



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 763 OF 2003

DAIRYCOM (K) LIMITED.....PLAINTIFF

VERSUS

KENYA DAIRY BOARD.....1ST DEFENDANT

KENYA BUREAU OF STANDARD.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by filing a plaint dated 28th November 2003, and amended on 3rd March 2010, seeking for judgment against the Defendants jointly and severally for:

- a) *A mandatory injunction directing the 1st defendant, its servants and/or agents to forthwith lift the illegal seizure of the said container and its contents and deliver the same to the plaintiff;*
- b) *An injunction restraining the 1st and 2nd defendants, their servants and/or agents interfering with the butter the subject matter of this suit;*
- c) *An order restraining the 1st and 2nd defendants from harassing and/or interfering with the operations of the plaintiff and its staff;*
- d) *A declaration that the Dairy Industry Act, (cap 336), Laws of Kenya does not provide for any requirement for import license or import permit in regard to the importation of dairy produce;*
- e) *The 1st and 2nd defendants, their servants and/or agents be restrained from making and publishing any other and/or further defamatory statements regarding the Plaintiff;*
- f) *General damages for the illegal seizure;*
- g) *General damages for misfeasance in public office;*
- h) *Exemplary damages;*
- i) *Special damages as pleaded in paragraph 13 of the plaint;*
- j) *Interest on (g), (h), (i), and (j) at such rate from the day of the illegal suit until payment in full; and*
- k) *Costs of the suit.*

2. The Plaintiff avers that, on or about 23rd October 2003, it imported into the Country, 1 X 20 foot, Reefer container No. MAE 05679191, containing 20 Metric Tons Butter 80% Salted Sweet Cream (herein “the butter”). On 29th October 2003, it paid the Import duty, Value Added Tax, Import Declaration Fees (IDF), to Kenya Revenue Authority (herein “KRA”), assessed in the sum of; Kshs. 1,816,291, and on 11th November 2003, it paid, Kshs. 95,461 as; Import Levy to the 1st Defendant.

3. However, on 21st November 2003, the 1st Defendant without any lawful authority purported to seize the container with butter for

undisclosed reasons. The Plaintiff avers that, the seizure of the butter was unlawful as, on 27th November 2003, the 2nd Defendant had issued it with a Certificate of analysis number; P.3925/03, indicating the butter met the required standard.

4. It is averred that, as a result the unlawful seizure of the butter, the Standard Newspaper Limited, on 27th November 2003, published a news item attributed to the; Permanent Secretary Ministry of Livestock Development and Fisheries; to the effect that, preliminary investigations by the 2nd Defendant, indicated that, the butter did not meet standards set by the 2nd Defendant. That, the 1st Defendant further made and published defamatory statements, in the electronic and print media to wit; that the Plaintiff had imported dairy products to the country illegally.

5. Be it as it were, the Plaintiff being aggrieved with the seizure of the butter filed an application alongside the plaint, seeking for orders inter alia; that a mandatory injunction be issued directing the 1st Defendant to lift the illegal seizure of the container. The application was heard on 19th February 2004 and a ruling delivered on 18th March 2004, whereby, the court ordered the 1st Defendant to immediately release the consignment of butter to the Plaintiff.

6. However, it is averred that despite the court order, the 2nd Defendant, on 19th March 2004, through its authorized officers and in breach of its mandate; under the Standards Act (cap 496) Laws of Kenya and the Regulations made pursuant thereto seized, detained and/or sealed the subject container stored at, SDV- Transami, Embakasi. The Plaintiff argues that, the seizure and the detention of the container and/or the butter, by the Defendants was; unlawful, unconstitutional, irregular, malicious, without regard to the rules of natural justice and in breach of their statutory duties; under the Dairy Industry Act (cap 336), Laws of Kenya.

7. That, the Plaintiff filed judicial review proceedings; vide Judicial Review Misc. Application No. 481 of 2004, as a result of refusal by the Defendants to release the butter as ordered by the court. However, on the 29th May 2004, the parties entered into a consent effectively quashing the 2nd Defendant's decision to seize, detain, and seal the consignment.

8. The Plaintiff argues that, due to the Defendants' stated wrongful acts, the consignment deteriorated and expired causing it to suffer losses in; demurrage, warehousing, and storage and hence the claim for special damages. The Plaintiff further claims for a sum of, Kshs. 30,000,000 per annum and interest thereon as loss of business.

9. However, the 1st Defendant filed a statement of defence dated 13th January 2004 and amended on 12th March 2010 in response to the plaint. It admitted seizing the Plaintiff's container with butter but argued that, the seizure was justified on the grounds that; the consignment of butter was imported without valid authority and the licence used to import the same had expired. Further, the Plaintiff breached the procedures laid down concerning importation of; Dairy products into the country. That the butter was imported from a country which is under quarantine by virtue of; Legal Notice no. 326 of 1996.

10. The 1st Defendant admitted that, indeed a cheque of Kshs. 95,461, was issued to it, purportedly in payment of Import levy, but it was rejected on the grounds that, it was issued improperly after the goods had been cleared from customs using a forced receipt, purportedly issued by the 1st Defendant, which was not the case.

11. The 1st Defendant denied publishing any statement in any media; electronic, print or otherwise to the effect that, the Plaintiff imported Dairy products into the country illegally. That, in the alternative and without prejudice, if any such publication was made, which is denied, the words complained of, if any, are not capable of bearing any meaning defamatory to the plaintiff. Finally, it was argued that, the mandatory injunction issued by; the court on 19th February 2004, was not directly and substantively related to the issues herein.

12. The 2nd Defendant, on 5th February 2004 filed a statement of defence dated 3rd February 2004 and averred that, it is a member of the International Standard Organisation (ISO), but denied that, there is an agreement between it and other ISO members for certification. That, ISO certification goods are prima facie goods that meet its required standards, hence there is reciprocity.

13. The 2nd Defendant argued that, it has no control over the alleged defamation, by the Permanent Secretary Ministry of Livestock Development and Fisheries and more so, on the press release, and neither can the said utterances avail to the Plaintiff a cause of action against it.

14. However, the 2nd Defendant admitted analysing the butter and releasing the results alluded to, by the Plaintiff but argued that, the results were based on a private sample submitted by the Plaintiff and on limited parameter requested for by the Plaintiff. That, on a without prejudice basis, in accordance with its primary mandate, it drew samples of the butter, carried out comprehensive test analysis for compliance with standard specifications for salted butter and the butter was classified substandard. The 2nd Defendant further denied the alleged loss, damage and/or injury by the Plaintiff.

15. However, the plaintiff filed a reply to the 1st Defendant's amended defence, literally reiterating the averments in the plaint and terming the amended defence as vague and merely intended to delay the hearing of the case.

16. The case proceeded to a full hearing whereby Andrew Omboto, a director and shareholder of the Plaintiff, testified on its behalf. He relied on the eighty one (81) paragraph statement he wrote dated 21st October 2015 and filed in court on 23rd October 2015 together with annexures thereto, in a bundle running to; two hundred and seventeen (217) pages. He also relied on a supplementary list of documents dated 1st July 2016 and filed on 4th July, 2016 in a bundle of forty-three (43) pages.

17. In a nutshell he testified that, the Plaintiff's company is fully owned by Dairycom B.V. which in turn is wholly owned by Hoogwegt Group B.V. That the company's various product line includes inter alia; skimmed full cream, fat filled milk and condensed milk powder,

butter, lactose and cheese. He gave a detailed account of how the butter was imported and subsequently delivered to Brookside Dairy Company.

18. He testified as to how various investigations were conducted by various investigative organs including the Defendants herein and the Directorate of Criminal Investigations, resulting in the seizure of the butter and the filing of the suit herein. He produced various documents in proof of the importation of the butter, payments of various fees and the claim for loss of business.

19. The Plaintiff's case was further supported by the evidence of; Ronald N. Bwosi, a Certified Public Accountant operating under the name and style of Ronald's & Associates. He testified that, he was instructed by the Plaintiff's company to carry out an independent and extensive audit of its business and its financial position from; the 6th day of March, 2001 to 30th September, 2013.

20. That, in carrying out the audit, he obtained all the necessary information and explanation from the "1st Defendant" which to the best of his knowledge was necessary to carry out the audit. That, for every financial year's report, he endeavoured to provide a summary of the findings in a simple manner. He fully relied on the Audit Report filed, which gives a true and fair view of the state of the financial affairs of the Plaintiff's company for the subject period.

21. The 1st Defendant's case was supported by the evidence of; its Administrative Manager; Peter Mutua; who relied on his witness statement dated 25th February 2016, alongside the list of documents dated and filed in court on 25th February 2016. He testified that, by dint of the Dairy Industry Act, (cap 336) Laws of Kenya, the 1st Defendant controls and regulates the dairy industry and its products in Kenya.

22. That, on 19th October 2003, the Plaintiff imported 40 Metric Tonnes of; butter from Northern Ireland via South Africa under an expired permit. Further, the license under which the Plaintiff purported to import the butter indicated that, it was from Australia yet the butter herein was from Northern Ireland. In addition, at the time of import, the director of; Veterinary Services had banned the import of live bovine and their products from European countries.

23. That, a notice for seizure was then issued to the Plaintiff in accordance to the Dairy Industry (Inspectors) Regulations and subsequently, Kenya Bureau of Standard, the body mandated to assess and ensure imported products comply, with the set standards recommended that, the importer be instructed to ship the consignment back to the country of origin.

24. He maintained that the goods were seized by the 2nd defendant for the failure to meet the required standards. That control measures in the dairy industry have been put in place to ensure that the unsuspecting public is not endangered by unscrupulous dealings by the market players and that had the plaintiff followed the regulations as set out, it would have avoided unnecessary losses.

25. That even then, after the court ruling delivered on 8th March 2004, the 1st Defendant released the seized goods to the Plaintiff but the goods were then seized by the 2nd Defendant herein for failure to meet the required standards. That, it has at all material times acted within its mandate in handling the Plaintiff's consignment.

26. The 2nd Defendant's Manager, Food and Agriculture Laboratory Antony Irungu, testified on its behalf and adopted his witness statement dated 20th September 2017, filed on 25th September 2017; alongside a bundle of documents dated 3rd October 2017. He stated that, the 2nd Defendant, is a statutory body established under the provisions of; the Standards Act, (chapter 496) of the Laws of Kenya and charged with the responsibility of, among others, promote standardization in industry and commerce and provide facilities for the examination and testing commodities and the manner in which they may be manufactured, produced, processed or treated.

27. That, the Standards are provided for in the Standards Act, and subsidiary legislations and orders made pursuant to the Act and under section 21 thereof; the standards set pursuant to the Act supersede any international standards or any other standards that may conflict with standards in Kenya.

28. The witness testified that, on 11th November 2003, the 2nd Defendant received a sample of salted butter for analysis and labelled it Sample Reference number BS/10869/03. The purpose of the analysis was to find out whether it complied with the standard specification for salted butter. On 19th November 2003, Mr. Charles Gathu a KEBS Import Inspection Officer, forwarded the sample to the laboratory for analysis vide Sample Submission Form number 12694. The analysis for chemical parameters were carried out as per the customer's request stated in the sample submission form and a Test Report issued on 19th November 2003, vide a Certificate No. BS/TSD/1564/F/03; signed by Ms. M. O. Miyumo; Head of Food Laboratory.

29. That, on the same date, the laboratory received a private sample of; Sweet Salted Cream Butter from the Plaintiff; Dairycom Kenya Limited, for analysis of, Microbial parameters as listed in the Sample Submission Form No. 35577. The sample was analysed as requested vide Sample Submission Form No. 35577 and a Test Report signed by Mr. J. M. Mwanyolo issued on 27th November 2003, under Certificate No. BS/TSD/2390/M/03.

30. The formal hearing of the case came to a close, whereupon the Plaintiff and the 2nd Defendant filed their final submissions. The 1st Defendant did not file submissions due to non-compliance with the directions given by the court in relation to the same. However, the Plaintiff filed submissions dated 17th October 2018, and the 2nd Defendant filed submissions dated 13th October 2018. I have considered both submissions in this Judgment alongside a list of authorities dated 23rd November 2018 and 13th March 2019, respectively attached thereto.

31. I have considered the evidence, the submissions and the arguments advanced and I find the following issues have arisen for consideration; -

(a) Whether the subject butter was lawfully imported;

(b) Whether the notice of seizure; Ref. No. 3078 and /or the notice of detention; Ref. No. SL/No. 0604 issued by the 1st and 2nd Defendants respectively were regular or lawful;

(c) Whether the Plaintiff suffered any loss and/or damage;

(d) Whether the plaintiff is entitled to the orders sought; and

(e) Who should bear the costs of this suit?

32. As regards the first issue I find that, there is no dispute that the Plaintiff imported the subject butter into the country on or about 23rd October 2003. There is however, conflicting evidence as to the source of the butter. Andrew Omboto avers at paragraph (12) of his statement that the Plaintiff secured 60 metric tonnes from Dairycom B.V. which according to his evidence at paragraph (6) of his statement, the company fully owns the Plaintiff's company. He gives the address of; Dairycom B.V. as Postal Address, P.O. Box 212-100 AE Amsterdam-the Netherlands. Therefore, according to that evidence the butter was sourced from Netherlands.

33. However, Peter Mutua, the 1st Defendant's witness argues that, according to the documents produced by the Plaintiff, the butter came from Northern Ireland via South Africa. I shall deal with this issue later on in this judgment.

34. Be that as it were, further evidence confirms that, 20 metric tons 80% salted sweet cream butter was indeed imported. The relevant payments were made including; Import duty, Value Added Tax to; Customs and Excise department, of Kenya Revenue Authority. The butter was then released to the Plaintiff. From the evidence, the butter was inspected by, COTECNA S.A, prior to shipping of the same on 11th September 2003 and a report dated 17th October 2003, issued vide (CRF) Number CC031077973/ZA.

35. However, it does appear when the butter arrived in Kenya, a report was made to the investigative agents that, the documents of importation were not valid. Initially, Kenya Revenue Authority commenced investigations into the importation of the butter but the 1st Defendant took over the investigations and involved the Directorate of Criminal Investigations extensively. However, the results of the criminal investigations have not been availed to the court; despite the 1st Defendant's allegation that, the Plaintiff used forged documents to clear the butter.

36. Be that as it may, the 1st Defendant admitted in its statement of amended defence that, it seized the butter. The question that arises is whether, it seized the butter lawfully. I have already made reference to the reasons advanced by the 1st Defendant for seizure of the consignment. In a nutshell, the 1st Defendant argues that, it issued the notice of seizure pursuant to; Legal Notice No. 215, dated 27th June 1964; the Dairy Industry (Inspectors) Regulations 1964 and Animal Diseases Act (cap 364) Laws of Kenya. However, a perusal of the notice reveals that, no reasons for the seizure were indicated therein. The reasons were only advanced in the pleadings.

37. However, I have considered the provisions of the law relied on by the 1st Defendant. I also note that, the same were also considered in depth at the hearing of the application filed alongside the plaint. The learned, by Hon Justice Ibrahim (as he then was), made extensive findings on the same. He held at page 5 of the ruling that; based on Section 3 of the Dairy Industry Act (cap 336) laws of Kenya, the 1st Defendant is indeed mandated to deal and regulate matters pertaining to dairy produce including butter.

38. The learned Judge also found that; Legal Notice No. 215 dated 27th June, 1964, gives the 1st Defendant Inspectors the power to seize the butter. However, the court observed that; the Inspectors must have reasonable cause to seize the consignment and must give reasons. The court further held that, Regulation 2 of the Dairy Industry (Imports) Regulations, does not refer to butter and therefore, the 1st Defendant could not rely on the same as a basis of the seizure. That, the butter is not a prescribed dairy produce under the Regulation 2 of the said Regulations. I have independently evaluated the subject provisions and I entirely concur with the findings of the court on the provisions.

39. In relation to the issue of the butter origin, the court observed that, the purported letter of "no objection" issued by the Ministry of Agriculture and Rural Development, shows the county of origin as Australia and not Northern Ireland. That, Legal Notice 326 of 1997 and Section 8 of the Animal Diseases Act (cap 364) Laws of Kenya, deals with animals and their products but does not cover milk and milk produces, or "dairy produce". Thus section 8 does not cover butter. The court concluded by stating that; "as a result, the quarantine notice cannot give the 1st Defendant any legal basis to seize the produce herein."

40. That, if at all the seizure was in enforcement of the Dairy Industry (Imports) Regulations, the said seizure would be illegal as butter is not a prescribed product under the said Regulations." As aforesaid, I have considered these provisions and I concur with the findings of the court that, the 1st Defendant did not act within the provisions of the law when it seized the Plaintiff's consignment.

41. It suffices to note that, the subject ruling was not appealed against and therefore it remains the finding therein and herein that, the 1st Defendant did not have lawful authority to seize the container and/or the butter. The 1st Defendant seems to have conceded to this finding, when it released the butter upon being ordered by the court to do so.

42. The next question to consider is whether the 2nd Defendant lawfully detained the subject consignment. The Defendant argues that, it was carrying out its statutory mandate of examination and testing of commodities, manufactured, produced, processed or treated to ascertain whether the same was fit for human consumption. It relies heavily on the reports analysis of the subject butter.

43. In this regard it suffices to note that, the certificate of analysis relied on by the 2nd Defendant is dated 28th November 2003. It shows that, the salted butter did not comply with the requirements of Kenya Standard Specifications for butter – KS 05-27 (1st Rev) in the following parameters: -

(a) Saponification value,

(b) Ph value;

(c) Acidity of extracted fat

44. However, upon release of these findings, the Plaintiff wrote a letter dated 2nd December, 2003, complaining about the “glaring discrepancies” in the results and submitted its own sample. The 2nd Defendant issued the Plaintiff with a certificate showing the butter was fit for consumption.

45. Be that as it were, the Plaintiff and the 2nd Defendant recorded a consent that fresh samples of the butter be taken to the Government Chemist and the department of; Food, Science and Technology, University of Nairobi for testing on the following parameters: -

(i) Saponification value;

(ii) Ph. Value;

(iii) Acidity of extracted fat;

46. The butter was analysed at the University of Nairobi as requested and by a letter dated 24th January 2004, Dr. J.W. Mwakumi reported that; he analysed the sample presented, evaluated the butter analysis results from various sources and concluded as follows: -

“the microbiological results (Certificate No. VS/TSD/2390/M/03 Certificate Number P 3925/03 dated 27/11/03), which are the key indicators of Food Safety and therefore fitness for human consumption, reveal that the product is highly acceptable and poses no conceivable hazard to human health. This is consistent with the results in Certificate of Analysis from the Originating Country (Certificate of analysis for Lot No. W4570 dated 13/05/2003).”

47. He then considered the results of; KEBS vide Certificate No. BS/TSD//1564/F/03 dated 19/11/2003 and the Certificate of Analysis from the Originating County (Certificate of analysis for Lot No. W4570 dated 13/05/2003). He concluded that, the KEBS results for moisture, and salt were abnormally low and that the FFA value was derived wrongly, hence the results were erroneous. That, in essence it renders the KEBS results (Certificate No. BS/TSD//1564/F/03 dated 19/11/2003) invalid and unacceptable. He stated that; even if the results in question were to be accepted as valid or accurate, the saponification value, pH and acid value do not render the produce unfit for human consumption. The results from the Government Chemist were signed for by Mr T.O. Owiti, which simply indicates the parameters but do not show any adverse findings.

48. Finally, the Department of Agriculture and Rural Development, issued Dioxin Certificate on 20th May 2003, which indicates inter alia that; the country of origin of the butter to be; North Ireland, United Kingdom. The description of the product is given as; “260 MT Bulk Salted Butter” and the consignee is; “Dairy com (Pty) Ltd, I woodmeal Drive. The results read as follows: “I hereby certify that, on the basis of the United Kingdom Residue Surveillance Program, the Dairy product above is free from harm of dioxin residues.”

49. Even then, as the matter was pending herein, on 29th May 2004, the parties entered into consent in; Judicial Review Misc. Application No. 481 of 2004, whereby it was agreed that, the Plaintiff’s consignment be released. The consent indicates that, 2nd Defendant acknowledged the seizure and detention of the Plaintiff’s consignment was unlawful. I therefore I find that, based on the results analysed above and the consent referred to herein, both Defendants jointly and unlawfully seized and/or detained the Plaintiff’s consignment.

50. The last question to consider is whether the Plaintiff is entitled to the orders sought. I have considered prayer (1) seeking for a mandatory injunction for the 1st Defendant to lift the illegal seizure, prayer (2) seeking for the Defendants to be restrained from interfering with the butter, prayer (3) seeking for the Defendants to be restrained from interfering with the Plaintiff’s business operations and staff, and I find that all those prayers have been overtaken by events.

51. As regards Prayer (4) seeking for a declaration that the Dairy Industry Act (cap 336) Laws of Kenya, does not provide for any requirement for Import License or Import permit; in regard to the importation of dairy produce, I find it was sufficiently dealt with in the ruling delivered herein and was spent accordingly. Prayer (5) seeking for orders that, the Defendants, their servants, and/or agents be restrained from making and publishing any other and/or further defamatory statements regarding the Plaintiff has also been overtaken by events by virtue of the fact that the subject matter to which the statements were made is no longer in existence. Even then the said statements were not made by the Defendants and neither is there evidence the statements are still being made.

52. I shall now consider Prayers (6), (6A) and (6B), seeking for general damages for the illegal seizure, misfeasance in public office and exemplary damages. In that regard, the Plaintiff submitted that, it is settled law that where there has been loss arising from an unlawful action, then damages may be awarded so as to put the claimant in a good position as if there had been no such loss. The Plaintiff relied on the case of; *total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs Janevams Limited (2015) eKLR* quoting the decision in *Visoi Saw Mills Ltd vs The Attorney General (1997) eKLR (Civil Appeal No. 78 of 1996)*.

53. It was further submitted that, in determining general damages to award, the binding decision of; Court of Appeal in Samuel Kariuki Nyangoti vs Johaan Distelberger (2017) eKLR, established that, the court will consider the matter on a balance of probabilities and the principles of; restitutio in integrum and will not only take into consideration, audited accounts, income, books of accounts but also the basis of the entire evidence and circumstances of the case.

54. I have considered prayer (6C) on special damages and find that, the claim is for a sum of; USD 158,400 equivalent to; Kshs. 11,880,000, being the product cost, CFR Mombasa Kenya. It is supported by a document at page 51 of the Plaintiff's bundle of documents filed on 23rd October 2015. I have looked at the subject document and note as follows; - it is indeed addressed to the Plaintiff by COM B.V. P.O. Box 212-1000 AE Amsterdam. The Netherlands. The details thereof indicate as follows; -

Invoice No.	BV 002206/04
Ref:	1499
Date	16.10.2003
Product	Freshly Produced Salted Butter
Weight	60,000 Kgs Net (60MT)
Packaging	2,400 Cartons, each 25Kgs net
Price	USD 2,640 Per MT
Amount	USD 158,000

Payment due date 45 days from shipment arrival in Kenya

55. It is clear from the document above and the details therein that it is an invoice. Generally, an invoice is raised to seek for payment from the person liable to pay. Be that as it were, the subject invoice shows the quantity of the butter as; 60,000 Kgs net (60MT). The price indicated therein is for a quantity of; 60,000 Kgs net (60 MT). That is the amount the Plaintiff is claiming for herein. Yet as per the amended plaint and paragraph 13 of the Plaintiff's statement, the subject matter herein relates to 20MT of butter.

56. Therefore, if 60MT of butter costs Kshs. 11,880,000, then 20MT thereof cannot cost the same amount. At most it can only be Kshs, 2,970,000. Even then, there is no evidence whatsoever that, after the invoice was issued, payment was made for the butter and for what quantity and in particular by the Plaintiff.

57. The plaintiff in that regard submitted that, the courts have adopted a more lenient approach in proof of special damages as stated in the case of; Thomas Gabaya & 2 Others 2012 eKLR to argue that so long as the claim is manifest it should be allowed. However, I find that, this claim is basically the main claim for special damages herein. It forms the back bone thereof. It is a substantial claim. If the payment was made by the Plaintiff's parent company then the receipts in proof of payment should easily have been availed.

58. However, taking into account the fact that, there is no dispute that, the butter was actually imported as per the evidence herein and obviously it was paid for, it is only in the interest of justice that the court compensates the Plaintiff the cost thereof, being the price of 20MT of butter at a sum of USD 2,640 per MT, which is equivalent to Kshs 3, 960,000.

59. The next claim of Kshs. 1, 816, 291 is fully supported by cheque No. 935366 and a payment voucher for the same. It is thus proved and awarded. Payment of Kshs. 49,929 is proved by receipt No. MBAC Receipt No. 77982.

60. The invoice claim for Kshs 137,255 is based on the evidenced of invoice No. 006195. The invoice shows that an amount of Kshs. 129,251.00 was paid on 7th November 2003 and a balance of Kshs. 13,004.00 left unpaid. No evidence of a receipt of payment. A claim of; Kshs 2,472,607.00 is based on a pro-forma invoice at page 65, which shows payment of; Kshs. 1, 916,772.00 leaving a balance of Kshs. 493,835.00. There is no evidence for payment. A claim of Kshs. 372,150.00 is said to have been based on invoice on page 69 and 70, and a payment voucher and/or remittance advise.

61. The claim of; Kshs. 500,000.00 by Transami for container plugging is supported by evidence at page 42 of; the list of documents. A claims for the sums of; Kshs. 1,475,925.00 and Kshs. 4,640.00 are not supported by any evidence. A claim for legal fees for; Kshs. 557,100.00 is supported by a payment voucher/remittance advise at page 41 of the supplementary list of documents filed by the Plaintiff.

62. As regards the claim for loss of expected profit. I note that, the plaintiff relied on the Expert's report which showed that the company incurred losses as indicated therein, and submitted that, the report is uncontroverted and the court should hold it in the highest standard. However, the 2nd Defendant submitted that, the Expert could not ascertain what percentage of the loss can be attributed to the Defendants. That even then, the loss was attributable to many factors including administrative costs and agents' fees. Further, the annual financial reports produced for the years 2001-2004, were all signed in the year 2005 after the suit was instituted and therefore they must have been manipulated by the Plaintiff for unjust enrichment.

63. I have considered the claim for loss of expected profit in the sum of, USD 21,600 or Kshs. 1,620,000.00. This is a special damages claim therefore, it required to have been specifically pleaded and and/or strictly proved. I also note that, the report relied on at pages 136-202 of the

Plaintiff's bundle of documents, is entitled "the annual reports and financial statements for the years 2001-2004" It is not specifically in relation to loss in relation to the subject matter herein. The Plaintiff averred that, it was dealing in various products, and therefore it is possible that this loss may have been in relation to other factors beyond the subject matter herein.

64. Even if the court were to consider it otherwise, I note and agree with the 2nd Defendant that the order by; Brookside Dairy was made on 10th November 2003, yet the import documents; indicate that the product was sourced as early as 16th October 2003. The delivery note number 00854 to Brookside Dairy Ltd shows that, the product being 25kgs x 798 cartons was delivered to Brookside Dairy Limited, on 8th November 2003. There is no price indicated in the subject documents, so that the court can be able to tell how much was being paid for the product as against the purchase price, to calculate the loss of profit if any. I therefore find that this claim is not proved.

65. In the same vein, although the Plaintiff pleads to loss of business, at paragraph 13(a), in the sum of Kshs. 30,000,000.00 per annum, however, the same is not a subject of a specific prayer under paragraph 15 and/or under paragraph 15 (6c) where special damages are sought for and neither was it pleaded as such under paragraph 13 of the plaint. It cannot be awarded

66. I shall now deal with issue of liability of the Defendants, described as the joint and several liability. I note that the 1st Defendant held the goods up to the date of the release upon the decision of the court for release of the same. Thus, its liability is limited up to the date of release of the goods. However, the 2nd Defendant held the goods until the release upon the consent in the Judicial Review order. It is noteworthy that, at the time the goods were released by the 1st Defendant, they had not expired and therefore any consequences that led to the expiry of the goods will be borne by the 2nd Defendant.

67. In conclusion, I enter judgment for the Plaintiff as against the Defendants jointly and severally in the sum indicated herein and a third thereof of the sum awarded as costs of the butter being Kshs. 1,320,000.00 as general damages 5, 280,000.00 on the amount awarded. The interest on judgment sums shall be at court's rate from the date of judgment until payment in full. Costs of the suit to the Plaintiff.

Dated, delivered and signed in an open court this 24th day of February 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Mari for the plaintiff

Ms. Kosani H/B for Mr. Kiraini for the 1st defendant

Mr. Omwenga for the 2nd defendant

Michael Court assistant