



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION

HCCC NO. 258 OF 2005

SHIGOG EXPORT LIMITED.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

JUDGMENT

1. The context of this dispute was aptly expressed by the Court of Appeal in Aberdare Freight Services Ltd v Kenya Revenue Authority [2006] eKLR:-

“The appeal before us emanates from one of the battlefronts in what this Court aptly christened *“the sugar wars”* of that period, in **Kenya Sugar Board vs Transouth Conveyors Ltd**, Civil Appl. NAI 101/05 (ur). The main combatants in the war are Sugar Importers, Kenya Revenue Authority, Kenya Sugar Board, Ministry of Agriculture and the Ministry of Finance, while the pawns in the whole saga are the sugar consumers and the fledgling sugar milling industry in the country. The general information available is that the country’s annual net sugar consumption is 600,000 metric tonnes, while local sugar production is only 400,000 tonnes, leaving a net national deficit of 200,000 tonnes. Some of that deficit may be imported duty-free, hence the scramble for quick profit.”

2. Shigog Export Limited (Shigog or the Plaintiff) was registered as an importer of sugar and its byproducts and was issued with a certificate of registration of importers on 7th October 2003 (Exhibit Page 1). The certificate was issued by Kenya Sugar Board (KSB) under the provisions of the Sugar Act (No. 10 of 2001).

3. Through Gazette Notice No. 2127 of 2004 (Exhibit Page 2), KSB invited tenders from registered importers for the importation of quantities of sugar specified in the notice. This was pursuant to an arrangement sanctioned in Legal Notice No. 12 of 2004 by the Minister for Finance (Exhibit Pages 2 and 3). In this latter notice, the Minister declared that goods consisting of refined, raw and mill white sugar imported for member states of the Common Market for Eastern and Southern Africa (COMESA) specified in the notice would enjoy a reduction of duty payable.

4. Shigog participated in the bid and was successful. In a letter of 29th March 2004 (Exhibit Pages 5), KSB authorized it to import raw and/or mill white sugar up to a maximum of 5000 metric tonnes under the provisions of Legal Notice No. 12 of 2004 during the period May/June 2004. Subsequently, on 7th May 2004, KSB, under the hand of its chief executive officer, published Gazette Notice No. 3436 of companies authorized to import sugar.

5. The case of Shigog was that on the strength of the letter of authorization, it made arrangements to import 5000 metric tonnes of Sugar from Sugar and Integrated Industries Company of Egypt. In this regard, two invoices, the first of 1st May 2004 being a pro forma Invoice and another of 17th May 2004 were issued by the vendor to Shigog (Exhibit Pages 7 and 8). These two documents will require further discussion.

6. In the Plaintiff presented to Court on 13th May 2005, Shigog avers that its consignment of 5000 metric tonnes left the port city of Suez and sailed to Mombasa. Shown to this Court is a COMESA certificate of origin (Exhibit Pages 9, 10, 11).

7. All was on course, according to Shigog, until Kenya Revenue Authority (KRA or the Defendant) by, a press release dated 26th May 2004

to the public, intimated that only 4.15 metric tonnes were still available to importers to be imported on the COMESA duty free terms and that the COMESA quota for duty free sugar was literally exhausted (Exhibit Pages 12, 13, 14, 15). Shigog contends that at the time of issuing the press statement, KRA intended and very well knew, or ought to have known that the said statement would be relied upon by sugar importers and would induce them to enter into or cancel their contracts for the importation of sugar. Shigog argues that KRA was under a duty of care in making the statement.

8. As will turn out, at the very heart of the Plaintiff's action, is the proposition that KRA overreached its statutory mandate by purporting to regulate the importation of sugar. Further, that it was guilty of negligence. The Particulars are set out in the Plaintiff.

9. Shigog thinks that, in addition, the press statement was false, inaccurate and misleading. It is averred that in other proceedings (being High Court Miscellaneous No. 946 of 2004) the Commissioner of Customs and Excise Duty admitted that he had issued an incorrect press release indicating that the COMESA Duty Free Quota had been exhausted, while it had not. Further, that the press statement gave the impression that importation of Duty Free sugar had been exhausted leaving only 4.15 metric tonnes while in truth and in fact the sugar alleged to have been imported had not arrived at the container freight stations.

10. That acting on the information of the press release, Shigog was forced to divert the consignment of sugar destined to Mombasa to the port city of Mogadishu, Somalia as it had not anticipated the imposition of 100% import duty or Sugar Development Levy and taxes at the port of Mombasa. At the hearing, Abdulrasul Swaleh Mohsen (**Mohsen**) the managing director of Shigog, showed Court a liner Bill of Lading (Exhibit Pages 19, 20) indicating Abdulahi Saleh (**Saleh**) of Mogadishu Somalia as the "consignee" of the sugar.

11. The Plaintiff's case is that, so as to mitigate its losses, it sold the sugar to the Saleh at USD 800,000 although it was eventually paid USD 200,000 only and there has been default in the balance. Shigog states that it has suffered loss and pitches for a Judgment of Kshs.175,300,000.00 arrived at as follows:-

i. Loss of profit	Kshs. 90,000,000.00
ii. Cost of importation	Kshs. 105,300,000.00
iii. Less price paid in Somalia market.....	Kshs. 20,000,000.00
	Kshs. 175,300,000.00

Shigog also seeks interest at the Court rate of 18% per annum and costs of the suit.

12. Through a Defence filed on 29th June 2005, KRA denies the claim. Specifically regarding the press statement, KRA states that it was entitled to clarify issues which arose between it and KSB in reference to Legal Notice No. 12 (The sugar wars alluded to in opening paragraph of this decision?). And that at any rate it denies ever intending to cause Shigog to rely on the press statement.

13. KRA further contended that Shigog's claim is premised on the misconception that KRA had power to allocate sugar from COMESA and that KSB was a necessary party whom Shigog elected not to sue.

14. Also raised, but not pressed at the hearing or in the closing arguments, is that Shigog did not serve KRA with a Notice, and if it did, it did not conform to the form prescribed by Section 13A of the Government Proceedings Act Cap. 40 as read with Section 3(2) (a) of the Kenya Revenue Act (Cap 469).

15. The parties crafted a joint list of agreed issues dated 15th April 2016. Although I reproduce the list, I hope that the parties will not find it discourteous if, in the end, the matter turns on much fewer issues:-

1. Whether the Plaintiff was a duly registered and licensed sugar importer.
2. Whether the Plaintiff made arrangements to import 5000 metric tonnes of sugar.
3. Did the Plaintiff's COMESA sugar land in Kenya before or on 26th May 2004? If so, when?
4. Whether the Plaintiff's goods were subject to COMESA Treaty and its protocol as at 26th May 2004. If so, how?
5. Whether the Plaintiff was entitled to rely on and whether it was prejudiced by the Press release dated 26th May 2004.
6. Whether the Defendant admitted to making an incorrect Press Statement dated 26th May 2004.
7. Did the Defendant demand payment of Duty on the Plaintiff's goods? If yes, how much and under what circumstances.
8. Whether the Defendant acted beyond its statutory mandate when it issued the Press statement dated 26th May 2004.
9. Was the Defendant's Press Release illegal, unjustified or irregular under the circumstances? If so, how?

10. Whether the Plaintiff was forced to look for an alternative purchaser or destination in Mogadishu. If yes, for how much and from which port of shipping?

11. Did the Defendant authorize the Plaintiff to re-export its goods? If yes, at whose request?

12. Whether the notice to sue was issued in accordance with Section 13A of the Government Proceedings Act Cap 40.

13. Whether the Plaintiff suffered loss of Kshs.175,300,000.00/=

14. Whether the Plaintiff is entitled to the reliefs sought.

15. Who is to bear the costs of the suit?

16. The evidence in this matter came from Saleh and Rosemary Mkok (PW 2) for Shigog and Kenneth Ocholla (DW 1) for KRA.

17. As a start, the Court examines the statutory framework governing importation of Duty Free sugar into Kenya from member countries of COMESA. As correctly submitted by counsel for Shigog, Section 27 of the Sugar Act No.10 of 2001 conferred upon KSB the duty to control importation of sugar into Kenya but subject to such regional and international trade agreements to which Kenya is a party. Section 27 reads:-

“Safeguard measures

(1) Subject to such regional and international trade agreements to which Kenya is a party, all sugar imports into the country shall be subject to the prevailing import duties, taxes and other tariffs and such imports shall be controlled by the Board.

(2) The Government shall introduce other safeguard measures as may be necessary to protect the industry from unfair trade practices.”

18. The importation of sugar at the relevant period was made under Article 61 of the Common Market for Eastern and Southern Africa (COMESA) Preferential Treaty. The Minister responsible for Finance was given the following role by Section 118 of the Customs and Excise Act Cap 472:-

“Arrangements for bilateral relief from duty

The Minister may from time to time by notice in the Gazette declare that arrangements specified in the notice, being arrangements that have been made between the Government of Kenya and another government with a view to the mutual relief of duty, shall, notwithstanding section 117, have effect in relation to duty and the notice shall, subject to the provisions of this section, have effect according to its tenor.”

19. It is in exercise of the power granted to the Minister by those provisions of the law that he published Legal No.12 of 2004 (Exhibit Pages 2 and 3).

20. As to the breadth of the power of the Minister under Section 118 in importation of duty free sugar, the Court of Appeal in Civil Appeal Transouth Conveyors Limited -vs- Kenya Revenue Authority & 2 Others[2008]eKLR observed:-

“It is however clear that Parliament by enacting section 118, did not want to clothe the Minister for Finance with more power than is donated by that section. Otherwise express words would have been used to make that clearer. Besides if Parliament had intended to give the Minister power to control importation of sugar, the same Parliament would not have enacted section 27 of the Sugar Act. That section must of necessity be read with section 118. Section 27, donates the power to the Kenya Sugar Board to control imports of sugar.”

21. In respect to the role of KRA, Ochola’s evidence was helpful. He stated:-

“It was the function of KSB to allocate the quotas. The work of KRA was to facilitate importation according to allocated quota.”

22. Once the minister had pronounced himself on duty payable in respect to the sugar to be imported, and once KSA had authorized various sugar importers to import the sugar in pursuance to the minister’s Notice, then KRA had no other role other than to facilitate importation. For as long as an importer was within his quota and the period authorized for importation, then KRA could not impose duty.

23. The press statement of 26th May 2004 by the Commissioner of Customs & Excise Duty, an officer of KRA, has to be viewed in this light. In the letter he was fairly categorical: -

“The Raw sugar quota of 89,000 metric tonnes is now exhausted save for 4.15 metric tonnes only. Any importation beyond the balance of 4.15 metric tonnes will be charged 100% import duty, 16% VAT and Sugar Development Levy.”

24. The raw sugar quota alluded to in that letter is the subject of Legal Notice No. 12 and pursuant to which KSB had authorized Shigog to

import 5000 metric tonnes of duty free sugar during the period May/June 2004 and June/July 2004. It is hardly contested that the period had not been breached.

25. It is common ground that by the time of the press release, Shigog had not benefited from authorization to import the duty free sugar. The communication from the KRA was that, save for 4.15 metric tonnes, the quota of sugar authorized by Legal Notice No. 12 had been exhausted. How did this come to be?

26. An explanation was offered by Ochola in his testimony:-

“KRA considered the quota allocation but already imports had began coming into the country. Gazette Notice was on 1st March 2004. There were no guidelines from KSB on how to manage importation, so KRA was administering on first come first serve basis on condition that they had license and quota allocation.”

27. He then added:-

“At time of the Gazette Notice 3431 of 7th May 2004, there was already importation authorized by KSB outside the Gazette Notice.”

28. Whilst there was no evidence that it was KSB that had authorized importation outside the Gazette Notice, what is clear is that if the quota of 89,000 tonnes had been exhausted by allowing imports outside the Gazette Notice 3431 of 7th May 2004 issued by KSB, then there was breach of that Notice.

29. A fulcrum of the Plaintiff's case is that, by the time of the press release, it had already purchased 5000 metric tonnes from Egypt and the same was on its way to Kenya by sea.

30. In the submissions by Mr. Ontweka for KRA, he passionately submits that the situational circumstances of the events that happened cannot strictly and selectively be blamed or meted on KRA. He argues that a myriad/plethora of missteps by the Kenya Sugar Board, Ministry of Agriculture and various disputes contributed to the state of affairs.

31. Even if the Court was to be sympathetic to that position, still KRA would have no legal power to constrict the authority to import given to importers through Legal Notice No 3431. By sending out a press release that importation beyond 4.15 metric tonnes will be charged 100% import duty, 16% VAT and Sugar Development Levy, KRA was overreaching its mandate.

32. An argument has been made, and this is reflective of what was taken up in defence, that KRA never intended to cause the Plaintiff to rely on the press statement. In his submissions, counsel for KRA, asserts that the information provided was in public interest and reasonable enough to give any prudent business person opportunity to mitigate on its losses, if any.

33. Undoubtedly a function of KRA is to assess and collect taxes, including import duty and VAT, on behalf of the Government. When it says duty shall be charged on an item, then the statement ought to be taken seriously by a potential taxpayer. Ochola in his evidence was unequivocal that:-

“After the exhaustion of the Gazette Notice, all importation attracted 100% Import Duty, VAT and Sugar Levy, irrespective of whether the importation was by an importer who had a quota.”

This underlines the seriousness in which the press release needed to be taken by any authorized importer who had not already used up its quota. It was a simple message, “if you bring in imported sugar under the quota in excess of 4.15 metric tonnes, then it will suffer import duty, VAT and Sugar Development Levy.”

34. It is then this Court's view, and finding, that any authorized importer who was prejudiced and suffered loss as a result of KRA's conduct would have a cause of action against KRA.

35. The manner in which Shigog says it suffered loss is clearly spelt out in its pleadings. First, that by the time of the press release, it had bought 5000 metric tonnes of sugar and the same had left Egypt and was bound by sea to Kenya. Second, so as to mitigate on its losses, it diverted the sugar to Mogadishu but nevertheless still sold it at a loss.

36. KRA doubts and refutes this.

37. What is the evidence? Mohsen, testifying for Shigog showed Court an invoice and pro forma invoice both predating 27th May 2004, the date of the press release. There was also a certificate of origin from the Cairo Chamber of Commerce dated 27th May 2004. As regards diversion of the shipment to Mogadishu, a liner Bill of Lading No. 17199 was produced. The Bill of Lading shows, partly, as follows:-

“Marks and Nos.

KSB/C/CE/25/2 VOL 1

29/03/2004

Number of original BS/L

10/6/2004”

It is not clear when the Bill of Lading was issued.

38. The onus was always on the Plaintiff to prove the action it had framed for itself. Its case, it bears repeating, was that it had paid for the sugar and the sugar had been shipped out of Egypt by 26th May 2004 when KRA released the press statement. Now, in respect to payment of the sugar the Plaintiff produced an invoice and pro forma invoice. This, it has been said before, is inadequate proof of payment and I say a little more when discussing the issue of damages.

39. As to when the ship left Egypt for Mombasa, no evidence was produced by the Plaintiff as to the date of dock out. What was produced was a Bill of Lading showing the consignee as Saleh of Mogadishu. It being explained that this Bill of Lading was issued after the shipment was diverted from Mombasa to Mogadishu.

40. In Black’s Law Dictionary (Tenth Edition) a Bill of Lading is defined as:- Ned

“A document acknowledging the receipt of goods by the carrier or by the shipper’s agent and the contract for the transportation of those goods; a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods.”

41. In so far as it is a document acknowledging receipt of goods by a carrier or by the shipper’s agent, a bill of lading would have insightful information as to when Shigog delivered the imported sugar to the shipper or the shipper’s agent. The Plaintiff’s story is that when the ship left Egypt it was destined for Mombasa. It is expected that a bill of lading for the Mombasa destination had initially been issued. On this the Mohsen testified:-

“I will have to check if I have the Bill of Lading to Mombasa before it was diverted.”

42. The Bill of Lading in respect to the Mogadishu destination is not helpful in establishing when the initial trip to Mombasa commenced. And there being no other evidence, then this Court is unable to find sufficient evidence as when (if indeed) the sugar left Egypt. This is in addition to the Plaintiff’s inability to prove if and when payment for the sugar was made. That is a major setback to the Plaintiff’s case. While the press release may have prejudiced the Plaintiff, it has not proved that it suffered loss in the manner in which it built its case.

43. The Plaintiff does not fare any better when it comes to proof of the special damages of Kshs.175,300,000/= it sought. Special damages once pleaded must be specifically proved.

44. On damages, PW2 gave evidence about sugar prices in Kenya for the period of May – August 2004 (P. Exhibit 2). Those prices are in a letter dated 3rd October 2012, written at a time when the witness was the chief executive officer of KSB.

45. Counsel for the Plaintiff submitted that the loss to his client would be worked out as follows:-

Projected sales less the cost of the sugar less the sales from the Somali market.

46. Using the price guideline produced by PW2, counsel worked the loss as follows:-

Projected profits	-	272,560,000/=
Cost	-	105,300,000/=
Less price from Somali market	-	20,000,000/=

The profit is much higher than Kshs.90,000,000/= that has been pleaded but counsel says his client had made a modest claim.

47. Sadly for the Plaintiff, this Court is unable to accept that the special damages had been proved because the cost of the purchasing the sugar was not proved. Once purchase price paid was not proved, then the substratum of the manner in which the loss was worked vanishes. This is the reason.

48. The Plaintiff produced an invoice and a pro forma invoice to demonstrate the purchase price paid for the sugar. But what is an invoice? This is defined as follows in Black’s Law Dictionary:-

“An itemized list of goods or services furnished by the seller to a buyer, usu. specifying the price and terms of sale; bill of costs.”

While pro forma invoice is:-

“A bill-like document that is sent to a customer to show what the price would be if the customer placed an order.”

49. Neither an invoice nor a pro forma invoice can ever be sufficient evidence of the price paid for the sugar. The two invoices showed that payment was required to be made by cash advance or by irrevocable confirmed letters of credit. The supposed purchase price was substantial and the transaction sophisticated enough that if cash had been paid or letters of credit issued, then there would be documentary evidence of the payment. There is no evidence that the cash was paid (by way of receipt or other acknowledgement by the seller) or that the letters of credit were issued.

50. This Court has to wonder why the Plaintiff would fail to produce such crucial documents. Documents that would not only prove that it had paid for the sugar before the impugned press release but also critical in establishing the loss suffered.

51. The upshot is that the Plaintiff has failed to prove its case and its claim must fail. The Plaintiff's case is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 5th Day of August 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Sagana for the Plaintiff.

Ochieng for the Defendant.