



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 16 OF 2006**

**RIFT VALLEY PRODUCTS LIMITED.....PLAINTIFF**

**VERSUS**

**PLEXUS COTTON LIMITED.....DEFENDANT**

**J U D G M E N T**

1. In this suit the plaintiff seeks the recovery from the defendant the sum of USD 60,773.89 as money had and received by the defendant for and the use of the plaintiff and for the sum of USD 10,665.24 and GBSP 1,500 being special damages said to have been the costs incurred by the plaintiff in tracing the good lost while on transit.

2. The circumstances giving rise to the claim were pleaded in the plaint to have been that sometimes on 5/10/1998, the plaintiff's 200 cotton bales were lost or stolen while on transit from Tanzania through Kenya and were subsequently acquired by the defendant and sold to one CNLT (far East) as part of a consignment of some 700 bales. The 700 bales attracted a price of 212,702.63 hence the value of the plaintiffs 200 bales is calculated at 60,773.80

3. In its efforts to trace the lost cargo, the plaintiff pleaded that it had spent the sum of USD 3,984 for transport to Malaysia, USD 3,000 accommodation while there and paid a Malaysian lawyer USD 3681 in fees together with GDE of 1,500 to a London Solicitor. In essence the plaintiffs claim is for money had and received on its behalf by the defendant on account of the purchase price of the lost goods and special damages being the costs incurred in seeking to trace and locate the goods.

4. In resisting the claim, the defendant filed a statement of defence in which the fact of loss of the cotton was said to be strange to the defendant as well as alleged loss of the cotton while asserting that the lawfully purchased the 700 bales from one **Tristar Group and Oil Mill Ltd** and denied that of the 700 bales, 200 belonged to the plaintiff. It was then pleaded in the alternative that the purchase was lawful in that it was done without any notice as to any defect in the vendor's title, for valuable consideration and that it did acquire good title thereto. On the basis of the asserted title, the defendants then contended that it did not have nor receive any money for the use of the plaintiff and at all and therefore invited strict proof of the plaintiff's allegations as to loss of the value as well as expenses in tracing the goods. It was then lastly pleaded and contended that the suit as crafted and filed was in the nature of tort and thus statute barred when filed. The defendant therefore prayed that the suit be dismissed with costs.

5. After a long deal of interlocutory matters, trial directions were given on the 23/3/2016 which time-lined parties on filing of witness statements and documents. Pursuant to such directions, a bundle of documents was filed by the plaintiff and was subsequently agreed to be used as a common bundle of the documents in the case which were then ordered to be produced by consent.

6. Based on such directions the matter proceeded to trial at which the plaintiff called one witness just like the defendant.

**Evidence by the plaintiff**

7. In terms of the case conference directions the plaintiff witness, its Managing Director, RAMESH KHAGRAM, adopted his witness statement dated 12/4/2016 and filed in court on 13/4/2016 as evidence in chief and also produced the bundle of documents dated and filed with the witness statement.

8. The gist of that evidence was that in the month of August 1998 the plaintiff bought some 200 bales of cotton from **Ms. Nyanza Co-operative Union (1984) Ltd**, in two lots Nos. L98/1126C and L98/1127A subject of invoice No. 22530 and release Order No. 6909. The said goods were then loaded into three trucks, belonging to Mohamed Transport, for purposes of being hauled from Mwanza to Dar es Salaam through Kenya for onward export. The same however did not land in Dar es Salaam, but were diverted into Kenya while on transit and were then shipped out of Kenya through Mombasa by the defendant who alleged to have bought the same from Richard Githome or Tristar Group and Oil Mill Ltd.

9. The defendant on his part had had the cotton sold to CNLT (Far East) SDN BHD in a consignment of some 700 bales and were traced to Malaysia with the help of Interpol, Kenyan Police, Customs department and the Malaysian police. The value of the plaintiff's cotton in 200 bales was calculated at USD 60,773.89 which the plaintiff contend was money had and received on its behalf and to its benefit and therefore due and owing for payment to it. The plaintiff also sought the recovery of the sum of USD 10,665.24 being the expenses incurred in pursuit of tracing the cotton in Malaysia and GB£ 1,500 being the solicitor's fees in London.

10. On cross examination, the witness confirmed having visited Malaysia and while there traced and identified the bales by their lot numbers with the assistance of the Malaysian police. He said that he did not know who stole the cotton while on transit, did not know who sold it to the defendant but knew that it is the defendant who sold the same to the Malaysian company. He said that even though he got the names of Githome and Tristar from the defendants, he was unable to establish who exactly sold to the defendant.

11. In re-examination, the witness referred the court to various documents in the bundle to show that the defendant invoiced the Malaysian company and that it was also the defendant who gave the shipping instructions and was named in the bill of lading as the shipper. He also directed the court to pages 96 -101 being the delivery notes to the plaintiff with the relevant lot number and that the Malaysia buyer did write to the Interpol and confirmed that the witness had identified the subject cotton bales. He also pointed out to court the commercial invoices at pages 105 and 106 as showing the defendant as the seller to Ms. CNLT Malaysia.

12. For the defendant, one NICHOLAS PETERS FRANCIS EARLAM the Managing Director of the defendant adopted his witness statement filed in court on 22/4/2016 and again on 6/7/2016 as evidence in chief. The gist of that evidence was that the defendant is a well-established large cotton trader with a reputation, throughout the world cotton trading community. He said to have been the past President and Vice President of the Liverpool Cotton Association on several occasions and that the association has rules which guide most international cotton trading contracts and provide for arbitration.

13. He expressed being a stranger to the allegation of theft of the suit cotton bales and stressed the fact that even if the allegations were proved, it was never in proved that the defendant had been privy to the alleged theft and conversion which was statute barred in any event. The witness asserted that the defendant lawfully purchased the 700 bales of cotton from one Tristar Group and Cotton Mills at full commercial value before subsequently selling them to CNLT (For East) BHD and had the same shipped out of Mombasa to Port Kleng in Malaysia on or about the 14/9/1998.

14. An assertion was added that the commercial transaction was conducted lawfully under the International Trade Rules and referred the court to the documents of sale at pages 105, 106 & 107 of the plaintiff's bundle. It was therefore denied that the defendant had received any money for the use or benefit of the plaintiff which could be recoverable with a further denial that the defendant could not be liable for the alleged expenses incurred in tracing the cargo outside Kenya.

15. In cross examination, he confirmed that having been the vice chair and Chairman of the Liverpool Cotton Association he was not an amateur but an experienced trader and had a good idea of the market players and would isolate a stranger from known traders. For a stranger he said he would buy cotton only against the documents of title being the bill of lading and in the absence of a bill of lading he would insist on truck weigh bills or warehouse receipts.

16. He added that one would seek lot numbers and certificates of quality, release orders and proof of payment by the seller before buying. He confirmed that Tristar was not a member of the Association but admitted having known Githome. He said that the defendant did not have a purchase invoice for the cotton and did not have a reason for not availing such an invoice. He then confirmed the defendant's position in the fax mail at page 104 dated 5/10/1998 that if the cotton was stolen then they would refund Ms. CNLT and demand the purchase price from Tristar. He then added further that they in fact demanded proof of title from Githome but his mobile phone was not working. He reiterated that he did not have any proof of payment of the price of the cotton or indeed any document of title as he was not aware if Githome availed any proof title.

17. Even though parties had been directed to settle and file agreed issues, there was never such an agreement but each filed separate issues. The plaintiff's issues are dated 12/4/2016 and filed in court on 13/4/2016. That list isolates and identifies three substantive issues for defamation. On the other hand, the defendant did identify some five issues in the list dated 18/4/2016 and filed in court on the 19/4/2016.

18. Accordingly, there are no agreed issues by the parties and it would obligate the court to frame the issues based on the pleadings filed. That shall be done upon review of the submissions offered which I consider to be wholly reliant on the documents produced and tailored, by both sides, along the isolated issues on each side.

### **Submissions by the plaintiff**

19. The summation of those submissions is that the plaintiff purchased the suit cotton from a co-operative society in Tanzania for purposes of exporting same out of Tanzania but the same were interrupted and stolen enroute to Dar es salam through Kenya where they were diverted before being exported to Malaysia. Premium was placed on fax correspondence attributed to the defendant and asserting the position of English law that if the seller to then did not have documents of title then they would have to undo the sale to the Malaysian Company as they demand the return of money paid to Tristar. The goods were indeed identified by the plaintiffs witness and a confirmation in that regard made by CNLT by their letter of 19/3/2001. Premium was equally placed on the documents of purchase from Nyanza Co-operative Union and included lint export permit, invoices and delivery notes. It was equally stressed that the evidence of DW 1, NICHOLAS FRANCIS EARLAM, was clear that the cotton trade demanded that title to cotton be availed before purchase yet he had nothing to show that they demanded and obtained documents of title from Tristar before committing to pay yet no such documents were availed at all. Lack of documents from Tristar and the correspondence confirmed to have emanated from the defendant were said to confirm that the defendant did not obtain good title to the cotton.

20. Despite evidence on how the defendant acquired title to the suit goods, there was evidence that the goods were indeed sold by the same defendant and shipped out at a consideration.

21. The plaintiff then cited to court **Odunga's Digest on Civil Case Law & Procedure Volume 2 (2<sup>nd</sup> edition)** for to proposition that where evidence exist but the person in possession fails to adduce same, the court is entitled to infer that its production would be adverse to such a party.

22. The decision in **Madhupaper International Ltd vs KCB Ltd [2003] eKLR** was cited for the position that the cause of action for money had and received is in the nature of quasi contractual claim and designed to prevent a person from retaining a benefit obtained from another when it would affront the sense and notions of justice and good conscience and that the object is to obligate and enjoin, a defendant being such recipient, to answer to the notions of fairness, equity and justice to make restitution. The position is said to assert that all a claimant is bound to prove is that in receiving the benefit, the defendant has been enriched at the expense and detriment of the claimant and therefore it would be unjust to have the defendant retain the benefit.

23. Lastly, the decision in **Delphis Bank Ltd vs Caneland Motors Ltd (2014) eKLR** was cited to the fact that merely that the money is in the hands of the agent for the recipient is no bar to recovery. On those submissions the plaintiff urged that the suit be allowed and judgment entered as prayed.

24. For the defendant, the submissions filed and highlighted was to the effect and gist that the plaintiffs claim being grounded upon the tort of conversion was statute barred and that there was no room for election to resort to the cause of action for money had and received. In any event it was submitted that cause of action is not revealed in the facts pleaded and evidence led showed that that apart from the tort of conversion the plaintiff had no other cause of action against the defendant. Even with the tacit admission of possible impropriety of the title to the goods in the fax mail by the defendant dated 5/10/1998 the defendant took the position that such was a position of the English law and not Kenyan. It was also stressed that there was a duty upon the plaintiff to prove not only the title to the goods but also the fact that the goods were stolen.

25. On the merits the law cited was said to be no avail to the plaintiff and that the facts availed proved that the defendant through its agent, one Richard Githomi, purchased the goods from Tristar at market value and then availed shipping instructions to its purchaser CNLT together with documents of title.

26. It was therefore contended that by the time the plaintiffs goods were said to have been stolen on the 5/10/1998 the defendant had long shipped his goods to CNLT on 12/9/1998.

27. Premium was then placed on the fact that there was neither police report nor document to show that there was theft and determination of the person who was thus liable it being added that there was no evidence that the invoice exhibited was ever settled. The defendant then submitted that the confirmation by CNLT only regarded 48 bails and another 100 which were not identified.

28. On its titled to the cotton, the Defendant placed reliance on the document it used to export the goods to CNLT including the bill of lading and relied on the provisions of carriage of goods by Sea Act which defines a bill of lading to be similar to document of title.

29. The Provisions of Section 24 of the sale of Goods Act was also cited for the proposition that the holder of avoidable title, passes a good title as long as he sells before his title has not been avoided at the time of sale and provided further that the buyer buys in good faith and without notice of the seller's defect as to title.

30. On such submissions, the defendant contended that the plaintiffs claim had not been proved and therefore that it was not entitled to any of the remedies sought hence the suit was a good candidate for dismissal.

#### **Issues for determination**

31. As said before the plaintiff's sees only three issues as calling for court's determination while the defendant isolated five of such issues. Having read the pleadings by both sides and the sets of issues filed by either side, I do consider that the following issues isolate themselves from determination:-

- i. Whether the plaintiff lost some 200 bales of cotton while on transit from Mwanza to Dar es Salaam through Kenya?
- ii. Whether the said good came to the possession of the defendant and were eventually sold for value by the defendant to a third party to these proceedings?
- iii. Did the defendant get a valid title to the goods as to be entitled to sell, pass title and receive the consideration thereof?
- iv. Is the plaintiff entitled to recover the value of the goods together with the expenses for tracing same from the defendant?
- v. What orders should be made as to costs?

#### **Did the plaintiff lose the 200 bales of cotton as pleaded?**

32. The evidence by the plaintiff which remain uncontroverted is that it did buy 200 bales from Nyanza Cooperative Union [1984] and was issued with invoice No. 22610 as well as lint Export Permit. Over and above those documents of title, there is correspondence from Nyanza Cooperation Union confirming more than once that they indeed sold to the plaintiff the cotton. In fact in the entire correspondence there is no doubt that the said seller never made any claims over the goods. The clearest of the evidence that the said seller deemed the title to have passed fully is contained in the letter of 13/11/1998 where the said Nyanza Co-operative Union demands to be paid for the goods.

33. Earlier on 15/10/1998 the same seller wrote to the advocate for the defendant and confirmed unequivocally that the owner of the 200 bales Lot No. L08/1126 C and L98/1127A ex Ngasamo Ginnery was the plaintiff. These documents are to this court sufficient proof that the goods were in fact sold to the plaintiff by the said Nyanza Cooperative Union and title duly passed to the plaintiff. Accordingly the ownership of the goods by the plaintiff cannot be in doubt.

34. As to whether the goods were lost and found their way to Malaysia in the custody of NCLT (For East) there is sufficient evidence including police reports by Kenyan police (page 69 of the bundle). Letter by advocate for Nyanza Cooperative Union (page 52-55) giving explanation and a report of investigations carried out and that six people were charged in Mwanza District Court in Criminal Cases No. 14 and 16 of 1998. The letter also confirms that the lorries used to ferry the goods bore forged or fake number plates. The bales with identifiable lot numbers were indeed traced and found in Kleng, Malaysia, by PW 1 and a confirmation to that effect made in the letter by CNLT dated 21/10/1998 to the police in Malaysia. That confirmation letter enclosed a parking list showing that a total of 148 bales had been traced and identified.

35. In so far as the plaintiff maintained and was not disproved that its goods were lost while on transit to Dar Es Salaam through Kenya, and that the goods were found in Malaysia, I do find that the goods were indeed lost and sold to the defendant who confirms having sold the same to CNLT. Having been lost and dealt with contrary to the owners wish, I do find that the same had been stolen and unlawfully sold to the defendant.

#### **Did the defendant take possession of the goods then disposed same?**

36. The correspondence by the defendant and its lawyers including export documents from Kenya to Malaysia confirm that the cotton was indeed sold to CNLT (for East) by the defendant in a consignment of some 700 bales. The sale of the said bales was for a consideration of USD 212,702.63. That fact of possession and sale is in fact admitted not only in the defence but also in the evidence by DW 1. To that extent, I do find that the defendant did in fact come by the possession of the goods sold same and received the purchase price thereof.

37. The receipt of purchased price is confirmed in the fax transmission of 5/10/1998 in which the defendant says if the cotton was stolen then it had to refund CNLT and demand its own money from Tristar. I therefore find and hold that the defendant having come to the possession of the goods sold same at a valuable consideration and received the purchase price thereof.

#### **What title did the defendant acquire from Tristar?**

38. The position taken by the defendant is that it did lawfully buy the cotton in open market and thereby acquired title before selling shipping same to Malaysia.

39. The second defence on the title to the goods is that in purchasing the cotton the defendant had no knowledge of the defective title of the seller and gave valuable consideration the established law that enshrines title to property and discourages improper acquisition thereof is expressed in the Latin maxim *Nemo dat quod non habet*. The rule simply says that a person who does not have title to goods, especially a thief, does not pass any title in the goods without the concurrence of the owner. Put the other way, the rule dictates that one cannot pass what it does not hold. The rule is codified in Kenya under the sale of Goods Act, Cap 31 Laws of Kenya. The provision states:-

#### **Sale by person not the owner**

**(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.**

**(2) Nothing in this Act shall affect—**

**(a) the provisions of any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;**

**(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.**

40. I understand the statute to say that when you are not the owner, you can only sell and pass title with the authority of the owner, and when you do without such authority then you pass no title to the Purchaser that can be better than yours. On that provision it is not difficult to conclude that a thief possesses no title to the stolen goods and that he is unable to pass any better title to a person he sells to.

41. In this matter while the defendant posited many a times and very affirmatively that he lawfully bought the goods from Tristar, no document of such sale was availed. In addition DW 1 was affirmative that being experienced in Cotton trade, they could not have brought the cotton without proof of title. He however failed to avail the documents that convinced the defendant about the title of Tristar. That he failed to avail such proof only underscore the fact that such documents never existed. If they never existed then there was no due diligence expected of a person of the defendant's caliber in the business before acquiring the good.

42. On the other hand, if indeed such documents existed but the defendant chose to conceal the same away from the court then the inference

to be drawn is that had the same been produced, they would have been adverse to the defendant's case.

43. In *Kenya Akiba Mero Financing Ltd vs Ezekiel Chebii & Others [2012] eKLR* the court had this to say of concealment of evidence by a party in possession. The court, Mabeya J, said:-

**“... where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the Court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party.”**

44. I do find that the evidence of how lawful the acquisition of the cotton for Tristar was specially within the knowledge of the defendant, who had the evidentiary burden to prove its lawful acquisition and when no evidence was led in that regard, that burden was not discharge. The failure to produce that crucial evidence also leaves the court with no option but to draw the inference that the evidence in its possession was not in support of its case but detrimental thereto. Accordingly there was no evidence to displace the plaintiff's otherwise cogent evidence that the cotton was stolen. In those circumstances, I do find that the defendant acquired no valid title to the goods and therefore when it sold the goods and received the purchase price if had no right to sell and keep the purchase price but otherwise received the said purchase price for the benefit of the plaintiff. I do find that to allow the defendant to keep the proceeds of sale of goods to which it had no title would be contrary to the dictates of equity and fairness but rather sanction and bless unjust enrichment.

45. It is the kind of a situation that would bless dishonest acquisition of property while derogating on the right to own property legally and lawfully acquired.

46. Lastly, having found that the defendant should not in equity and fairness be allowed to retain the proceeds of sale, and it being known that the value of the 700 bales was 212,701.63, the plaintiff's claim becomes obviously ascertainable by simply calculating the value of 200 bales on the basis of the defendant's invoice to CNLT. I do find that sum to be USD 60,773.89 which is the sum I decree to have been the sum of money had and received by the defendant for the benefit of the plaintiff.

47. From the foregoing, I do enter judgment for the plaintiff against the defendant in the sum of USD 60,773.89 being the sum had and received by the defendant to the benefit of the plaintiff.

48. In coming to this conclusion, I have duly taken into account the submission offered by the defendant that its title to the goods could have been voidable but had not been voidable but had not been avoided at the time of sale. I understand that submission to apply to both sales between Tristar and the defendant as well as that between the defendant and CNLT. On that submission reliance was placed on the provisions of section 24 of the Sale of Goods Act. That provision says:-

**“Sale under voidable title**

**When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title”.**

49. The answer to that submission lies in whether the title obtained from a non-owner is void or just voidable. A title is said to be void *ab initio* when its foundation and acquisition is irretrievably bad and cannot be imbued with legality or propriety. On the other hand a title is said to be voidable when it stand on an apparent good standing and remains so till it is voided by the person who claims to have a better title. **JOWITT'S DICTIONARY OF ENGLISH LAW** explains the difference between the two words **“void and voidable”** as follows:

**“void”:**

**Thus, if a contract is made without the true consent of the parties or for any immoral consideration it is void *ab initio*. NO person's rights can be affected by it, whether he is a party or a stranger. In the case of a contract which is void for illegality, immorality, or on a similar ground, if money has been paid as the consideration of its performance, the party who has paid it may repudiate the contract and recover it back at any time before performance.”**

**“voidable”:**

**“An agreement or other act is said to be voidable when one of the parties is entitled to rescind it, while until that happens it has the legal effect which it was intended to have. It can however, be disputed only by certain persons and under certain conditions, and the right of rescission may be abandoned by the party entitled to exercise it... If that person acquires rights under a voidable contract or other transaction without notice and for value, they cannot afterwards be put in a worse position by its being set aside. Herein avoidable contract differs from a void contract, for in the latter case no third person can acquire rights under the contract unless the party against whom it is void elects to affirm it.”**

48. From this distinction, I hold the view and opinion that a contract is only voidable as between the parties to it. In the present case, the title to Tristar was never obtained with any consent of the plaintiff for which reason it was a void title and not just voidable. In **MAYNARD MACKENZIE DANG'ANA v COMMISSIONER OF POLICE & another [2011] eKLR**, the court had a chance to deal with a like situation and delivered itself as follows:-

**“Although it is not disputed by the 2<sup>nd</sup> respondent that Benson Wangalwa as the Human Resources Manager had mandate to deal with disposal of its motor vehicles, such mandate could only be exercised for the benefit of the 2<sup>nd</sup> respondent but not otherwise. I agree with the 2<sup>nd</sup> respondent that the provisions of Section 24 of the Sale of Goods Act cannot assist the**

**petitioner since Benson's title over the motor vehicle was void for all purposes".** (emphasis added)

50. Flowing from the foregoing, I do find and hold that Tristar had no title to be avoided by the plaintiff. Its title was void *ab initio* for having been illegally obtained and when it sold to the defendant it could only pass what it held, a void title. In that scheme of things, section 24 of the Sale of Goods Act cannot be called upon to aid the defendant.

**How about the Special Damages of USD 10,665.24 and GB€ 1,500,00?**

51. This was a special damage claim or just liquidated claim. At trial the plaintiff availed receipts for:-

- Legal fees and accommodation USD3,684.21 (pg 26)
- Legal to Samuel Wordsworth GB\$ 587.50

52. I do find that the two sums were sufficiently proved and become available for award to the plaintiff. There was no proof of the other pleaded expenses and therefore even though specifically pleaded not all were strictly proved and what has not been proved cannot be awarded.

53. In resisting this award the defendant took the position that the plaintiff was not entitled to the award because it had not proved loss and title to the goods. That line of defense cannot stand now that I have found that the goods were improperly acquired and it took efforts by the plaintiff to trace them to the person the defendant had sold them to. The plaintiff having proved his title to the goods cannot be faulted for meeting such expenses but ought to be viewed as having taken steps to mitigate own losses. I find and hold that the plaintiff is entitled to every cent shown by evidence to have been incurred.

54. On special damages, therefore, I entered judgment for the plaintiff for USD 3,684.21 and GG\$ 587.50

55. In conclusion, the plaintiff is entitled to judgment against the defendant as follows:-

- a) USD 60,773.89 being money had and received by the defendant for the use of the plaintiff.**
- b) USD 3,684.21 and GB€ 587.50 being the expenses incurred in tracing the goods lost.**
- c) Interests at court rates from the date of loss being till payment in full.**
- d) Costs of the suit and interests therein at court rates.**

**Dated, signed and delivered at Mombasa this 28<sup>th</sup> day of February 2020**

**P.J.O. OTIENO**

**JUDGE**