goods to the plaintiff, which then commenced clearance of the said goods, but the container was missing.

52. It was asserted that the letter dated 6<sup>th</sup> January, 1999 from Rughani Brothers authorized change of consignee from ECU Line Kenya Ltd., to Rocham Enterprises thus bestowing ownership of the subject goods to the plaintiff. It was stated that notwithstanding the amendment of the bill of lading, the plaintiff was the designated clearing agent and by KRA's failure to approve trans-shipment of the goods, and with them having been approved for home use, the party to which the decisions were directed, namely, the plaintiff, should be presumed to be the owner of the consignment of goods.
53. It was further submitted that the bill of lading was not endorsed or the manifest changed due to the disappearance of the container in the hands of KPA. It was stated that the plaintiff demonstrated the existence of the agreement to purchase the goods by producing invoices and eventual consummation of the agreement after the consignor changed the consignee through the shipping agent, in favour of the plaintiff.
54. It was submitted by Counsel for the plaintiff that the transfer of the bill of lading quite often generates effects of transfer of property in the goods although at times the transfer of ownership rights may have occurred earlier and the bill of lading just confirms the agreement for customary practice and international trade. It was argued that the right of the consignee to ask for or take goods from KPA at the time of loss remained untouched even if there were no changes in the bill of lading. It was stated that the plaintiff had demonstrated through his evidence and documents that the purchase agreement and taking of the actual delivery of the goods was frustrated by KPA. It was submitted that Rughani brothers through a fax transmission sent on 13<sup>th</sup> January, 1999 at 2:37p.m., instructed the local shipping agent to change the consignee to the plaintiff and it thus became the owner of the goods.
55. It was indicated that it was not contested that the container in issue arrived at the Port of Mombasa on 18<sup>th</sup> July, 1998 and it was transferred to a customs bonded warehouse.
56. The plaintiff's Counsel suggested that since the relationship between the plaintiff and KPA was that of a bailor and bailee, respectively, KPA was under an obligation to ensure the safe delivery of the container to the appropriate warehouse and to facilitate the clearing thereof. It was submitted that KPA also had a statutory duty to the plaintiff.
57. It was further submitted that in order for a bailee to be held liable it must be proved that he was negligent or reckless in the handling of the bailor's goods. Nigerian Supreme Court decisions in **Charles D.O. Ogugua v Armels Transport Ltd.** [1974] LPELR-SC.214/73 and **Panalpina World Transport (Nigeria) Ltd v N.T Warikobo** [1975] LPELR-SC.254/74, were cited to support the said proposition.
58. It was submitted that KPA was negligent because it failed to offer even a simple explanation on the whereabouts of the container which was in its custody. It was stated that all the witnesses, including those called by the plaintiff, testified that KPA was responsible for offering security within the customs warehouse area as DW1 testified that KPA keeps records of all goods that exit the Port of Mombasa and further that KPA usually issues gate passes for goods leaving the port. It was pointed out that KPA failed to identify the person to whom the Customs (KRA) sold the container to and to whom a gate pass was issued.
59. It was argued that although the container was deposited in the customs warehouse, the defendant was still entitled to levy port charges if it was redeemed by the consignee before sale, through a customs auction. It was further argued that if the container was sold through a customs auction, KPA as the port operator had an interest in the proceeds of the sale as statutorily provided in accordance with Section 42(4) of the East African Community Customs Management Act (EACCMA).
60. It was contended that KPA breached its contractual duty in the handling of container No. MCLU-225942-1 as the customs warehouse where it was transferred to, was within the territorial jurisdiction of KPA and that DW1 testified that the container was shifted to the yard and not in the warehouse. This court was urged to take judicial notice of the fact that the defendant owns the particular customs warehouse and the yard where the goods were deposited. It was thus submitted that although KRA was responsible for levying duty on goods stored in such warehouses; liability did not pass to it for custody and safety of the goods. It was stated that was the reason why goods due for release from the warehouse must have a clearance/gate pass from KPA.
61. The plaintiff's Counsel stated that the evidence of DW2 was to the effect that KPA security officers were in charge of security within the customs warehouse. He also made reference to Section 12(1)(e) of the KPA Act which outlines KPA's obligations to consign and store goods, among other duties, and that it is in breach of its obligations if a container goes missing under their watch. It was stated that the statutory powers of KPA are elaborated further in Sections 24, 25, 26, 27 and 28 of the KPA Act.
62. This court was urged to uphold the position that KPA was responsible for handling and storage of the goods in issue at the Port of Mombasa until the final collection by the consignee.
63. The plaintiff's Counsel submitted that the plaintiff suffered loss equivalent to US\$ 67,279.18 being the cost of the goods and US\$ 5,000 being the cost of the container, after the plaintiff was unable to redeem the goods after they went missing.
64. With regard to the defence raised by KPA in its statement of defence, the plaintiff's Counsel submitted that the intent of the provisions of Section 62 of the KPA Act in the context of this case, is to deny the plaintiff the right to a fair hearing, which is a constitutionally guaranteed right under the Constitution of Kenya. He relied on the case of **Multiserve Oasis Company Ltd v Kenya Ports Authority & Another** [2012] eKLR, where the High Court held that in the new constitutional dispensation, the jurisdiction of the High Court is unlimited except to the extent circumscribed by the Constitution and that no ordinary statute can deprive the High Court of its unlimited jurisdiction where the Constitution has not.
65. The case of **Threeways Shipping Services (K) Limited v Kenya Ports Authority** [2012] eKLR, was cited in urging this court to interpret the provisions of Sections 62 and 22 of the KPA ACE as a whole, so as to arrive at a harmonious interpretation.
66. It was submitted that since the consignment of goods in issue was under the authority of KPA at all times, the disappearance thereof could only be attributed to its negligence but it had failed to discharge its legal burden of proof.

67. In respect to the provisions of Section 65(1) of the KPA Act requiring a notice of claim to be lodged with KPA for non-delivery within 6 months of the date from which the goods were received by KPA, it was stated that the goods in this case arrived at the Port of Mombasa on 18th July, 1998. It was indicated that within 6 months, on 20th January, 1999 a notice was issued to KPA. That prior to that, a notice had been issued to KRA on 14<sup>th</sup> January, 1999.

68. With regard to the provisions of Section 66 of the KPA Act which limits the commencement of actions against KPA to 12 months, and within 6 months of cessation of a continuing injury or damage, it was argued that the claim herein was brought after 12 months and that the injury or damage complained of by the plaintiff was a continuing one upto the time of filing the suit and beyond. It was submitted that the second part of Section 66 (b) of the KPA Act applies to this case and the plaintiff was within the limitation period when he filed the suit herein.

69. The plaintiff's Counsel relied on the decision in **Kenya Ports Authority v Timberland (K) Limited** [2017] eKLR, where the Court of Appeal upheld a decision of the High Court to the effect that where investigations conducted by KPA were inconclusive, the defence of limitation of time could not apply. Drawing a corollary to the present case, it was pointed out that the disappearance of the container in issue cannot be said to have been a time bound occurrence with a defined period of commencement, for the reason that the custodian of the container, KPA, never acknowledged its disappearance at any given time.

70. It was stated that whereas KPA promised to look into the matter, it never communicated to the plaintiff about the fate of the container. It was argued that its disappearance therefore remains continuing as long as the container has never been certified as lost. It was asserted that confirmation of the loss of the container by KPA would have defined the commencement of the period of limitation, as defined in the KPA Act. It was further stated that confirmation of the loss of the container had not been done upto the time of institution of this suit, which connotes the fact that the offence was a continuing one, hence the limitation of time does not apply.

71. It was submitted that even if one was to hold a contrary view, the Court of Appeal in **Kenya Ports Authority v Timberland** (supra) held that the limitation period was extendable under Section 26 of the Limitation of Actions Act. That the court in the said case found that the suit for loss of a consignment was properly filed 6 years after the fact of the loss. This court was urged to dismiss the defence of limitation of time.

72. In concluding his submissions, the plaintiff's Counsel stated that the plaintiff had proved his case on a balance of probabilities and should be compensated for the loss suffered as prayed in the plaint.

73. In the submissions filed on behalf of KPA, its Counsel stated that the only parties liable to sue are those disclosed in the bill of lading which is the contract of carriage and serves as the evidence of title. It was indicated that the plaintiff produced a bill of lading No. QLF078MUMMOM562 which gave the name of the consignor as ALL Cargo Movers (I) PVT Ltd., based in Mumbai and the consignee as M/s Sears of Rwanda. It was further indicated that the Notify Party was ECU Line Kenya Ltd.

74. It was submitted that in paragraph 3 of the amended plaint, the plaintiff averred that it was originally contracted as a clearing and forwarding agent by M/s Rughani Brothers, while in paragraph 4 of the said plaint, it alleged that they purchased the merchandise from the same entity, after the customs department declined to give a permit for trans-shipment of the cargo. It was indicated that PW1 said as much in his evidence in court. It was also stated that he produced 3 invoices from M/s Rughani Brothers dated 4<sup>th</sup> July, 1998 as per his supplementary list of documents filed on 20<sup>th</sup> June, 2018 addressed to M/s Sears of Kigali.

75. It was indicated that the plaintiff also produced a facsimile (fax) message purportedly from Parekh Marine Agencies PVT Ltd dated 6<sup>th</sup> January, 1999 instructing NOTCO to change the Consignee name from ECU Line Kenya Ltd to M/s Rocham Enterprises. The Counsel for KPA admitted that it is a common shipping practice for the consignee to change while the goods are still on transit, but the bill of lading which serves as the contract of carriage as well as evidence of title, remains the sole legal document which gives a party the right to institute legal proceedings. The case of **Mason v Lick Barrow** 1 B1.H. 359 cited in the Stroud's Judicial Dictionary, 4<sup>th</sup> Edition was relied on in defining what a bill of lading is.

76. It was contended that by failing to produce evidence of purchase of the goods in issue, the plaintiff failed to prove that he was the *bonafide* owner of the goods, and that the only party liable to sue was the one indicated on the bill of lading. It was contended that the payment made by cheque for reshipment of the goods was not proof of ownership. The case of **Midlands Gem Limited & Another v Airspace Forwarders Limited & Another** [2016] eKLR, was relied on to demonstrate that the plaintiff was merely a clearing and forwarding agent of the cargo. It was submitted that as such, he was a stranger to the bill of lading and had no *locus standi* to institute the suit herein. It was thus submitted that this court lacks jurisdiction to hear and determine this dispute as the wrong parties were before it.

77. In reference to Section 12(1)(d) and (e) of the KPA Act, it was submitted that KPA has a statutory duty of care towards the consignee and consignor to temporarily store cargo pending clearance by the consignee upon expiry of the duration of time given to them. It was stated that KPA was required by law to transfer the cargo the subject of this suit to a customs warehouse as per the provisions of Section 27(4) and (5) of the then Customs and Exercise Act and that was done. That the same was confirmed by DW1 and DW2 as the latter together with the customs officer in charge of the customs warehouse, received the said cargo.

78. It was asserted that once DW2 received the container as per the "Goods Sent to Customs Warehouse" Form No. CT/1597/9/9, KPA had no further role to play with the cargo since it was outside its jurisdiction. The provisions of Regulation 221 of the East Africa Harbour Regulations 1970 were cited to support the foregoing submission.

79. It was stated by the KPA's Counsel that both DW1 and DW2 testified that the customs warehouse was under the jurisdiction of the KRA which was responsible for its own security. She relied on Judicial Review Miscellaneous Application No. 196 of 2005 **Republic v Kenya Ports Authority Managing Director ex-parte applicant Jamamu International Limited**, to support her submissions. This court was urged to find that KPA was not in breach of its duty of care as the same was discharged when the cargo was deposited at the customs

warehouse.

80. On the issue of whether the plaintiff suffered loss and damage and was entitled to compensation, it was submitted by Counsel for KPA that since the plaintiff failed to demonstrate that it had purchased the cargo, it was not entitled to the claim for the loss of value of the same. It was argued that the claim for compensation for reshipment charges was paid to the shipping line (NOTCO) and could not be claimed from KPA.

81. The provisions of Section 23 of the KPA Act were cited to support the submission that any liability for loss, mis-delivery or detention should not exceed the declared value of the goods. It was also stated that since the plaintiff had not proved to have been the *bona fide* purchaser and owner of the goods, KPA was not liable for the entire claim.

82. In submitting on the provisions of Section 62 of the KPA Act which provide for arbitration, the Counsel for KPA relied on the Court of Appeal decisions in **Kenya Ports Authority v Modern Holdings [EA] Ltd.** [2017] eKLR and **Kenya Ports Authority v Kuston Limited** [2009] 2 EA 212, to indicate that the plaintiff at the first instance should have resorted to arbitration.

83. With regard to the provisions of Section 66 of the KPA Act on limitation of actions, it was submitted that this court has no jurisdiction to entertain this suit as it was time barred. The decision in **Kenya Ports Authority v Cyrus Maina Njoroge** [2018] eKLR, was relied on to support the said position. It was submitted that in this case, KPA sent a letter dated 20<sup>th</sup> March, 1999 to the plaintiff in which it expressly stated that once goods were transferred to the customs warehouse, they were deemed to have been delivered to their owners and that the plaintiff should sort out the issue of the missing container with the Customs Authority. The letter also indicated that the claim was time barred as per the provisions of Section 65(1) of the KPA Act. It was stated that PW1 and PW2 confirmed having received the said letter. It was KPA's Counsel's submission that the said letter was conclusive communication of any internal investigative process.

84. As to whether a notice of claim was issued, it was submitted that where a contract of carriage or governing statute contains clear provisions on how to prove a notice of claim as well as institute a claim, it was then clear that no action could lie against KPA. This court was urged to find that in view of the express statutory provisions of Sections 62, 65 and 66 of the KPA Act, the jurisdiction of this court had been ousted and it could not therefore entertain this claim. It was submitted that the plaintiff had failed to prove its case on a balance of probabilities. She prayed for the plaintiff's case to be dismissed with costs.

85. The plaintiff's Counsel filed supplementary submissions on 20<sup>th</sup> May, 2019. In responding to the issue of *locus standi*, it was submitted that as a matter of practice, the consignee of a bill of lading can change the consignee by endorsement. He relied on Section 23 of the Treatise Carriage of Goods by the Sea (2nd Edition) by the learned Author John Wilson, where he states that a holder of a bill of lading can transfer ownership of the goods during transit, by merely endorsing thereon.

86. It was asserted that the plaintiff acquired ownership of the goods and that the said fact could not be challenged by anyone. The decision in **Fredrick Njora Mwangi v Wilhemson Ship Services and 2 Others** [2017] eKLR, was relied on where the Court ordered goods to be released to a consignee in the absence of an original bill of lading, after it was shown on a copy of the bill of lading that the plaintiff was the named owner of the goods. It was indicated that there was no other claimant to the goods and the court introduced the concept of a beneficial owner. It was submitted that in the said case, the court found that there was evidence of transfer of ownership of the goods.

87. It was pointed out that in the present case, there was no other person who had claimed ownership of the goods. It was submitted that even if the defendant was to succeed in its argument challenging the legal ownership of goods by the plaintiff, the evidence on record, at the very least, established that the plaintiff was the beneficial owner of the goods.

88. The plaintiff's Counsel indicated that the bill of lading is more than just a contract of carriage between the shipper and the carrier. He submitted that it is a document of title and a receipt for the shipped products and that it can also be a security for a debt.

89. He distinguished the case of **Midlands Gem** (supra) cited by the Counsel for KPA, by stating that the court therein was not dealing with a situation of a change of consignee or a case of lost goods in storage, but the case dealt with goods that never arrived at their destination on time and were never returned when recalled. He asserted that in the present case, the plaintiff was dealing with KPA as a warehouseman or bailee.

90. It was submitted that the plaintiff herein being the final holder of the bill of lading, was entitled to delivery of the goods upon clearance at the port of discharge. It was asserted that as long as the goods were in its custody, the defendant had a duty of care to ensure their safety until delivery to the plaintiff.

91. On the issue of jurisdiction, the plaintiff's Counsel submitted that Section 62 of the KPA Act is unconstitutional for denying litigants access to justice. He also argued that if this court was to hold that the said section is constitutional, the ouster of jurisdiction in Section 62 of the KPA Act only applies to cases where damages arise generally in the exercise of the defendant's powers under Sections 12, 13, 14, 15 and 16 of the KPA Act.

92. He also submitted that Section 22 of the KPA Act appears to qualify the bar to a claim by exempting cases where the defendant is negligent for loss, misdelivery, detention, or damage to goods delivered to its custody in the exercise of its specific function as a warehouseman. That however, the Court of Appeal in reviewing High Court decisions in **Multiserve Oasis Company Ltd v Kenya Ports Authority and another** (supra), **Threeways Shipping Services (K) Limited v Kenya Ports Authority** (supra) and **Kenya Ports Authority v Modern Holdings** (supra), reversed only the holding on constitutionality of Section 62 of the KPA Act but it did not reverse the holding on the interpretation of the said Section *vis a vis* Section 22 of the said Act, which was preferred in **Threeways Shipping Services (K) Limited v Kenya Ports Authority** (supra). Mr. Gachiri submitted that the interpretation in the last case remained good law.

93. He posited that Section 22 of the KPA Act exempts KPA from liability except where the loss, misdelivery, detention or damage is caused

by want of reasonable foresight and care on the part of KPA or any employee. He referred to Section 23 of the said Act which limits liability to the declared value of the goods, under Section 22 of the KPA Act.

94. It was pointed out that Section 22 of the KPA Act specifically deals with KPA as a warehouseman and that parliament specifically removed that category of KPA's powers and functions from the general application of Section 62 of the said Act, in cases where KPA is negligent.

95. In making reference to Counsel for KPA's submissions that KPA was exempted from liability due to the fact that the container in issue was stored at the customs warehouse which was under KRA, Mr. Gachiri invited this court to make reference to the Container Terminal Operations Manual available on KPA's website, which shows that KPA is in charge of containers from the point of receipt to the point of delivery to the consignee. It was stated that the said manual is very clear that the defendant houses all the government agencies involved in the delivery and receipt process of containers, including the Kenya Revenue Authority in what is described as a "One stop centre". This court was urged to take note that the foregoing was a matter of public record and judicial notice of the same should be taken. The plaintiff's Counsel submitted that this was a clear case of negligence on the part of KPA and that it was liable under the provisions of Section 22 of the KPA Act.

96. The plaintiff's Counsel submitted that Section 66 of the said Act could not come to the aid of KPA as the letter dated 20<sup>th</sup> March, 1999 cannot be said to be evidence of conclusive investigations. He expounded his argument by stating that the letter simply stated that the goods had been delivered to the custom – bonded warehouse, but they were not found at the said place. He indicated that the loss of the said container is what should have been investigated and the outcome disclosed to the plaintiff. Mr. Gachiri indicated that the said letter from KPA gave the plaintiff hope that the consignment of goods would eventually be found if he made repeated inquiries.

97. He concluded his rejoinder by stating that the loss of the said consignment was a continuing injury which brought the action within the qualified exemption in Section 66 of the Kenya Ports Authority Act.

## **ANALYSIS AND DETERMINATION**

98. The parties hereto filed a list of agreed issues on 16th December, 2011. The said issues are enumerated here below-

- (i) Did the plaintiff purchase the merchandise in container No. MCLU-225942-1 from Rughani Brothers?
- (ii) Did the carriage vessel and container arrive at the Port of Mombasa on or about 18th July, 1998 under a bill of lading and did the defendant move the said container by itself or its agents to a customs boarded (sic) warehouse under Reference No. CT/1599/9/98?
- (iii) Was the defendant bound under the said bill of lading or was it a term express or implied of the contract between the shippers, the plaintiff and the defendant that the defendant would take all reasonable precautions and care to ensure safe delivery of the said container to the appropriate warehouse and to administratively facilitate the clearing of the said container from the port to the warehouse?
- (iv) Did the defendant breach its contractual duty in handling container MCLU-225942-1?
- (v) Did the plaintiff suffer loss, expense and damage? If so, to what extent?
- (vi) Is the plaintiff entitled to damages from the defendant?
- (vii) What are the orders as to costs and interest in respect of the parties herein?
- (viii) Did the plaintiff import any goods through the Port of Mombasa?
- (ix) Did the plaintiff comply with all the port and customs procedures?
- (x) Did the plaintiff pay all port and customs dues?
- (xi) Did the plaintiff suffer any loss and damage at all?
- (xii) Did the plaintiff comply with the provisions of Sections 62, 65 and 66 of the KPA Act?

99. In making the determination herein, this court has taken into account the evidence adduced alongside the documentation relied on, the written submissions filed by Counsel for the parties, the authorities relied on and the applicable law.

### **Issue No. (i)**

100. The plaintiff did not produce a receipt confirming payment for the merchandise contained in container No. MCLU-225942-1. What the plaintiff produced was a fax message dated 6<sup>th</sup> January, 1999. It was sent on 13<sup>th</sup> January, 1999 by Rughani Brothers and it was addressed to NOTCO. The original author of the said message was an agency by the name of Parekh Marine Agencies Pvt Ltd. The subject matter was "change in consignee name".

The contents of the fax message were as follows-

“With reference to the above mentioned, please note that the shipper has confirmed to us to change the consignee name from Eculine Kenya Ltd. to M/s Rocham Enterprises.... Hence, kindly ammend (sic) your records accordingly.” (emphasis added).

101. The plaintiff produced 3 invoices dated 4<sup>th</sup> July, 1998 from Ms Rughani Brothers addressed to M/s Sears of Kigali which was the original consignee. The said invoices outlined the cost of the cargo. The defendant’s Counsel challenged the said fax message changing the consignee by stating that even though it is common in shipping practice for the consignee to change while the goods are still on transit, the bill of lading which serves as the contract of carriage as well as evidence of title, remains the sole legal document which gives a party the right to institute legal proceedings.

102. The plaintiff’s Counsel was of a different view as his stand was that the holder of the bill of lading can transfer the ownership of the goods on transit, merely by endorsing on it.

103. This court’s finding on the above issue is that the plaintiff proved that it was the legal owner of the goods contained in container No. MCLU-225942-1. The plaintiff acquired ownership of the said goods through the fax message addressed to NOTCO which transferred ownership of the said goods. The fax message was sent to NOTCO by Rughani Brothers of phone No. 91222063256. Ownership in the goods changed through the said document. Indeed, KPA did concede to the fact that the consignee on a bill of lading can change. It was clearly stated by PW1 and PW3 that the bill of lading was never lodged at KPA because the goods disappeared.

104. The court in the case of **Societe Miniere Delet v Afrika Invest Limited and 2 Others** [2015] eKLR, adopted the description of a billing of lading given in the **Lexis Navigator Dictionary** which states that-

***“A Bill of lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of contract of carriage under which the goods have been delivered to and received by the ship. The signed Bill of lading is handed over to the shipper, who may either hold on to it or transfer it to a third person. During the voyage and transit, the Bill of lading under the law merchant is considered the symbol of goods described in it, and the endorsement and delivery of the Bill of lading operates as a symbolic delivery of the goods. This person may be named in the Bill of lading as the person to whom the delivery of the goods is to be made on arrival at the destination, in which case he is known as the consignee, if he is not named in the Bill of lading, he is usually known as the holder or endorsee of the Bill of lading. The holder of the Bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus in the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner’s lien for freight. A Bill of lading used by the ship owner’s agent in the absence of any contract of carriage is a nullity.”***

105. In the present case the original consignee was M/s Sears of Rwanda, Kigali. The plaintiff was however contracted by M/s Rughani Brothers to trans-ship the goods to a different consignee by the name M/s Azhar Al Khaleej of Deira, Dubai. The trans-shipment was however not approved by the customs department of the KRA. The plaintiff stated that it purchased the goods from Rughani Brothers. PW2 who was an employee of NOTCO confirmed having received a fax indicating that the plaintiff was the new consignee of the goods. It is this court’s finding that by so doing, ownership of the said goods was accordingly transferred to the plaintiff when he became the endorsee of the bill of lading.

#### **Issues No. (ii), (iii) and (iv)**

106. It was confirmed through the evidence of PW1 that the container No. MCLU-225942-1 arrived on board motor vessel Olive Bank and it was discharged on 24<sup>th</sup> July, 1998 from the said ship. It was confirmed by DW2 that the said container was transferred to the customs warehouse and as an appointed agent for the shipper, NOTCO carried out instructions given to them but could not lodge the manifest as the goods were missing.

107. Due to the instructions which were given by Rughani Brothers which was the shipper, to its agent NOTCO to change the consignee to the plaintiff, this court holds that despite of the non-production of receipts for the purchase of the goods from Rughani Brothers, there was evidence of an agreement between the shipper to transfer ownership of the goods to the plaintiff through the fax message. As per the evidence of PW3, when he went to confirm the physical availability of the container in issue at the customs warehouse, it was nowhere to be found.

108. DW2 explained that once the container was transferred to the customs warehouse, it became the responsibility of the KRA to safeguard it until duty and other payments had been made.

109. This court’s finding is that upon container No. MCLU-225942-1 being discharged at the Port of Mombasa, the defendant was bound to take reasonable precautions and care to not only ensure that the container was delivered safely to the customs warehouse but also to facilitate its clearance from the Port of Mombasa when required.

110. Under the provisions of Section 12(1)(e) of the Kenya Ports Authority Act, KPA is bestowed with power to act as a warehouseman and to store goods whether or not such goods have been or are to be handled as cargo or carried by KPA.

111. In **Equator Distributors v Joel Muriu and 3 Others** [2018] eKLR, the Court of Appeal held thus-

***“The relationship between the appellant and 3<sup>rd</sup> respondent became one of bailor. It is not for the 3<sup>rd</sup> respondent to state that it***

was a gratuitous agent. The 3<sup>rd</sup> respondent was a bailee of the motor vehicle registration No. KAC 970G with clear instructions to deliver the vehicle at the appellant's premises in Voi. The basic rule is that the bailee is expected to return to its owner the bailed goods when the bailee's time or possession of them is over, and he is presumed liable if the goods are not returned. We note that the bailee is not an insurer of the good's safety; liability depends on the circumstances. The 3<sup>rd</sup> respondent and its employee driver, the 2<sup>nd</sup> respondent, owed the appellant a duty of ordinary care to safely deliver the vehicle at Voi". (emphasis added).

112. The evidence adduced in this case was that when PW3 went to the customs warehouse to look for the container, it was nowhere to be found. KPA shifted the blame to KRA by stating that it had its security guards manning the custom warehouse area. PW1, PW2 and PW3 in their evidence were categorical that the container could not have left the KPA premises without KPA issuing a gate pass or a document authorizing the removal of the said container from the port area.

113. This court's finding is that even if KRA had interest in the container in issue for recovery of tax due, KPA also had interest in it too as it was required to levy port charges for the same. There was no evidence to indicate that the cargo in the container was ever auctioned. If it had, KPA would have had knowledge of the same. It was therefore not possible for the container to have left KPA's premises without its knowledge. It is this court's finding that KPA was the bailee of the container in issue and is therefore liable for the loss of the same since the said container was nowhere to be traced within the territorial jurisdiction of KPA at the Port of Mombasa.

#### **Issue Nos (viii), (ix) and (x)**

114. As stated in issue No. (i) of this Judgment, the plaintiff did not import any goods through the Port of Mombasa but the shipper sent a fax message to NOTCO, endorsing the plaintiff as the consignee of the goods in container No. MCLU-225942-1. The fax message sent to NOTCO was dated 6<sup>th</sup> January, 1999. It was sent on 13<sup>th</sup> January, 1999. The plaintiff became the consignee of the goods and legal ownership was conferred on it through the said message.

115. The plaintiff sought to locate the physical container at KPA's premises before it could pay tax and clearance charges but PW3 could not locate it in the customs warehouse. The plaintiff wrote to KPA and the KRA so that it could be informed of where the container was. The letter from KPA denying liability was dated 20<sup>th</sup> March, 1999. The plaint in this case was filed on 11<sup>th</sup> September, 2001. Contrary to the submissions by Counsel for KPA, from the foregoing, the plaintiff had the *locus standi* to file this suit, as the consignee of the goods following the fax message from Rughani Brothers.

#### **Issue No. (xii)**

116. The Counsel for KPA was of the view that the jurisdiction of this court was ousted by failure by the plaintiff to comply with the provisions of Section 62 of the KPA Act which provides for arbitration.

117. Section 62 of the Kenya Ports Authority Act provides as follows –

***“(1) In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Registrar of the Nairobi Centre for International arbitration established under the Nairobi Centre for International Arbitration Act, 2013 (No. 26 of 2013).***

***(2) Nothing in this section shall be construed as entitling any person to compensation-***

***(a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or***

***(b) for any damage suffered as a result of the user of any works authorized under this act unless such damage results from negligence in such user.”***

118. The provisions of Section 62 of the KPA Act must be read alongside Section 22 of the same Act which provides as follows-

***“Subject to this Act or any contract, the Authority shall not be liable for the loss, misdelivery or detention of, or damage to goods delivered to, or in the custody of the Authority except where such loss, misdelivery, detention or damage is caused by the want of reasonable foresight and care on the part of the Authority or employee.”*** (emphasis added).

119. In this case, the plaintiff's contention was that KPA out of negligence lost container No. MCLU-225942-1 and the goods contained therein when the container went missing without trace from the customs warehouse which is located within the KPA premises. The Court of Appeal when addressing an appeal arising from the application and interpretation of the provisions of Sections 62 and 22 of the Kenya Ports Authority Act, in the case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited** [2019] eKLR, stated thus-

***“[27] We have examined and analyzed the various judicial decisions in which it has been held that Section 62 of the Kenya Ports Authority Act ousts the jurisdiction of the High Court. The decisions are distinguishable as they do not consider and determine the negligence exception embodied in Section 62 (2)(a) and (b) of the Act. Further, the decisions have not examined and considered the relationship between Sections 22 and 62 of the Kenya Ports Authority Act. On our part, we note that the interpretation and application of Section 22 as read with Section 62 of the Kenya Ports Authority Act has not previously been canvassed and determined by this court.”***

[28]. A plain reading of Section 22 of the Act imposes liability on the part of the Kenya Ports Authority for loss of goods occasioned by mis-delivery caused by want of reasonable foresight and care on the part of the Authority or its employee. In the instant matter, the claim and cause of action against the appellant is founded on negligence whose particulars prima facie allege want of reasonable foresight and care on the part of the Authority.

[29]. Conversely, Section 62 of the Act specifically refers to the powers of the Authority exercised pursuant to Sections 12, 14, 15 and 16 of the Act. Of relevance to this appeal is the exception in Section 62(2)(a) and (b) of the KPA Act which stipulate that a person is entitled to compensation for any damage suffered through negligence or damages entitled otherwise than through the provisions of the Kenya Ports Authority Act.

[30]. In arriving at our decision in this matter, we bear in mind that the Kenya Ports Authority Act has no express provision for striking out a suit. We also bear in mind that access to justice as enshrined in Article 48 of the Constitution is a fundamental right, that cannot be derogated from. Whereas Alternative Dispute Resolution (ADR), such as arbitration, is crucial in expeditious disposal of disputes, by its very nature ADR is inferior to the principle of access to justice.

[31]. The appellant submitted Section 62 of the Act ousts the jurisdiction of the High Court. Section 62 of the Act should not be interpreted to impede access to justice by denial of access to a court of law. Further, the provisions of Section 62 of the Act is not aimed at shielding the Authority from any and all liability particularly liability arising from negligence. Section 62 should be interpreted and applied in a manner that enhances efficiency in Port management and expeditious resolution of disputes between the Authority and its customers. The Section is not a carte blanche to escape liability from common law duty of care. In our considered view, Section 62(2)(a) and (b) of the KPA Act establishes an exception whereby a person is eligible to compensation if that person was entitled to compensation otherwise than through the provisions of the Act. The legal question is what forum would determine the loss or damage suffered otherwise than through the provisions of the Kenya Ports Authority Act? The answer to this question perforce incorporates negligence as a cause of action that is not covered by Section 62 of the KPA Act.

[32]. Convinced that Section 22 of the KPA Act impose (sic) liability for mis-delivery of goods and satisfied that Section 62(2) (a) and (b) of the KPA Act creates a negligence exception, we find the learned judge did not err in his determination that the High Court had jurisdiction to entertain, hear and determine the respondent's claim which is founded on negligence and want of care on the part of the appellant and or its employees." (emphasis added).

120. Flowing from the above decision, and the fact that the plaintiff's case is grounded on KPA's lack of duty of care leading to the loss of the container in issue together with the goods therein, this court's finding is that the decisions cited by Counsel for the KPA that this court has no jurisdiction to hear this dispute are not applicable to the circumstances of this case.

121. The decision in **Kenya Ports Authority v Threeways Shipping** (supra) arose from the case of **Threeways Shipping v Kenya Ports Authority** [2012] eKLR, Judge J.B. Ojwang (as he then was) held thus-

**"From the pleadings on both sides, it is clear that a serious controversy, with implications for parties' rights and duties, exists. Issues of such a kind generally fall to the judicial process for fair hearing and resolution under the adjudicature authority which has been entrusted with a specific mandate, under Article 159 of the Constitution of Kenya, 2010. Against this principle, the court must adopt a strict interpretation of any ordinary statutory dispensation tending to confer different favours – such as Section 62 of the Kenya Ports Authority Act (Cap 391) is clearly doing."** (emphasis added).

122. Under Article 159(2)(a) of the Constitution, any court in its exercise of judicial authority, is required to ensure that justice is done to all irrespective of status. Hence, in this case, I accept the plaintiff's submission that the dispute herein should be resolved in the context of Section 22 of the Kenya Ports Authority Act rather than Section 62 of the said Act and that the claim herein can be resolved by the High Court.

123. On the issue of jurisdiction this court holds that the plaintiff in filing this suit in court did not run counter to the provisions of Section 62 of the Kenya Ports Authority Act. Under Article 48 of the Constitution of Kenya it could elect to pursue the dispute through arbitration or a court process. The plaintiff in this case opted to pursue its claim by way of litigation instead of filing an Arbitration cause.

124. This court is of the same view as the Counsel for the plaintiff that the jurisdiction of the court was not ousted by the provisions of Section 62 of the Kenya Ports Authority Act. As such, this suit was filed for adjudication before the right forum.

125. On the issue of compliance with Section 65(1) of the KPA Act, the said provisions state as follows-

**"No person shall be entitled to compensation for non-delivery of the whole of a consignment of goods, or for any separate package forming part of such consignment, accepted by the Authority for handling or warehousing unless a claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within six months of the date upon which such goods were accepted by the Authority."**

126. In this case, the container in issue was discharged at the port of Mombasa on 18th of July, 1998 from the motor vessel Olive Bank. The plaintiff wrote to the KPA Managing Director on 15<sup>th</sup> February, 1999 informing him that they had been unable to track the container at the customs warehouse. Copies of relevant documents were attached to the said letter for his perusal. This court is of the finding that the plaintiff wrote to the defendant giving it particulars of the container and goods that had gone missing. This court holds that the plaintiff complied with the provisions of Section 65(1) of the Kenya Ports Authority, when it wrote to KPA Managing Director, on 15<sup>th</sup> February, 1999.

127. This court further holds that the 6 months within which time started running for the plaintiff to issue a claim for the loss of the

container was from the 6th of January, 1999 when it became the consignee of the goods in the container. Prior to that, the plaintiff had been given instructions to trans-ship the goods to Dubai and therefore it was not the legal owner of the goods. On discovering that the consignment was missing the plaintiff served KPA with a claim for the said goods on 15th February, 1999. That was done within a period of about one month and a week after the plaintiff became the legal owner of the goods in container No. MLCU-225942-1. KPA's Counsel's contention that the provisions of Section 65(1) of the Kenya Ports Authority Act were not complied with is thus unfounded. The case of **Midlands Gems Limited and Another v Airspace Forwarders Limited and Another** (supra) cited by Counsel for KPA on limitation of liability is not applicable to this case.

128. In regard to whether the suit herein is statutorily time barred under the provisions of Section 66 of the Kenya Ports Authority Act, the answer lies in the proceedings that took place before this case commenced hearing. Due to the duration of time taken from the time the suit was filed to when it commenced hearing, it could have escaped the attention of the Counsel on record that the issue of limitation of actions had been dealt with and is no longer available for resolution by this court.

129. The proceedings of this case reveal that through an application by way of Chamber Summons dated 18th March, 2002, the plaintiff's Counsel filed an application seeking leave for the plaintiff to file this suit out of time and for the plaint filed on 11th September, 2001 to be deemed as being duly filed within time. Through a ruling dated 23<sup>rd</sup> day of July, 2002, Hon. G.A Omwitsa, Commissioner of Assize, made the following ruling-

***“Upon hearing the submissions made by Counsel for the applicant and after perusing the annexures to the application I am satisfied that the application is well merited. I allow the application. The plaint filed herein to be deemed as duly filed costs in the cause” (sic).***

130. KPA filed an application by way of Notice of Motion dated 16<sup>th</sup> June, 2008, seeking *inter alia*, an order for the striking out of the plaintiff's suit for having been filed outside the limitation period. The said application was opposed by Counsel for the plaintiff. On 2<sup>nd</sup> July, 2008, Mr. Kyandih Advocate for KPA attended court before Judge Azangalala and sought to prosecute the application dated 16th June, 2008. In the course of doing so, he realized that a ruling had been delivered by Hon. G.A. Omwitsa, Commissioner of Assize, granting the plaintiff leave to file this suit out of time. Mr. Kyandi then withdrew the application dated 16th June, 2008. His application was not objected to by Mr. Egunza who attended court for the plaintiff. The court allowed withdrawal of the said application with no order as to costs.

131. Arising from the proceedings outlined above, I have no hesitation in holding that the plaintiff's suit was deemed to have been properly filed after the plaintiff applied for and was granted orders by Hon. G.A Omwitsa, Commissioner of Assize. This court also holds that in the said circumstances, the suit herein cannot be regarded as being statutorily time barred as per the provisions of Section 66 of the Kenya Ports Authority Act.

#### **Issue Nos. (v), (vi), (vii) and (xi)**

132. PW1 testified that at the time the plaintiff's goods got lost, he was at the prime of his life and he lost an opportunity to trade in the said goods. This court has no difficulty in arriving at the conclusion that the plaintiff suffered loss when its goods disappeared from the customs warehouse. Having found that the customs warehouse was situated within the port premises, KPA owed the plaintiff the duty of care to ensure that the goods were only cleared from the port after it had issued a gate pass to the consignee of the goods or its duly authorized agent or servant.

133. DW1 who testified for KPA stated they keep records of all goods that exit the port and usually issue gate passes for goods leaving the port. He stated that he was adducing evidence on port procedures and that the cargo in issue was not stripped for auction purposes. He indicated that KRA issues **gate pass D** for cargo to leave customs warehouse and a letter would then be addressed to all the relevant offices at Kilindini and at the port security gate. He also said that they did not avail all the documents for the consignment in issue because they were in the archives.

134. This court notes that the case herein was filed on 11th September, 2001. It did not commence hearing until the 5th of March, 2018. The witnesses called by KPA therefore had more than adequate time to look for and retrieve the relevant documents if they had wanted to do so. In the absence of any documentation being produced by KPA, the buck as to the disappearance of the container and goods therein from the customs warehouse at the Port of Mombasa, rests with KPA. DW2 in her examination-in-chief said that at the time the container in issue was transferred to the customs warehouse, KPA security officers would patrol different areas and would only go to the customs warehouse if they had something to do in the offices there. She said she could not recall clearly. The demeanour of DW2 was not reassuring. When cross-examined by Ms Ikegu she changed her evidence and said that KPA security guards had no access to the customs warehouse area.

135. DW1 indicated that customs preventive services provided security for goods stored at customs warehouses. DW1 and DW2 maintained that their liability ended when the goods were deposited at the customs warehouse. Ms Ikegu relied on the provisions of Regulation 221 of the East African Port and Harbours Regulations, 1970. Mr. Gachiri controverted the said submission by referring to the Container Terminal Operations Manual available on KPA's website, which shows that KPA is in charge of containers from the point of receipt to the point of delivery to the consignee and that it houses all the other relevant Government agencies at the Port of Mombasa.

136. DW1 never handled the container in issue and said Mr. Ngokho, who had since retired handled the said container. DW1 knew nothing about the container in issue as he was a stacker when the said container got lost.

137. In this court's view, the submissions made by the Counsel for KPA that it was not liable for the loss of the plaintiff's cargo is escapist. DW1 in cross-examination stated that at the exit gate of KPA, security officers are in charge to ascertain that all goods have gone through the correct processes. He confirmed that the customs warehouse is located at the KPA premises.

138. In **Chatrishia & Co. Ltd. v. Puranchand & Sons** [1959] E.A. 746, the appellant company had stored metal sheets in the respondent's

godown and they went missing. The Court's decision in the words of Gould, JA (pp.754-755) was as follows-

**“In the present case the respondents as bailees have failed to produce goods bailed to them and no explanation as to what has happened to them has been forthcoming. There are undoubtedly possible explanations for their loss which would not be covered by the exemption clause contained in the letter of October 31, 1956, and the respondents have therefore failed to bring themselves within its protection .....In my view..... the learned Judge was correct in holding that, upon a basis of bailment, the respondents were liable for the value of the sheets which are unaccounted for.....”** (emphasis added).

139. This Court's finding is that the plaintiff herein has proved its case on a balance of probabilities and the value of the goods lost were ascertainable through the 3 invoices produced by the plaintiff in its supplementary bundle of documents filed on 20<sup>th</sup> June, 2018.

140. On the prayer for general damages, the same is not allowable in this case as the plaintiff quantified its claim by way of special damages. In **Kenya Tourist Development Corporation v Sundowner Lodge Limited** [2018] eKLR, the Court Appeal stated as follows-

**“ ..... a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshi vs. Karsan [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also Securicor (k) vs. Benson David Onyang & Anor [2008] eKLR.....”** (emphasis added).

141. PW1 gave the value of the container which disappeared from the KPA as US dollars 5,000. The said amount was prayed for in the plaint and the claim is justified as the container has never been found.

142. On the issue of the sum of Kshs. 567,560/= paid by the plaintiff to NOTCO, PW1 also stated that the amount which was paid by the plaintiff for trans-shipment of the container was applied to the work they did for the shipper. PW1 was of the view that the plaintiff was entitled to the said cost.

143. Going by the evidence of PW2 he was of the view that the plaintiff had the right to claim for the work done in lodging Form C10, which authorizes changes being made on the manifest. He also stated that the entire project was rejected due to the fact that the goods were not available at the KPA. From the documents filed by the plaintiff, the cheque drawn in favour of NOTCO (K) Ltd for the payment of Kshs. 567,560/= was dated 28<sup>th</sup> November, 1998. The proceedings reveal that instructions for trans-shipment were received by NOTCO on 26<sup>th</sup> November, 1998. PW1 said that the message was from the shipper's agents. As at that time, the instructions which had been given to the plaintiff were for trans-shipment of the goods to Dubai. PW1 said he was given the assignment by the shipper in October, 1998. That he liaised with customs to authorize trans-shipment but the request was not approved and he was told to do local clearing of the goods for the Kenyan market.

144. The evidence adduced is clear that as at the time instructions were given to trans-ship the container in issue to Dubai, neither PW1 nor PW2 had gone to KPA premises to check on the availability of the container and the goods therein. It cannot therefore be correct for PW2 to claim that the goods could not be trans-shipped because the container was nowhere to be found. It is clear from the evidence of PW1 and PW3 that they became interested in the availability of the container after KRA directed that the goods therein be converted into home use. However, when PW3 went to look for the container so that he could lodge documents for clearance, he could not find it.

145. The fax from Rughani Brothers which was transmitted to NOTCO on 13<sup>th</sup> January, 1999 and the letter written by the plaintiff on 15<sup>th</sup> February, 1999 to the Managing Director, KPA informing him of the non- availability of the container at the customs warehouse, it is clear that loss of the container did not lead to lack of approval for trans-shipment. Due to the circumstances outlined above.

146. PW2 stated that NOTCO expended some of the Kshs. 567,560/= in lodging Form C10. In this court's view, that was a process that was required for trans-shipment of the container. This court's findings is that the amount paid to NOTCO for trans-shipment of the container in issue is strictly a matter to be resolved between the plaintiff and NOTCO. I hold the same view as the KPA's Counsel that KPA is not liable to reimburse the plaintiff the amount of Kshs. 567,560/= it paid to NOTCO.

147. On the issue of interest, this court's finding is that if the plaintiff cleared the container and sold the goods which were contained therein, it would have boosted its business income. That was not to be as the container and the goods were nowhere to be found. PW1 in his evidence said that he was at the prime of his life at the time the container disappeared. He was then trading as Rocham Enterprises. The plaintiff as a result must have suffered a big economical blow. I therefore hold that the plaintiff is entitled to interest from the 15<sup>th</sup> February, 1999 when it communicated to the KPA Managing Director about the loss of container No.MLCU-225942-1 as the said container has never been traced to date.

148. This court therefore enters Judgment for the plaintiff as against the defendant in the following terms-

- (i) US dollars 67,279.18 being the value of 128 bales of Indian Dycos polyester and viscose blended fabrics;
- (ii) US dollars 5,000 being the replacement value of container No. MLCU-225942-1;
- (iii) Interest is awarded to the plaintiff at court rates from 15<sup>th</sup> February, 1999 until payment in full; and
- (iv) Costs of the suit are also awarded to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26TH DAY OF FEBRUARY, 2021.**

**Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

Ms Kamau holding brief for Mrs Ikegu for the plaintiff

Mr. Origi holding brief for Mr. Gachiri Kariuki for the defendant

Mr. Oliver Musundi - Court Assistant.