



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 1590 OF 2002**

**JARIBU CREDIT TRADERS LIMITED.....PLAINTIFF**

**VERSUS**

**THE COMMISSIONER OF CUSTOMS & EXCISE.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff sued the Defendant vide a Re-Amended Complaint dated 31<sup>st</sup> January, 2013 seeking judgment for:

**“a. Kshs.45,729,970/=.**

**b. General damages for unlawful seizure of the goods.**

**c. Economic loss and/or loss of profits resulting from the unlawful seizure.**

**d. Loss of re-investment income and profit on the same.**

**e. Costs of the suit.**

**f. Interest on a, b, c and d above payment in full.**

**g. Any other of further relief this court may deem fit to grant.**

2. The claim is stated to have arisen when the Defendant without reasonable cause unlawfully seized the Plaintiff's imported goods on the grounds that the same were suspected to be unaccounted for. That the goods were subsequently held as exhibits in Nairobi CM's Cr. Case No. 1266/96 and by the time they were released to the Plaintiff following the court's orders in the aforesaid criminal case on 16<sup>th</sup> October, 2001 the value of the goods had depreciated. That consequently the Plaintiff suffered a loss of Ksh.5,524,673/=. It is further averred that the Plaintiff also suffered Ksh.38,099,568.70 loss of Profits and Ksh.2,105,727.94 storage charges.

3. The claim is denied as per the Defendant's Amended Statement of Defence dated 3<sup>rd</sup> March, 2011. It is pleaded that the Notice of Seizure was lawfully issued due to non-payment of duty in accordance with the Customs and Excise Act. It is further pleaded that the goods were seized *in situ* at the Plaintiff's premises and that the Defendant did not take custody of the goods. The Defendant denied any refusal to release the goods.

4. During the hearing of the case, PW1 Suresh Nanalal Kantaria testified on behalf of the Plaintiff. He adopted his witness statement dated 14<sup>th</sup> September, 2011 and produced the Plaintiff's bundle of documents as exhibits. PW1 described himself as the Chairman of the Plaintiff Company. He stated that the goods the Plaintiff imported from Singapore through its supplier were as follows:

**“a. 59 pieces of air conditioners make CS-2403 KF**

**b. 50 pieces of air conditioners make CS-1803 KF**

**c. 16 pieces of air conditioners make CS-1203 KF**

d. 112 pieces of 20" color TV make TC-20L3T

e. 310 pieces Panastar radio cassettes FD-1000

f. 269 pieces Panastar radio cassettes FD-2000 fm."

5. PW1's further evidence was that when the aforesaid goods arrived in Kenya, the Customs Duty was assessed and paid as per the Import Entry document produced. That on 3<sup>rd</sup> May, 1996 the Defendant served the Plaintiff with a Notice of Seizure of the said goods for suspected contravention of Section 196 (c) as read with Section 185(d) of the Customs and Excise Act. That some of the Plaintiff's employees were also arrested and charged in Nairobi CM's Cr. Case No. 1266/96 where the goods were held as exhibits. That the goods were seized within the Plaintiff's premises with instructions from the Defendant's Officer that the goods should not be interfered with until the criminal case was concluded. That requests by the Plaintiff for the seizure of the goods to be lifted was not heeded by the Defendant despite the Plaintiff having produced all the importation documents.

6. Further evidence by PW1 was that by the time the Defendant lifted the Notice of Seizure on 11<sup>th</sup> November, 2002 and also confirmed that the goods were properly documented, the value of the goods had depreciated and the Plaintiff thereby suffered loss and damage. That the Plaintiff would have sold the goods at Ksh.16,294,155/= but ended up selling them same at Ksh.10,789,482 and therefore suffered a loss of Ksh.5,524,673/=. He prayed for judgment for the said sum of Ksh.5,524,673/=:, general damages for the unlawful seizure of the goods costs and interest. He abandoned the claim for the Ksh.38,099,568.70 loss of profits and also abandoned the claim for loss of re-investment income and profit.

7. DW1 Ben Afwamba testified on behalf of the Defendant. It is his evidence that he retired from the Defendant's employment at the rank of Assistant Commissioner, investigations branch. His evidence was that there was a report by Rayshian Apparels Ltd that it's Company's documents were being doctored by an Electronics Importer wherein the Bill of Lading used by Rayshian Apparels Ltd to import duty exempted fabrics was being used to clear electronic goods from Singapore without payment of duty.

8. That joint investigations carried out by the Defendant and the police ended up with the arrest of a clerk from Ms Mackenzie Maritime Ltd for duplication of a manifest, the Defendant's employee in-charge of manifests, two employees of the Plaintiff and an employee of Rayshian Apparels Ltd. That the goods the subject of this suit which were found at the Plaintiff's Go-Down were seized on suspicion of being unaccustomed. That after investigations, the arrested persons were charged with criminal offences.

9. It is abundantly clear from the evidence on record that the complaint was made by Rayshian Apparels Ltd. That Police Officers and the Defendant's Officers proceeded to the Plaintiff's premises where DW1 issued a Notice of Seizure. The Notice of Seizure which is dated 3<sup>rd</sup> May, 1996 reflects that the goods were seized *in situ*.

10. The Notice of Seizure reflects that it was issued under Section 196(c) of the Customs and Excise Act as read with Section 185(d) iii of the said Act. The said Section 196(c) provides as follows:

**"An officer or police officer may seize an aircraft, vessel, vehicle, goods or anything liable for forfeiture under the Act and any such aircraft, vessel, vehicle, goods animal or other thing may be seized whether or not a prosecution for an offence under this Act which renders it liable for forfeiture has been or will be taken"**

11. The crux of this matter is whether the goods the subject of this suit were customed or not. This is what will inform the decision whether the Notice of Seizure was lawfully issued or not.

12. On the one hand, the Plaintiff whose evidence was that duty for the goods was paid has produced as exhibits the following import documents:

(a) Import Entry No. 307 for the Air conditioners with the duty payable reflected there as Ksh.221,811/=. A receipt No. 265354 which issued by the Defendant on 14<sup>th</sup> September, 1995 for the said sum of Ksh.221,811/= and a KPA receipt.

(b) Import Entry No. 330 for the radios with the duty payable reflected as Ksh.239,432/=:, Import Declaration Form the Defendants receipt No. 265397 issued on 14<sup>th</sup> September, 1995 and a KPA receipt No. 416470 issued on 22<sup>nd</sup> September, 1995.

(c) Import Entry No. 101 for the TVs with duty assessed as Ksh.78,877/=:, Import Declaration Form No. 12654, receipt No. 305682 for the said sum of Ksh.478,877 issued on 3<sup>rd</sup> November, 1995 and KPA receipt No. 412773 dated 14<sup>th</sup> November, 1995 for payment of Ksh.42,367/=:.

13. On the other hand, the Defendant has produced as exhibits the documents marked as the genuine documents from page 98-Page 113 of its bundle of documents which include what is stated as the genuine the cargo Manifest and on page 114 documents which are described as fake manifests and other documents relating to Rayshian Apparels Ltd which include invoices for cotton fabrics and Inland Containers Depot Release Orders and other documents described at page 134 as genuine entries which are in the name of Rayshian Apparels. DW1's evidence is that the fake documents were used to clear the goods herein without the payment of duty.

14. The Defendant's bundle of Documents also include Import Entry No. 307 for the air conditioners which is a copy of the same Import Entry No. 307 produced by the Plaintiff with the total duty payable and all the other entries therein being the same inclusive of the cancellations. This document is amongst the documents from page 134 in the Defendant's bundle of documents marked as genuine documents.

15. Import Entry No. 330 for the radios which has also been produced by the Plaintiff is part of the documents referred to in the Defendant's letter dated 20<sup>th</sup> February, 1996 and is amongst the Defendants documents which are marked as genuine. The said letter states that the goods in the Import Entries and the containers numbers reflected therein were suspected of being undervalued or under declared but that upon verification extra duty had been paid as reflected therein. The Defendant has also produced a copy of Import Entry No. 330 amongst his documents marked as genuine.

16. The duty assessed in the Import Entry produced by the Plaintiff is Ksh.288,033/= and the Defendant's stamp reflects the date as 7<sup>th</sup> February, 1996. The copy of same number Import Entry (No. 330) was also produced by the Defendant as a genuine document and reflects the duty payable as Ksh.239,432/=. There is no explanation by the Defendant by way of evidence in respect of the disparities in the copies of documents relating to Import Entry No.330. The Defendant has also exhibited their receipt No. 285397 dated 14<sup>th</sup> September 1995 for Ksh.288,033/=. There is no explanation by the Defendant concerning these discrepancies in their documents which are described as genuine. The same Import Entry No. 330 was also produced by the Plaintiff has a stamp for 22<sup>nd</sup> September, 1995 and the duty payable is reflected as Ksh.239,432/=.

17. The Defendant has also exhibited amongst his genuine documents Import Entry No. 107 for the TV's with the duty payable reflected as 478,877/= and the document bears the Defendant's stamp for the date 14<sup>th</sup> November, 1995 which is a replica of the copy produced by the Plaintiff.

18. The Plaintiff's had written to the Defendant on 14<sup>th</sup> June, 1996 (See page 219 of the Defendant's bundle of documents) requesting that the Notice of Seizure issued on 3<sup>rd</sup> May, 1996 be lifted and furnished the Defendant with the Import Entry documents and receipts. As observed hereinabove, the Import Entry No. 330 was amongst the ones with duty cleared by the Defendant in the letter dated 20<sup>th</sup> February, 1996.

19. Having combed through the documents produced by both parties in support of their rival positions, I find the Plaintiff's case that duty was paid by the time of the issuance of the Notice of seizure is supported by their documents and also by some of the Defendant's documents as analyzed above. DW1 in his evidence and in his letters which form part of the Defendant's bundle of documents which consistently reflect that duty was not paid is contradicted by the documents and letters written by other officers of the Defendant's which reflect that duty was paid. The Defendant's side has relied on documents which give contradictory positions regarding the payment of duty.

20. Finally, the Defendant's in their letter dated 11<sup>th</sup> December, 2002 written to the Plaintiff (Page 110 of the Plaintiff's bundle of documents) stated as follows:

**“Kindly note that we have now concluded our investigations and can confirm that it has been established that your goods were properly documented and taxed in accordance with the provisions of the Customs and Excise Act Chapter 472, Laws of Kenya.**

**We therefore uplift the said seizure notice in accordance with Section 196(c) as read with Section 185(d) (iii) of the said Act.”**

21. With the foregoing, this court finds that the Plaintiff has proved that duty had been paid at the time the Notice of Seizure was issued. The Plaintiff is therefore entitled to general damages for unlawful seizure of the goods from the Defendants. As observed hereinabove, the investigations carried out at the Plaintiff's premises involved both the Defendant and the Police. The criminal case which involved the Plaintiff's employees was prosecuted by the Attorney General and ended up in an acquittal on 16<sup>th</sup> October, 2001. Earlier on, the court had released the goods in question from being court exhibits on 16<sup>th</sup> October, 2001.

22. The goods were therefore court exhibits prior to the date of release and the Defendant herein could not have released them. However, there was no reason why the Notice of Seizure remained in force after the release of the exhibits by the court. It has been argued by the Defendant in their submissions that they were not served with the court orders. Both parties herein were connected with the criminal case through their roles played by their different entities and ought to have followed up to know the results of the criminal case. I find that the Defendant played a major role in the detention of the goods. If the Defendant had confirmed the payment of duty from the onset, the goods would not have been seized.

23. The Plaintiff's abandoned the claim for economic loss and/or loss of profits resulting from unlawful seizure (prayer c) and also abandoned the claim for loss of re-investment income profit (prayer d) which are particularized in paragraph 12 and paragraph 13A of the plaint as Ksh.38,099,568,70 and Ksh.2,105,727.94 respectively. No evidence was adduced in support of the abandoned claims. He stated that his final prayer was for Ksh.5,524,673/= general damages, costs and interest.

24. Regarding the claim for Ksh.5,524,673/= loss due to depreciation of the goods, the Plaintiff produced as exhibits invoices for the same. There is no evidence in support of the depreciation or how the prices reflected in the invoices were arrived at. No receipts, account or any other documents have been produced in support of the amount of value stated to have been lost due to depreciation. I find the claim for the sum of Ksh.5,524,673 not proved on a balance of probabilities.

25. As stated by the Court of Appeal in the case of **Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority CA MSA No. 106/06** held that:

**“...A mere invoice as the one produced in evidence was incapable of proving purchase. The claim could have been proved very easily by producing either a receipt from M/s General Tyre Sales Limited which was alleged to have supplied the alleged tyres or a witness from that company to confirm that indeed money changed hands when the alleged new tyres were acquired by and delivered to the appellant... unless it is specifically endorsed to the effect that the goods for which invoice**

was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word "PAID" on the invoice and that would turn the status of the invoice into a receipt... and an invoice is given in cases where an order for support of goods has been made but payment is not yet made."

26. On general damages for the unlawful seizure of the goods, I assess the same at Ksh.3,000,000/= (See for example the case of **Great Lakes Transport Co (U) Ltd (Supra)**).

27. With the foregoing, I enter judgment for the Plaintiff for the sum of Ksh.3,000,000/= general damages, costs and interest.

Date, signed and delivered at Nairobi this 23<sup>rd</sup> day of July, 2020

**B. THURANIRA JADEN**

**JUDGE**