



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 75 OF 2006

SAMUEL WANDERA..... 1ST PLAINTIFF

MOSES JUMA MAJONDA2ND PLAINTIFF

-VERSUS-

MASTERMIND TOBACCO (K) LTD.....DEFENDANT

J U D G M E N T

1. By a plaint dated 22/2/2006, the plaintiffs claimed that in 2003, they entered into a dealership contract with the defendant to act as an export dealer first in Tanzania and then later in D.R.C. Congo for the defendant's tobacco products.
2. They claimed a total sum of US \$75,050, being sums paid for purchase of a consignment of cigarettes which was not delivered and a refundable security deposit for the cigarettes purchased.
3. The defendant opposed the claim vide a statement of defence dated 11/4/2006 which was amended on 14/12/2011. It contended that by a dealership agreement dated 1/3/2001, it appointed **Pangrass Enterprises** as an export dealer in Moshi within the Republic of Tanzania.
4. That the defendant dealt with and/or sold tobacco products to the plaintiffs on their own behalf and as authorized agents and/or officials of **Pangrass Enterprises** as its customers and/or purchasers of export products.
5. The defendant contended that, in breach of the dealership agreement between the parties, the plaintiffs and/or **Pangrass Enterprises** dumped and/or diverted export cigarettes into the local market. As a consequence, the Kenya Revenue Authority sought from the defendant as the manufacturer of the said export products, excise duty, refund of rebate claimed on the said products, 10% late payment fine and 2% monthly penalty totaling to Kshs. 7,658,927/-. That the said sum continued to accrue 2% penalty compounded each month from 1/11/2003.
6. It was further contended that as a result of the breach, the defendant withheld the sum of US \$65,000/- in lieu of the Kenya Revenue Authority's aforesaid demand of Kshs. 7,658,927/-. The defendant counterclaimed the said sum from the plaintiff contending that the plaintiff were liable to indemnify the defendant.
7. As regards the security deposit for cigarettes in the sum of US \$10,050 the defendant contended the same was forfeited in accordance with the agreement between the parties in light of the aforesaid alleged breach.
8. In reply, the plaintiffs contended that under the contract, the defendant was required to escort all export stocks to the registered Kenyan border exit point and ensure that the stocks crossed to the country of export. In the premises, the plaintiffs were strangers to the tax tussle between the defendant and KRA and denied the counterclaim accordingly.
9. The plaintiff called 2 witnesses, **Samuel Wandera Kadima (Pw1)** and **Nelson Kinyua Mutegi (Pw2)**. **Pw1** told the Court how the plaintiffs entered into the dealership agreement and later signed a written one dated 1/3/2001. That it was customary for the plaintiffs' goods to be accompanied by an escort from the defendant company and a KRA representative. The escort will reach the Kenyan boarder process the export documents and return with them to the defendant's factory at Nakuru.
10. He further told the Court how the plaintiffs made an order in July – August, 2003, for Rocket Cigarettes (650) cartons and Supermatch Kings Cigarettes 700 cartons for US \$ 65,000. The payments were made directly to the defendant's account between 31/7/2003 and 12/8/2003. These were Export Order Nos. 1546 and 1547. That the consignment in respect of Export Order No. 1546 was never delivered.
11. **Pw2** was working as a storekeeper for the defendant at Nakuru in the years 2001 and 2003. He explained to Court how the export

procedures by the defendant were undertaken. That the export documents were solely handled by the defendant's officer up-to the boarder and he returned them to the defendant after the goods had been cleared at the border.

12. The defendant called three witnesses in support of its defence. **Robert Mutuma (Dw1)**, the defendant's head of legal services, testified that there was a dealership agreement between the parties. Under the agreement, the plaintiffs were to forfeit the security deposit in the event the export cigarettes were sold within the country. The defendant was to arrange an escort for export stock and the plaintiffs were to have the endorsement of all the relevant documents at the border.

13. He was not aware of any security deposit being made by the plaintiffs. That in July, 2003, the plaintiffs ordered 700 cartons of cigarette vide Order No.1547 for export to DRC Congo. The defendant's Chief Security Officer gave the escort and the Export Declaration Form No. 085 duly endorsed at Busia on 31/8/2003.

14. Later, the defendant learnt from KRA that the Export Declaration Form No.085 had not been properly endorsed by customs Busia after it received a demand for Kshs. 7,184,520/- for the said un-exported consignment of Export Order No.1547. The plaintiffs were not entitled to the Order No.1546 for 650 cartons as they had not paid for the same. That the KRA made claims against the defendant totaling Kshs. 19,752,000/- in respect of the plaintiffs' exports of the defendant's cigarettes.

15. He concluded that the KRA had demanded a total of Kshs. 26,936,520/- in taxes. In the circumstances, the plaintiffs were liable to pay the defendant the claimed sum of Kshs. 7,184,520/ demanded by KRA.

16. In cross-examination, **Dw1** told the Court that it was the obligation of the plaintiffs' agents to clear the goods at the border and hand over the documents to the defendant's officers. The plaintiffs had refused to obtain tax clearance certificates from the KRA despite requests by the defendant.

17. **Franklin Miriti Kinyua (Dw2)**, the defendant's export manager, told the Court that after the processing of the documents at the border, the defendant's security officer would return with the documents to the defendant and cannot know if the goods were dumped. That the goods ordered by the plaintiffs were found dumped in the Kenyan market and the defendant decided to withhold the deposit paid by the plaintiffs.

18. **Nahashon Gachau (Dw3)**, testified that the clearance documents for the 700 cartons were returned by the defendant's security officer whereupon the defendant filed its returns with KRA. It is then that KRA raised a demand for tax and refused to approve the rebate applied for. Despite being given an opportunity to call a witness from KRA, the defendant failed to do so and closed its case on 22/2/2021.

19. The court has considered the entire record. The first issue for determination is whether there is a valid enforceable contract between the plaintiffs and the defendant.

20. It is not in dispute that the Letter of Agreement dated 1/3/2001 established a relationship between the parties. The said letter was addressed to Pangrass Enterprises and appointed them as the defendant's export dealer in Moshi, Tanzania. The terms of the relationship between the parties were clearly set out therein. There was no dispute that the plaintiffs were trading under that name.

21. In any event, the defendant admitted that it dealt with the plaintiffs on their own behalf and as authorized agents and/or officials of Pangrass Enterprises. Accordingly, the Court finds that there existed a contractual relationship between the parties as evidenced in the defendant's letter dated 1/3/2003.

22. The second issue is whether the said agreement was breached and if so, by who. The plaintiffs contended that the defendant breached its contractual obligations by failing and/or refusing to release the 650 cartons of Supermatch King Cigarettes placed under order No.1546. That it unlawfully refused to refund the sum of US \$65,000 paid in respect of the said order and a further sum of US \$10,050 paid as security deposit for the said consignment.

23. In support of their case, the plaintiffs produced the Export Order No. 1546 for US\$65,000/ and pay in slips totaling US\$ 65,000. The defendant admitted in its counterclaim that it withheld the sum of US \$65,000 in lieu of the KRA's demand for Kshs. 7,658,927.

24. In view of the foregoing, there is no dispute that the plaintiffs paid to the defendant the said sum of US\$65,000 for the said consignment of 650 cartons of Super Match Kings cigarettes. It is also not in dispute that the consignment was not delivered to the plaintiffs in terms of the agreement between the parties.

25. The defendant's defence was that, the plaintiffs breached the agreement by failing to ensure that the earlier consignment of 700 cartons of cigarettes destined for DRC Congo were not dumped in the local Kenyan market. That after the defendant lodged a claim for rebate in taxes in respect of the said consignment, KRA declined the claim and demanded taxes amounting to Kshs. 7,658,927/-. The defendant counterclaimed this amount from the plaintiffs. That it is for this reason that the defendant withheld the aforesaid sum of US \$65,000 in lieu of the KRA's demand for Kshs. 7,658,927.

26. The subject agreement states at paragraph 3:

“You (the plaintiffs) will ensure that once you or your appointed agent(s) have taken possession of export cigarettes ex-factory or ex-our warehouse, none are sold or disposed of in any manner by you or your agent in the local Kenyan market. In the event that these are found in the local market, then whether you have dumped them and/or sold them in the local market or not, your deposit will be forfeited forthwith but with notice thereof. Where applicable you are expected to execute a transit bond equivalent of the potential tax liability of your consignment”.

27. From the foregoing, it is clear that the remedy open to the defendant in the event of dumping was forfeiture of the deposit paid in respect of the subject goods. There was no evidence that was led to show that the sum of US\$65,000 paid in respect of the 650 cartons of cigarettes was security deposit. That sum was for the value of the subject goods and not security deposit.

28. The claim that the said sum was being held to offset the claim by KRA for Kshs. 7,658,927 cannot hold. Firstly, the defendant led no evidence to show that such a claim had been made and if made, that it was genuine. The defendant failed to call a witness from the KRA to corroborate its allegations despite being given ample opportunity to do so.

29. Secondly, even if there had been dumping in respect of the consignment of 700 cartons of rocket cigarettes, the defendant's remedy lay in forfeiting any security deposit paid in respect thereof.

30. It should be recalled that the agreement between the parties was that the security was to be to the extent of tax liability if the goods were to be dumped in the Kenyan market. This was clearly stipulated in the agreement. The court cannot rewrite a contract of the parties. See **National Bank of Kenya Ltd v Pipelastik Samkolit (K) Ltd & another [2001] eKLR**.

31. Accordingly, the plaintiffs claim for US\$65,000 was proved to the required standard and the claim succeeds.

32. As regards the claim for US\$10,050, that was not proved. While it may well be that the plaintiffs may have paid the alleged deposit, there was no evidence by way of deposit receipts to prove such payment. That claim fails.

33. As regards the counter-claim, the failure by the defendant to call a witness from the KRA to produce the alleged demand letters and prove that there had been dumping of goods by the plaintiff was fatal. The allegations remained just that, mere allegations. The claim therefore fails.

34. Accordingly, the Court finds merit in the plaintiffs' claim and enters judgment in their favour against the defendant as follows: -

- a) The sum of US \$65,000.
- b) Interest on (a) above at court rate from the date of filing suit until payment in full.
- c) The claim for US\$10,050 is dismissed.
- d) The counterclaim is dismissed.
- e) The plaintiffs will have the costs of the suit

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY, 2021.

A. MABEYA, FCI Arb

JUDGE