



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL AND ADMIRALY DIVISION**

**CIVIL CASE NO. 65 OF 2014**

**PETRA DEVELOPMENT SERVICES LIMITED.....PLAINTIFF**

**-VERSUS-**

**EVERGREEN MARINE(SINGAPORE)PTE LIMITED.....1<sup>ST</sup> DEFENDANT**

**GULF BADAR GROUP (KENYA) LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The chequered history of this dispute dates back to **2014** when the Plaintiff contracted the Defendants to carry **six (6) containers** by sea from the port of Mombasa to Port Mundra and Port Mangalore both located in India.

2. By its **Plaint** dated **22<sup>nd</sup> May, 2014** and later **amended** on **25<sup>th</sup> July, 2019**, the Plaintiff pleaded that it agreed to sell to **Raj Kripal Lumbar Ltd India (the purchaser)**, **250 Containers of Rough Square Wooden Beams** at a consideration of **USD.3,750,000**. In part performance of the agreement the Plaintiff shipped **six** of those containers through the Defendants on board of **Motor Vessel "Hammonia Gallicum"** on **6<sup>th</sup> March, 2014** by the port of Mombasa, **four (4)** of the containers destined to the port of **Mundra** and the other **two (2)** to the **Port of Mangalore**.

3. The Plaintiff claimed that subsequent to the sailing of the Defendants' Motor Vessel from the port of Mombasa, the Defendants issued to the Plaintiff unsigned copies of the Bills of Lading in respect of the **six** containers for perusal and confirmation. The Plaintiff, however, claims that the Defendants wrongfully withheld and refused to release the original Bills of Lading numbers **321400001014** and **321400001341** thereby causing the Plaintiff to fail to fulfill its obligations with the purchaser. As such the Defendants (sic) breached the provisions of **Section 3** of the **Carriage of Goods by Sea Act, Cap 224, Laws of Kenya**. According to the Plaintiff, the Defendant's refusal to release the Bill of Lading is based on the Defendants' wrongful demand of payment of their debt, owed by a separate entity, to the Plaintiff.

4. For clarity purposes, it was alleged by the Defendants that there has been a long existing relationship between the Plaintiff and Lumberlogs International Trading and indeed shared a common Director. Thus, the Defendant was justified in refusing to release the Bill of Lading to the Plaintiff until a sum of **USD.202,110.67** owed by Lumberlogs International Trading to the **1<sup>st</sup> Defendant** was satisfied. These allegations were made by the Defendant in an application dated **12<sup>th</sup> May, 2014** which I will shortly address below.

5. The Plaintiff further pleaded that consequent to the unjustifiable conduct of Defendants the purchaser terminated **Sale Agreement** whose estimate value was **USD3,750,000/=** as a result of which the Plaintiff suffered damage.

6. Based on those facts, the Plaintiff by its **amended Plaint** sought special damages for a total of **USD.2,476,611.20** as follows:

**a. USD.18,640.00 – As the amount the first Defendant required for payment on account of demurrage and penalties relating to the first lot of 6 containers at destination in India.**

**b. USD.90,000.00 – The value of the six (6) containers which were rendered absolute and the contents destroyed.**

**c. USD.2,367,971.20 – As loss sustained by the Plaintiff as a result of the Defendants' conduct arising out of the termination of the contract between Raj Kripal Lumbar Ltd and the Plaintiff for the supply of Rough Square Teak Wooden Beams.**

7. The Plaintiff further sought for Judgment jointly and/or severally against the Defendants for;

- a. **A mandatory injunction to compel the Defendants to unconditionally release to the Plaintiff the original signed Bills of lading numbers 32140001014 and 32140001341 in terms of the approved drafts;**
- b. **A mandatory injunction compelling the first Defendant to unconditionally and without charge deliver the Plaintiff's cargo at Port Mundra and Mangalore, India upon presentation of the original Bills of lading by the Plaintiff and/or consignee in India;**
- c. **A mandatory Injunction to compel the Defendants to fully indemnify the Plaintiff and/or the consignee for all additional charges and/or penalties incurred or to be incurred by the Plaintiff in India in order to take delivery of the said six containers in consequence of the Defendants' wrongful and unlawful actions including but not limited to additional port charges, customs charges or penalties or other statutory charges and/or penalties;**
- d. **An injunction to restrain the Defendants whether by themselves or through their employees, servants or agents or howsoever else from breaching the contract of carriage contained in and evidenced by the Bills of Lading Numbers 32140001014 and 32140001341;**
- e. **An injunction to restrain the Defendants whether by themselves or through their employees, servants or agents or howsoever else from charging any demurrage or other charges or penalties;**
- f. **USD2,476,611.30;**
- g. **Interest on (f) above at court rates from the date of filing suit to the date of payment in full on a compounded basis, and**
- h. **Costs of and incidental to this suit.**

8. The claim was supported by the witness statement of one **Rami Fakhouri** dated **15<sup>th</sup> August, 2018**, list of documents dated **20<sup>th</sup> August, 2018** and filed in court on **24<sup>th</sup> August, 2018** and a supplementary list of documents dated **22<sup>nd</sup> October, 2018** and filed on **24<sup>th</sup> October, 2018**.

9. Be that as it may, an interlocutory Judgment was entered against the Defendants on **9<sup>th</sup> July, 2014** and the suit was later set down for formal proof on **14<sup>th</sup> November, 2018**.

10. It is however viable to outline some of the applications that came up pending the hearing of the case as well as the decision rendered by the court thereof. I opt to go that way so that the issues which were determined at an interlocutory stage are crystal clear.

11. The first was the **Notice of Motion** Application dated **12<sup>th</sup> May, 2019** filed by the Plaintiff on **22<sup>nd</sup> May, 2014**. A summary of the prayers sought by the Plaintiff by the said application are *inter alia* that:

- a. **The court issues a mandatory injunction compelling the Defendants to unconditionally release to the Plaintiff the original signed Bills of Lading Numbers 32140001014 and 32140001341.**
- b. **A mandatory injunction issue against the first Defendant to unconditionally and without charge deliver the Plaintiff's cargo at the designated ports in India upon presentation of the original Bills of Lading either by the Plaintiff and/or in India.**
- c. **That the Defendants and/or their agents be restrained from breaching the contract of carriage contained in and evidenced by the Bills of Lading (mentioned above).**
- d. **The Defendants and/or their agents be restrained from charging any demurrage or other charges or penalties to the Plaintiff in respect of the six containers unless the Plaintiff returned the containers within 21 days of receipt of the original bills of Lading.**
- e. **That a mandatory injunction issues as against the Defendants to fully indemnify the Plaintiff for all additional charges and penalties incurred or to be incurred by the Plaintiff in India consequence of the Defendant's unlawful actions including but not limited to, additional port charges, customs charges or any other statutory charge and penalty.**

12. Despite service of the application, the Defendants filed no reply to the application, a consequence of which the court allowed the application as prayed save for the prayer seeking the Defendants to fully indemnify the Plaintiff for all additional charges and penalties incurred or to be incurred by the Plaintiff in India. The court pronounced itself as such vide a **Ruling** delivered on **3<sup>rd</sup> June, 2014**.

13. The second application was the Defendants' **Notice of Motion** Application dated and filed on **25<sup>th</sup> June, 2014**. The application was seeking for orders to stay and set aside the orders made on **3<sup>rd</sup> June, 2014**. The key grounds which were relied upon by the Defendants were that, the court lacked jurisdiction to hear the matter by virtue of a clause preferring the High Court of London as the Court of first instance in case of a dispute and further that the Defendants were justified to withhold the Plaintiff's cargo in exercise of general right of lien for a debt allegedly owed by the Plaintiff's Director.

14. The Defendants' application was dismissed in its entirety vide a **Ruling** delivered on **13<sup>th</sup> August, 2014** by the Hon. Lady Justice Mary Kasango. In the said Ruling, the court held *inter alia*, that the Defendants exercised their right under jurisdiction clause to waive the jurisdiction of England by filing an unconditional appearance. The Honourable Judge held that the Defendants had submitted themselves to the Jurisdiction of this court and the Defendant could not allege otherwise. The court further held that the Plaintiff Company is an entity different from its Directors under the law and so are the legal liabilities. However, it is during the pendency of this application that the Plaintiff sought and obtained an interlocutory

Judgment against the Defendants.

15. The Defendants dissatisfied with the Ruling preferred an Appeal. Of course, this ignited the filing of the third application by the Defendants which is a **Notice of Motion** application dated **21<sup>st</sup> August, 2014**. The Application sought for orders of Stay of Proceedings in the suit pending the determination of the intended Appeal and further that Leave be granted to Defendants to file a statement of defence out of time depending on the outcome of the Appeal.

16. The Defendants filed yet another application dated **2<sup>nd</sup> September, 2014** seeking to set aside the interlocutory Judgment entered against the Defendants. Parties were directed to canvass the two applications together. After considering the arguments the court delivered a **Ruling** on **19<sup>th</sup> February, 2016** and dismissed the two applications for want of merit.

17. It is noteworthy that the Defendant appealed against both the Rulings delivered on **13<sup>th</sup> August, 2014** and **19<sup>th</sup> February, 2016** vide **Appeals No.91 of 2015** and **No.23 of 2016** respectively, which Appeals were later consolidated. However, the Court of Appeal upheld the trial court Rulings vide a **Judgment** delivered on **30<sup>th</sup> September, 2016** and dismissed both Appeals.

18. The Plaintiff further filed an application dated **7<sup>th</sup> May, 2019** seeking to amend the Plaintiff and the same was allowed vide a Ruling delivered on **24<sup>th</sup> July, 2019**. The Defendants were yet again aggrieved by the said Ruling and sought to appeal against the order allowing amendments. The Defendants subsequently filed a **Notice of Motion** application dated **15<sup>th</sup> November, 2019** seeking Stay of proceedings pending the hearing and determination of the intended Appeal arising from the **Ruling** delivered on **24<sup>th</sup> July, 2019**. However, this Court was not persuaded by the Defendants' case of Stay and eventually dismissed the application. At the time of writing this Judgment, the Defendants had not updated the court on the position of the intended Appeal.

19. That is the summary of the pleadings and a myriad of applications which were filed by the parties.

#### **Evidence by the Plaintiff**

20. On **14<sup>th</sup> November, 2018**, the matter proceeded for Formal Proof whereby the Plaintiff called one witness **Mr. Rami Fakhouri**, the Director and majority Shareholder of the Plaintiff. He adopted his own witness statement dated the **15<sup>th</sup> August, 2018** and filed in court on **24<sup>th</sup> August, 2018**. He also produced as **Exhibit P1** the bundle of documents headed "**The Plaintiff's further List of Documents**" dated **22<sup>nd</sup> October, 2018** and filed in court on the **24<sup>th</sup> August, 2018** comprising of some 141 pages.

21. The bundle has the copy of **Audited Accounts** for the year **2014** prepared and compiled by **Khaled Mohd AL Otaibi**, Public Accountants and Consultants and a number of correspondences and documents exchanged between the Plaintiff and third parties. He also referred the court to transfer swift message value dated **14<sup>th</sup> October, 2015**. The letter dated **26<sup>th</sup> September, 2014** by the Purchaser, **Raj Kripal** terminating the Contract was also referred to. As a result of the termination, the witness avers that the Plaintiff suffered loss of profit amounting to **USD.2,367,971.20** as reflected by copies of audited accounts at pages 114-141 of the bundle of documents. Although the Plaintiff's cargo was released following orders of this court, the witness avers that the entire cargo was at a damaged state as confirmed by a **Spot Inspection Reports** dated **22<sup>nd</sup> September, 2014** and **25<sup>th</sup> September, 2014** contained at **pages 107 to 110** of the bundle of documents filed in court on **24<sup>th</sup> August, 2018**. The **Spot Inspection Report** was prepared by **Messrs. U.K Marine (India) Surveyors & Consultants**.

22. However, it is important at this point to note that **Mr. Wafula**, Counsel for the Defendants objected to the production of the Spot Inspection Report on the basis that they formed a professional opinion and in accordance to the rules of evidence, they ought to be produced by the maker. The court ruled on the issue in agreement with **Mr. Wafula** by holding that expert reports are always due for production by the makers every time the objection is raised. For that reason, the court held that the reports at **pages 107-110** of the Plaintiff's bundle of documents could not be produced by the PW1 but by their maker.

23. With regard to the Audited Accounts Financial Statements to which **Mr. Wafula** objected to their production on account that it was an expert opinion, the court was not amenable to that objection. Since **PW1** is the Plaintiff's Director, the court was of the view that he could produce the Audited Accounts Financial Statements. The bundle of list of document filed on **24<sup>th</sup> August, 2018** was produced as **Exhibit P1** save for the two Spot Inspection Reports.

24. **PW 1** further stated that since the **six containers** of the teak wood beams was rendered to be of no commercial value, the Plaintiff had agreed with the purchaser to reimburse the purchaser of any expenditure incurred in receiving and having the cargo inspected which was communicated vide a letter dated **26<sup>th</sup> September, 2014** by the purchaser as amounting to **USD.9,875/=**. Further, the expenses incurred for destroying and disposing off the cargo was at a total cost of **USD.8,735/=**. Therefore, the total amount claimed by the Plaintiff is **USD.18,610/=**. The Plaintiff further produced a copy of swift message confirming the payment of **USD.18,610/=** through **CITIBANK N.A New York** to the purchaser. The "outgoing swift message" contained in the supplementary list of documents filed on **20<sup>th</sup> October, 2018** was produced as **exhibit 2**.

25. After **PW1** had testified, the Hon. Justice Otieno recused himself on basis that parties had lost faith in the trial court and it would be hard to do justice for the parties in the circumstances. The file was then placed before me and thereafter **PW1** was cross-examined on **6<sup>th</sup> May, 2019**.

26. On cross-examination, **PW1** stated that although the Plaintiff executed a Contract for supply of **250 Containers** with the Purchaser, **Raj Kripal Lumbers**, the Defendants were not party to the said Contract but only contracted the Plaintiff for the carriage of **six (6) containers** only. That the Contract of carriage is contained in the two Bills of Lading being **Nos. 32140001014** and **No.32140001341** and only related to the carriage of cargo from Mombasa to India as pleaded under **paragraph 3** of the **Plaint**.

27. **PW1** testified that the Plaintiff engaged the services of **SABA GIFCO** as a transport agent and it agreed on the terms in the Bills of Lading, which were binding to all the parties.

28. **PW1** told the court that vide a **Letter** dated **15<sup>th</sup> February, 2014**, the purchaser terminated the contract of sale as a result of which the Plaintiff suffered loss of **USD.3,750,000/=** which is the purchase price of the **250 containers** including the **six (6) containers**. He further stated that the Plaintiff's agent in India received a Port Notification from the port authorities to clear the cargo or the cargo would be auctioned. However, he said that he was not sure if it was the Plaintiff or the Defendant who cleared the cargo but that the Purchaser did not accept the Bill of Lading after they had been discharged. He also stated the Plaintiff now claims **USD.2,457,931.20** as damages for the loss of revenue. Further that the claim is buttressed by the fact that the Plaintiff sold **259 containers** and obtained a total of **USD.2,367971.20** which they claim as loss of profit. The amount of the **six (6) containers** which the **PW1** alleged was **USD.90,000** is also claimed.

29. When cross-examined with regard to the Audited Accounts Financial Statements, **PW1** averred that the maker of the report exhibited some errors on the Plaintiff Company's name by including the word "**private**" and further indicating the year "**2016**" instead of "**2015**".

30. On re-examination, **PW1** reiterated that the Defendants were holding the Bill of Lading on account that the Plaintiff had to settle the amount of **USD.2000** owed by a third party and the court has already ruled on these issues. He also corrected that the contract between the Plaintiff and the purchaser was terminated vide a **Letter** dated **10<sup>th</sup> April, 2014**.

31. With that evidence the Plaintiff's case was closed and parties were then directed to file and exchange submissions in support of their respective cases.

#### **Submissions by the Plaintiff**

32. Having outlined the facts of the case, the Plaintiff opted to submit on the criteria for dealing with the claim for damages arising out of wrongful and unlawful inducement of breach of Contract as provided in the case of **Joseph Ochieng & 2 Others, T/A Acquiline Agencies...Vs...First National Bank of Chicago [1990]eKLR**. In that case the Court of Appeal held the ingredients to be;

- a. The wrongdoer knew or acquired Knowledge of the contract in question and its essential terms.**
- b. He so acted or interfered whether by persuasion, inducement or procurement or other means as to show that he intended to cause a breach of contract or prevent its performance by one party to the detriment of the other party.**
- c. The breach of contract was directly attributed to such act or interference; and**
- d. That damage was occasioned or likely to be occasioned to such other party.**

33. Applying those principles to the instances of this case, the Plaintiff submitted that it has not been denied that the Plaintiff contracted the Defendants for shipment of the **250 containers** to India. Also, that the Defendants were made aware of the Contract of sale between the Plaintiff and the Purchaser, **Raj Kirpal Lumber Ltd**. Further that the Defendants were made aware of the purchaser's intention to terminate the Contract in the event that the Plaintiff failed to supply them with original Bills of Lading as agreed. However, the Defendants continued to withhold the original bill of lading to the detriment of the Plaintiff.

34. According to the Plaintiff, the Defendants have conducted themselves with lack of candour, evasiveness and malice to prevent the Plaintiff from performing its obligations under the Contract.

35. Be that as it may, **Mr. Khagram**, Counsel for the Plaintiff submitted that the facts of this case exhibit the four requirements as established throughout the facts of the case. He further submitted that the fact that there is an interlocutory Judgment on record, these points would be moot. He sought the court to award the damages of **USD.2,476,611.20** as sought and enter judgment against the Defendants to that effect. He also pleaded with the court to award interest at court rates of **12% per annum**.

#### **Submissions by the Defendants**

36. I have considered the Defendants' voluminous submissions filed on **28<sup>th</sup> September, 2020**. I am inclined not to outline them here but to highlight them alongside my analysis.

#### **Analysis and Determination**

37. Having set out the state of the pleadings, the evidence and the rival submissions, it is now convenient to consider the issues raised in this

suit. However, before I proceed in isolating the issues for determination, I wish to comment on the issues which have already been determined, and the prayers which have as a result been overtaken by events and/or determined.

38. In **paragraph 5** above, I did set out verbatim the prayers sought in the **Plaint**. It is my finding that the Plaintiff has been awarded all those prayers save for **prayers (f) and (g)** which are related to determination of quantum and the interest thereof. I am also of the view that the fact there is an interlocutory Judgment that was entered as against the Defendant on **9<sup>th</sup> July, 2014**, the only issue for the determination of the court is the quantum of damages which the Plaintiff is entitled to and whether or not the Plaintiff is entitled to the interest claimed.

39. It is now clear that the Plaintiff's claim in **paragraphs 13 and 16** of the amended **Plaint** is **USD.2,476,611.30**. The claim is made on basis that the Plaintiff firstly, incurred expenses on account of demurrage, penalties and costs for destroying the **6 containers** which were rendered unfit, at a cost of **USD.18,640.00**. Secondly, the value of **six containers** which were rendered absolute and contents destroyed which is a total of **USD.90,000/=** and thirdly, the loss the Plaintiff incurred out of the termination of the Contract with the purchaser which is in aggregate value of **USD.2,367,971.20**.

40. I will begin with the claim for **USD.90,000/=** which the Plaintiff alleges is the value of the **six (6) containers** which were rendered absolute and contents thereof destroyed. The Plaintiff submitted that following the wrongful withholding of the Bills of Lading by the Defendant, the Plaintiff was unable to clear the **six containers** from the port of India and the value of the **Six Containers** was **USD.90,000/=**. It is averred that following an inspection report, the teak wood in the six containers was found to be damaged and un-utilizable owing to too much conduct with water.

41. The Defendant in submitting on whether the claim for **USD.90,000/=** for the six containers was proved, **Mr. Wafula**, Counsel for the Defendants submitted that the Plaintiff's Consignee in India, **Raj Kripal** accepted the **six containers**, cleared the cargo, took it to their yard and opened it. However, they alleged that the cargo was damaged facts which were never proved. He reiterated that the production of the Spot Inspection Report was successfully objected to and the court cannot rely on that report. Further, that **PW1** admitted on cross-examination that he was not present when the cargo was opened in India and without any further evidence in support of the claim for damaged cargo, **PW1's** evidence is as good as hearsay which is inadmissible.

42. This court is alive to that fact the Plaintiff was directed to ensure that the Spot Inspection Reports were produced by the maker of the report. The directions were not obliged with and as it stands, no witness was called to prove that the teak wood in the **six containers** were entirely damaged as indicated in the reports. Consequently, the reports are not part of the court's record. While it may be true that the Plaintiff's properties were damaged there is no proof of the properties damaged. The Plaintiff merely attached the inspection reports in the bundle of documents but they were not produced in court to prove that the contents of the **six containers** were damaged. I find that the Spot Inspection Report as it lies on the court record is of no use and has no probative value at all. The Plaintiff would have been better placed if it had called the maker of report to produce the reports and testify to help the court ascertain the extend of the loss and damage on the **six containers**. It is trite law that a claim for special damages must be specifically pleaded and strictly proved. The special damages claim herein is unproven and I disallow the same.

43. The second claim set for determination is for **USD.18,640.00**. as submitted by the Plaintiff. It is about the expenses incurred on account of demurrage, penalties and costs for destroying the **6 containers** which were rendered unfit. A copy of swift message confirming the payment of **USD.18,610/=** through **CITIBANK N.A New York** to the purchaser **Raj Kirpal Lumber Ltd** was produced in the bundle documents filed on **20<sup>th</sup> October, 2018**. I am satisfied that this special damages was correctly pleaded in the **amended Plaint** and the payment thereof has also been specifically Proved. I therefore proceed to award the Plaintiff **USD.18,610/=** as pleaded.

44. Lastly, on the Claim for **USD.2,367,971.20**, the Plaintiff submitted that it incurred loss of income to a tune of **USD.2,367,971.20** out of the termination of the Contract with the Purchaser, **Raj Kirpal Lumber Ltd**. Evidence was adduced that the Plaintiff had executed a Contract worth **USD.3,750,000/=** but was terminated owing to the unlawful acts of the Defendant by withholding the Bills of lading. Since the Plaintiff did not sell the remaining **244 containers** to the Purchaser, the Plaintiff claimed the amount on grounds of loss of profit and income. The Audited Reports of Accounts were produced to show that the Plaintiff had made similar profits in the subsequent year denoting that were it not of the acts of the Defendants, the Plaintiff would have made similar profits.

45. **Mr. Wafula**, Counsel for the Defendants based their argument on the case of **Hadley...Vs...Baxendale** and submitted that the loss of the **244 containers** is too remote to be claimed in law and was not even contemplated by the two parties at the time of Contract. He added that where two parties had entered into a Contract which one of them breaches, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered as arising naturally according to usual course of things or from such breach of the Contract itself. In that regard, **Mr. Wafula** submitted that the Contract for carriage as evidenced in the Bill of Lading was with respect to **six containers** and not the whole **250 containers** which are somehow extraneous.

46. As for whether there is proof of an alleged loss of profit to a tune of **USD.2,367,971.20**, **Mr. Wafula** submitted that the Plaintiff failed to produce any evidence in support thereof. He reiterated that the audit report was an expert opinion and could not be produced by **PW1**. If the court was to accept the report, then it would have erred and acted against the provisions of **Section 35** of the **Evidence Act**.

47. In my view however, as earlier indicated the Hon. Justice P. J. Otieno allowed the audit reports to be produced as exhibits in this case on the grounds that they are documents related to a Company (the Plaintiff) which the **PW1** was a Director and a majority Shareholder would be in a position to produce. I therefore consider the audit reports as being properly on record.

48. In the event that **Mr. Wafula**, Counsel for the Defendant was so aggrieved then the proper avenue would have been to appeal against the order and not submitting otherwise at this stage. However, **Mr. Wafula** submitted that the report is unreliable since even **PW1** confirmed that it was prepared in respect of a Company known as Petra Development Service Company Private Limited which is unknown to the **PW1** and much different from the Plaintiff Company.

49. It was also **Mr. Wafula's** case that the allegations that the **Raj Kripal Lumbar Limited** terminated the Contract for the sale of **250**

containers which occasioned the Plaintiff loss to be a total lie. He submitted that the **PW1** admitted to having sold **255 containers** including the **244 containers**. According to the Learned Counsel, the Plaintiff had a duty to mitigate loss and any loss claimed should be limited to the **six (6) containers**. He avers that the Plaintiff ought to have engaged other shipping lines for carriage of the other remaining **244 containers**.

50. In my view, the law permits compensatory damages to be awarded for a breach of Contract to include loss of profit when at the time of contracting, the parties knew, or could reasonably be supposed to have had in their contemplation, facts which would lead a person to expect loss of profits if a breach of the Contract occurred. I will illustrate this by giving a hypothetical example;

**“Supposing that if parties at the time of contracting knew or could have reasonably known from the facts that the Plaintiff planned to deliver fuel to the entire community and could not do so without the truck, then loss of profits would be a proper element for the compensatory damages”**

51. In the instant case, could someone comfortably say that at the time of contracting the Defendants knew or could reasonably have known that the Plaintiff planned to deliver by shipment the **250 containers** to the Purchaser, **Raj Kirpal Lumber Ltd** in India and the Plaintiff would not deliver the **250 containers** without the services of the Defendant?

52. In my view, the answer is No, and for the following reasons; At **paragraph 6** of the **amended Plaintiff**, the Plaintiff pleaded and I quote verbatim:-

**“...the Plaintiff through its agents in Uganda, SABA GIFCO, contracted the Defendants to carry the first lot of 6 containers from port of Mombasa to Port Mundra (4 containers) and port of Mangalore ( 2containers) respectively as directed by the Purchaser.”**

The Plaintiff further pleaded under **paragraph 8** that the Defendants breached the provisions of **Section 3** of the **Carriage of Goods by Sea Act, Cap 224** in refusing to release to the Plaintiff the two original signed Bills of Lading in respect of the shipment of the **six (6) containers**.

53. From the above excerpt, it is without doubt that the Plaintiff only contracted the Defendants through its agents in **Uganda SABA GIFCO** for the carriage of only **six containers** and not the entire fleet of the **250 containers**. It cannot also be inferred that the Defendants were aware or could have been aware that the Plaintiff intended to engage its services for shipment of the entire **250 containers**. In my view, therefore, the termination of Contract vide the Ruling dated **10<sup>th</sup> April, 2014** with regard to the remaining **244 containers** is too remote to infer consequential loss as against the Defendants.

54. The contract of carriage between the Plaintiff and the Defendants as rightly submitted by both parties was contained in the two Bills of Lading and liability could only arise with regards to the terms agreed therein. In addition to the aforesaid, although it was established that the Defendants were liable for breach of Contract, as a general principle, the purpose of damages for breach of Contract is, subject to mitigation of loss, for the claimant to be put in as far as possible the same position he would have been if the breach complained of had not occurred. In this case, I have established that the Defendants herein could only be liable for breach related to the shipment of the **six (6) containers**. Therefore, the Plaintiff was only required to specifically prove the damages with regard to **the six containers**.

55. Be that as it may, I refer to the case of **British Westinghouse Electric & Manufacturing Company...Vs...Underground Electric Railways Company of London Limited [1912] AC 673**, where the Court observed that:

**“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of the damage which is due to his neglect to take such steps.”**

56. Mitigation of damages is not a question of law, but one of fact depending on the circumstances of each particular case, the burden of proof being on the defendant (see **African Highland Produce Limited..Vs.. Kisorio [1999] LLR 1461 (CAK)**). In this case, the Defendants submitted that the Plaintiff could have mitigated the loss of income on the **244 containers** by engaging another shipping line for carriage of the containers to India. Furthermore, the Plaintiff pleaded that it had later sold the containers to other third parties.

57. However, although the Plaintiff claimed for **USD.2,367,971/=** as loss for income on profits, I am unable to award those damages as claimed for the reason that upon realizing that the Defendants were in breach of the agreement with regard to the shipment of the **six(6) containers**, which information was in the knowledge of the Plaintiff as early as **June 2014**, the Plaintiff ought to have mitigated the damages that he was suffering following the non-delivery of the **six containers** by the Defendants by looking for services of carriage elsewhere. It cannot be expected that the Plaintiff sat and waited to mourn over the breach of agreement. Consequently, I disallow this prayer.

58. In the end, I hold that the Plaintiff has established his claim against the Defendant on a balance of probabilities with regard to the prayer for the amount paid on account of demurrages and penalties related to the first lot of **Six(6) containers** and I deem it fit and just to grant.

59. I therefore award the Plaintiff:-

**a. A total of USD.18,640/= as pleaded;**

**b. Costs of the suit; and**

**c. Interest at court rates on the sum awarded from date of filing suit until payment in full.**

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 14<sup>th</sup> day of DECEMBER, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

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 **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**