

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 306 OF 2001

1. SHELLY BEACH HOTEL

2. KENSINGTON INTERNATIONAL LTD.....PLAINTIFFS

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

J U D G M E N T

Apology

1. I must first and foremost apologise to the parties for the delay that has occurred between the time the judgment was first scheduled, 23.03.2018 and now. On the same breath the court is grateful to Ms. A. I Hayanga & Associates advocates for having brought it to the court's attention that while this matter was pending judgment, the file found its way back to the registry where a notice was erroneously issued for its dismissal for want of prosecution. That confusion is largely regretted even as the court takes note of the counsels concerns that there had been deliberate attempts to interfere with the safe custody of the file leading to a court order by judge Havelock dated 17/9/2013.

Background and outline of the facts

2. In this suit the plaintiffs seeks from the defendant **USD 480,600/= (40,370,400)** being the lost income from use of the suit trucks for the period the same could have been used by the plaintiff if not for the seizure, value of the two trucks in the sum of **Kshs.7, 000,000**, legal expenses and related charges **Kshs.500,000/=**, punitive /aggravated damages as well as interests and costs.

3. The claim is grounded upon an operation carried out on 11/4/2000, pursuant to information by an informer that the 2nd plaintiff had in its possession unregistered motor vehicles and was using interchanged registration number plates on such vehicles. That raid which the plaintiff contend was unlawful, led to the seizure of two Trucks; **Chasis No. 55978 and 407372**, which the 2nd plaintiff says was assigned to it by the 1st plaintiff who had imported the same. The seizure was equally faulted for having been unlawful because all the customs duty had been paid receipted and the vehicles released to the 2nd plaintiff. As a result of the seizure and detention the plaintiffs alleges to have suffered loss and damage they claim against the defendants. Particulars of such loss were then given and calculated at an aggregate sum of **USD 480,000/=**.

4. It was equally pleaded and claimed that as a result of the seizure and detention the plaintiff lost contracts with a third party which contracts were then awarded to third parties.

5. In the defence filed by the defendant, it was admitted that having reasonably suspected that the 2nd plaintiff had in its possession uncustomed motor vehicles, they visited its premises on the date pleaded by the plaintiffs and on failure to produce evidence of payment of customs duty, they gave notices of goods to be deposited in customs warehouse and towed away two motor vehicles chassis no. 559 78 and No. 2CF 32CP004073752. That seizure was effected after a statement was taken from the General Manager of the 2nd plaintiff, one Stephen Wabomba Wangila, to the effect that the company would implant registration plates for the registered trucks onto the unregistered ones.

6. After the seizure, one Abdilatif Ali Hussan (DW 2), carried out further investigations which revealed that the two vehicles had actually had their customs duly paid and recommended release provided warehouse rent was paid to the customs warehouse. That decision provoked the suit which was first filed in the Chief Magistrates Court, Mombasa, in which the trucks were ordered to be released and the trucks were indeed released on 2/8/2000.

7. The Defendant by pleadings and evidence contended that the seizure was lawful having been necessitated by the 2nd plaintiffs failure to produce the evidence of payment of customs duty and that the damages claimed could not have been a result of the seizure because the two trucks were not only unregistered but were also immobile due to mechanical breakdown and had to be towed to the customs warehouse and were actually released back to the plaintiff in the same conditions they had been seized. It was equally contended that the subsequent auction of the two trucks, by a judgment creditor, could not be blamed on the defendant because the said creditor was actually owed by the 2nd plaintiff.

8. In addition the defendant contended that the 2nd plaintiff had make a declaration to customs department that the value of the two trucks was **Kshs.459,131,000/=** and **804,537/=** respectively, hence the claim of **Kshs.7,000,000/=** was exaggerated and unfounded. In effect the defendant denied the plaintiffs claim in entirety and prayed that the same be dismissed with costs.

Evidence adduced by the plaintiff

9. The production of evidence commenced on 29/7/2003 before Khaminwa J when PW 1, PW 2 and PW 3 gave evidence in chief and the defendant's counsel sought leave to reserve his cross examination of all the three witnesses for another date. It is of note that even though that leave was granted then, the plaintiff main witness Mr. Stephen Wabomba Wangila did not attend court to be cross-examined and have his testimony tested as dictated by the provisions of Section 146, Evidence Act.

10. I have gone through the record of proceedings and it is evident that at least on four occasions, this court and those before it, had directed that the plaintiffs 1st, 2nd and 3rd witnesses attend court for reserved cross examination but only PW 3 Mr. Henry Watta Kiburi attended and was cross examined. That to this court renders the probative value of the evidence of the two witnesses who did not attend, worthless. Having not been tested by cross examination, I do consider the evidence of PW 1 & PW 2 worthless and I shall disregard same in my determination of the dispute.

11. That leaves only the evidence of PW 3, PW 4, PW 5, PW 6 & 7 on behalf of the plaintiff and that by the DW 1, DW 2 on behalf of the defendant to be the basis of this court's determination. In my assessment of the entire evidence though, the evidence of PW5 and PW6 go towards solving the dispute as to who was the true plaintiff. That to me is an issue that does not call for my determination being not a pleaded issue.

12. The evidence by PW 3, as a motor vehicle assessor and valuer was to the effect that he inspected the two subject vehicles at the 2nd plaintiff's yard, and not the customs warehouse, and prepared the valuation report produced as exhibit P7. To him the two motor vehicles were serviceable. He valued both at Kshs.7, 000,000/=. He said both were not locally registered and that he road tested the IVECO but not the other vehicle due to the fact that it did not have batteries. That piece of evidence only confirmed that the two units were indeed in possession of the 2nd plaintiff and what their market value was as at the date of assessment. Of note regarding this witness's testimony is the fact that he valued the motor vehicle in the month of February before they were towed away in April 2008

13. PW 4 was one Clyde Anthony who testified that he was introduced to the directors of the 2nd plaintiff by PW 1 and met the directors while visiting the United Kingdom. He said that he contracted the 2nd plaintiff's vehicles on 11/5/2000 for purposes of transporting cargo. He produced the letters of offer detailing rate of payment for the transport. He said the contract to transport cargo to Kampala was open-ended while that to Tanzania was for a period of 12 months and renewable.

14. He said that a truck could make 3 return trips per month. He said the contract was not performed because the lorries had been impounded and he had to get an alternative transporter and that took him a considerable time to achieve.

15. On cross examination the witness said that there was no formal contract but just letters of offer and acceptable and that they negotiated on account of two (2) motor vehicles. At the time he wrote the letters some cargo had arrived in vessels while other vessels were yet to arrive and he was not sure when the vessels would arrive. He denied knowledge if the vehicles were registered in Kenya just as he did not know the internal workings of the 2nd plaintiff.

16. PW 5 Johnson Otieno Adera, a state counsel, and Assistant Registrar in the Registrar General's Office, was called to shed light on the registration of apparently two companies going by the 2nd plaintiff's name. He produced the certificate of incorporation for company no. C84440 which was registered on 11/12/1999 but an issue about the registration was raised by a company with similar name and allegedly registered on 19/12/2000 and issued with Certificate of incorporation no. C.92271. The directors of the company no. C84440 were identified as Collins Ford, Lillian Ford and Anne Marie Ford with one Victor Were as the company Secretary. Company No. C92271 was said to have been promoted by, Stephen Wabomba Wangila and Yahya Suleiman Mbuthia. He produced the two certificates of incorporation as Exhibit P14 & 15 and correspondence as Exhibit P16 and 17, the witness said that even though the first company had always filed returns the second had never and his contacts with the directors of the 2nd company were to impress upon him that the first company had not been registered.

17. In cross examination, the witness confirmed that the 1st company had always filed return unlike the 2nd company which had not. He said that he had directed the 2nd company to change its name but nothing had been done as at the date of him giving evidence. He confirmed the existence of two companies by the name of the 2nd plaintiff and said it was difficult to know which of the two was the real plaintiff in this suit was was.

18. PW 6, Victor Arara Were, was the company secretary of the 2nd plaintiff at the time. To him the company he acted for was registered under certificate no. 84440 and produced a Board resolution of 30/10/2000 appointing him to so act as **Pexhibit18**. He produced the Annual returns as **PExhibit 21** for the period 2000 to 2006. He also produced CR 12 as **Pexhibit 23 a-c** to show that the Fords had remained the only director of the company. To him the cause of action in this matter was by the company he acted for and not the other registered under certificate no. 92271.

19. On cross examination he said that he only dealt and knew only one of the three directors, Mr. Collins Ford and that he did not attend the meeting whose minutes are captured in PExhibit 18 even though the documents says he was one of the people in attendance. He denied involvement in the day to day running of the company and confirmed that he knew nothing about the facts of this case. To this court, the evidence of this witness added very little towards resolving the dispute at hand but it would seem that the purpose of letting him was to address the side issue of which of the Kesingtons was the authentic one.

20. PW 7 was Mr. Collins Stephen Ford, a director of the company registered as C. 84440 and owns 98% of the shares and the managing director thereof. His evidence was that through one Mr. Phillip Jone, the General Manager of the 1st plaintiff he imported trucks, trailers, generators and loaders and produced a bill of lading in that regard as PExhibit 24.

21. He said the dispute in this suit started in February 2000 while he was not personally present in Kenya and that his then General Manager PW 1 was in a better position to say what transpired. He was however told by PW 1 that the two trucks were taken away by the defendant and he did not know where they were as at the date he testified in court.

22. He said by the time the trucks were seized he had executed a contract with a Tanzanian Company to have machinery to Tanzania and Uganda and expected to earn some 500,000 USD a figure worked out by an accountant retained by Mr. Wangila on the plaintiffs behalf. That projected income was lost on account of seizure of the trucks by the defendant. He prayed that the plaintiff be awarded compensation payable by the defendant for the loss of anticipated projects as well as the value of the trucks in the sum of Kshs.7,000,000/= together with costs of the suit.

23. The witness said that the company secretary was one Victor Were and that Mr. Wangila and John were employees of the 2nd defendant and not directors. He said he had records of monthly wages to prove their status as employees not directors. He produced the monthly wage sheet as **PEXH 25**. He however confirmed knowledge that Mr. Wangila and John incorporated a company with similar names as the 2nd plaintiff and that Mr. Wangila was dismissed from employment on 15/7/2000 as evidenced by dismissal letter produced as exhibit P26. He however wished to rely on Mr. Wangila's evidence and that the 1st plaintiff had no interest in the litigation because their only involvement was the importation of the trucks on his behalf.

24. On cross examination, the witness repeated that he was outside jurisdiction when the cause of action arose and that his evidence was based on information given to him by Mr. Wangila and Mr. Clyde Sharp. He was unable to tell whether the trucks were driven or towed out of his yard but stated that at that time he had 11 trucks for the purposes of the transport business but the contract with Trans east Ltd only intended to engage two trucks. There were no specification of what the two trucks were to take, he repeated having not been a signatory to the contract and could not tell how long the trucks stayed at the defendants yard. When shown the letter of offer for the contract, he confirmed that the same was made on 18/5/2000 yet the trucks had been taken away on 11/4/2000. At the time of seizure the trucks were yet to be registered in the name of Shelly Beach Hotel Ltd who had imported them into Kenya. On the value claimed on account of the two trucks the witness said the same was based on the valuation report by a valuer he commissioned but when shown exhibits P3 & P4 he confirmed that the two trucks had a declared value of Kshs.444,507/= and 306,470/= respectively which did not add up to Kshs.7,000,000/=.

25. The witness confirmed and reiterated that by the time the trucks were impounded they had not been registered in Kenya. He however denied knowledge of PW 3 and PW 2 and what both told the court in evidence. He was aware that the suit started in the magistrate's court but did not know if it was dealt with to finality by that court.

26. On re-examination, the witness told the court that the declared value for purposes of duty was not the same as the market value. He added that the clearance of the trucks was undertaken by transami and that only Mr. Wangila would know what happened with the case at the magistrate's court. He could also tell the court when the trucks were ever released. After that witnessed stepped down the matter was adjourned to enable the plaintiff call other witnesses and avail PW 1 & 2 for cross examination but that took parties a period between 9/2/2006 till the 2/9/2015 when this court took over the conduct of the matter and gave directions that the matter would proceed from where it had reached.

27. When hearing resumed on 29/2/2016, only PW3 attended for cross examination however PW 1 never attended despite all attempts by all parties including the court. Accordingly the plaintiff's case was closed without PW 1 & 2 being cross examined.

Evidence by the defendant

28. On behalf of the defendant, two witnesses, KIPSANG SAMBAI DW 1 and ABDILATIFF ALI HASSAN, DW 2 were called as witnesses. DW 1, was the forensic investigator with ethics and anti-corruption commission at the time of his testimony but who was at the material time to the cause of action arose, seconded to the defendant in its revenue police unit. He adopted his detailed witness statement dated 23/8/2016 and produced 6 documents marked EXH. D 1-6. The gist of the witness statement was that the vehicles were impounded on reasonable suspicion that duty had not been paid on them and that the same were not in sound mechanical conditions hence had to be towed to the defendants yard and that upon investigations it was established that duty had been paid and the vehicles were therefore released to the plaintiff. He confirmed upon cross examination that PW 1 confirmed to him that the two plaintiff had no relationship save that their Chief Officers were friends and that at the time of importation the 2nd plaintiff had not been incorporated hence the trucks were imported in the name of the 1st defendant. He said that having been impounded the trucks were released to the 1st plaintiff on 2/8/2000 after it was established that import duty had been paid to the defendant. On the date of removal, the witness said they were informed that the motor vehicles were not serviceable and hence they had to be towed and not driven to the defendant's yard.

29. On reasons for seizure the witness stated that there was a report that the plaintiff would exchange registration number plates on unregistered vehicles hence the seizure was in good faith merely to establish whether or not duty had been paid. He added that the suspicious of number plates being exchange on the vehicles was confirmed when he interviewed Mr. Wangila. When asked questions by the court the witness said that the vehicles were towed on 11/4/2000 to the customs warehouse and that when the court ordered release, there was demand for warehouse rent which was also successfully contested by the plaintiffs.

30. DW 2 was Mr. Abdilatiff Ali Hassan, an employee of the defendant trained in customs taxation. In 2000 he was deployed in Mombasa in investigations department as a revenue officer. On 11/4/2000, him and PW1 were detailed to investigate allegations that the 2nd plaintiff was using trucks on Kenyan roads whose payment of customs import duty was suspect. The suspicion was occasioned by information that the 2nd plant would interchangeably use road licenses and registration number plates on different vehicles. After their investigations narrowed down on the two suit trucks, they visited the 2nd plaintiffs yard and demanded production of documents for the two vehicles to prove payment of customs duty and on failure to so produce by the 2nd plaintiff the two trucks were ordered to be deposited in customs warehouse and were then towed away because they could not move due to mechanical unsoundness. Later he carried out investigations at the roads Transport department and confirmed that indeed duty had been paid. He is the person who instructed customs warehouse to release the trucks but subject to payment of customs warehouse rent for the period 11 April to 16/5/2000 because to him the detention was occasioned by failure by the 2nd plaintiff to produce documents. He was surprised that the plaintiff had made a huge claim for alleged loss of use of the motor vehicle which were never in running conditions.

31. On cross examination, the witness said the detention was to enable the owners to prove payment of customs import duty. He denied

talking to Mr. Wangila and that it was the duty of the plaintiff to produce the documents of import and payment of duty.

32. On re-examination, the witness stated that the vehicles actually belonged to the 2nd defendant but were imported into Kenya by the 1st defendant. To him the two trucks would not have been detained if the 2nd defendant had shown to them the documents on 11/4/2000.

33. With those two witness, the defendant case was closed and parties were then directed to file and exchange written submissions. The submissions by the plaintiff were filed in court on 3/7/2017 together with list of authorities while those by the defendant were filed on 9/6/2017 with a separate list of authorities.

The submissions by the plaintiff

34. Beyond recap of the evidence by the parties, the plaintiffs urged their case along the lines of agreed issues dated 21/5/2003 even though it was all along contended that one Maundo Advocate did not validly represent the plaintiffs. Those issues were structured into 12 but can be broadly lumped into six issues besides the incidental issue on costs. The six substantive issues in the view of the court are:-

- i) *Whether the matter was res judicata mbs cmcc no. 2437/2000?*
- ii) *Whether there was issued and served notice of intention to sue?*
- iii) *Whether the trucks were ever seized or deposited into customs warehouse?*
- iv) *Whether the detention was based on reasonable suspicion as lawful ground?*
- v) *Whether the plaintiff had suffered any damage in the hands of the defendant and entitled to compensation?*
- vi) *What would be the quantum of such compensation if due?*

35. To the plaintiff the question of validity of detention of the trucks was decided by the court while this matter was still before the magistrate's court as Mombasa CMCC No. 2437/2000 where the release was order at the defendant's costs and in default the plaintiff to meet such costs and claim from the defendant. The plaintiff contended that despite own finding that the detention was based upon unfounded suspicion, the trucks were not released until a court order was issued and even after the court order there was still non-compliance till get another order was issued. The plaintiff contend that the defendant's conduct amount to outright contempt which matter the court ought to take into account and find that the defendant wronged the plaintiff by detention of the two trucks.

36. On res judicata, the plaintiff took the view that the suit in the Chief Magistrates Court was merely for release of the trucks and did not concern itself with the damages sought herein. It is contended by the plaintiff that the matter never proceeded beyond the interlocutory applications and cannot attract the principle of res judicata. In any event, it was submitted, the Chief Magistrate's Court Case was the same one transferred to this court.

37. On damages, the plaintiffs relied on the provisions of Kenya Revenue Authority Act, Section 23 to permit suits against the commissioner general and for payment of damages and costs by the said officer and cited the decision of **Satwan Singh Dhanjal vs KRA [2005] eKLR**.

38. On the quantum of damages the plaintiff urged that it be awarded both special general and exemplary damages and cited to court **Mombasa Development vs AG [2000] eKLR** on when that class of damages is awarded. It was submitted that oppressive intrusion and trespass had been proved and therefore exemplary damage were due and merited.

39. On loss of business the claim is grounded on a contract between the plaintiff and Trans East Ltd disclosed in a letter of offer dated 18/5/2000 and accepted by the letter of 26/5/2000.

40. For the defendant, submissions were offered to the effect that on a tip from an informer, the law protects it from revealing, they sought to establish if the plaintiff had been using unregistered vehicles on the road by interchange of road licenses and registration number plates. Reliance was placed on a statement given on 12/4/2000 by PW 1 to DW 1 that the plaintiff would supplant number plates on unregistered trucks from use on the Kenyan roads.

41. So the first attack by the defendant against the suit is that it is res judicata CMCC NO. 2437/2000 because in that suit the court had said that the matter would be disposed off at that stage and final orders made. To the defendant, the magistrate's court had jurisdiction to deal with the matter pursuant to Section 205 (2) Cap 472 and it was therefore unnecessary to have the suit transferred to the High Court but the plaintiff had it so transferred to avoid the impact and finality of the final orders by the magistrate's court.

42. The decision in **Francis James Khasia vs Public Service Commission [2016] eKLR** was cited to court for the proposition that courts ought to be vigilant to guard against litigants evading the application of the doctrine of res judicata stressing the fact that the best should be whether the plaintiff can be seen to bring afresh a matter previously heard and determined by a court of competent jurisdiction.

43. On the merits of the case, the defendant takes the first issue with the failure by PW 1 & PW 2 to attend court for purposes of cross examination. It is submitted that the right to cross examination having been reserved and all attempts having been made to compel the witness to be cross examined and having evaded the cross examination, that evidence was subject to be totally ignored. For that failure to be cross-examined the defendant contends that their evidence ought to be disregarded all together and relies on the decision of people of **Phillipines vs Rervando Monje Rosario Hardino & 3 Others**.

44. The admitted fact that the two trucks were not registered in Kenya was taken up for the position that the same would not be lawfully employed to Kenyan roads hence no income would be lost by their being impounded. Overall the defendant took the view that the evidence of PW 4, 5 & 6 and even 7 do not assist the plaintiffs case much and that the case thus should be dismissed. The evidence of DW 1 & 2 were submitted to have been plain cogent and sufficient to displace the plaintiffs claim of illegal seizure and demonstrate that the trucks were merely deposited in a customs warehouse pending verification of status of duty payment. On general damages for loss of business, exemplary damages and special damages, the defendant contended and submitted that no proof of injury was established and therefore that the plaintiff suit should fail in whole. In the defendant's submissions for the plaintiff claim for damages to succeed, it was its duty to prove a valid contract and capacity and ability to perform the validly executed contract which it is contended was never done. The defendant then cited to court the precedent in *Amos Kinuthia vs Vaga Ltd [2006] eKLR* and *African Highland Produce Ltd vs Kisoria [2001] 1 EA 1*.

45. On the claim of Kshs.7,000,000/= being the loss of the value of the trucks on account of sale pursuant to execution of a court order, the defendant made submissions that the trucks were released to the plaintiff in the condition they had been seized and therefore no loss is attributable to them. *Johnson Nugwe Wanganga vs Joseph Nyaga Karugi [2014] eKLR* was cited for the proposition of law that loss of trade debts and non-payment of bank loans are not anticipated as the natural and probable consequences of breach of a landlord tenant relationship.

46. On punitive and aggravated damages, counsel made submissions to the effect that these are damages at large but depends on and are affected by the motive conduct and motive of committing the tort. Decisions in *Abdulhamid Ebrahim Ahmeed vs Municipal Counsel of Mombasa* as well as *Kapa Oil Refineries Ltd vs KRA & Others* was cited for the position of law that motive and conduct that suggest malevolence is an important consideration and that demand for payment of taxes is not malicious, oppressive of irrational because the same are sanctioned by a statute.

Issues for determination

47. Having read the pleadings in the file, the evidence led and the submissions offered, and having taken into account the agreed issues filed by the parties, and without belittling their endeavor and industry in coming up with the 12 agreed issues, I have formed the opinion that there are only six issues, as isolated heretofore, sufficient to assist the court adequately consider and determine the dispute between the parties. In determining those issues, however, I will seek to answer one overriding question, whether, the seizure, detention or deposit of the two trucks by the defendant was accentuated by ignoble considerations or made in pursuit of the objectives of the law under Customs And Exercise Act as read with Kenya Revenue Authority Act?

Analysis and determination

Is this suit res judicata

48. There was the pleading by the defendant at paragraph 10 of the statement of defence as well as the written submissions that the suit is bad for being *res judicata*. The basis of that pleading is that the issue of release of the motor vehicles was determined by the court by its ruling dated 21/7/2000. Outrightly, this was an improperly taken objection or just wholly misconceived. There is evidence in the proceedings of this file that the said order was issued pursuant to an interlocutory application in this very file prior to it being transferred from the lower court. The first point which militates against the objection being seen to be properly taken is that there is only one suit. There has never been a subsequent suit this court has been called upon to adjudicate by re-opening a concluded matter. The words of the statute, Civil Procedure Act, Section 7 emphasize the existence of a former suit. The Act provides:-

“Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. (Emphasis added)

49. I do find that there having been no other suit, prior to this suit, this objection which must be viewed as a preliminary objection must be rejected pronto. It is the kind of objection that the court must frown upon as serving no purpose but to confuse issues and waste time^[1]

Did the plaintiff serve a letter before action?

50. There was a document produced as plaintiff exhibit 6 by consent. That letter dated 18th January 2001 is evidently a demand which I accept as sufficient for the purposes of a letter before action. But then that pleading was not pursued by the defendant because no evidence was led on it and even submissions were never offered on it. While I do note that the suit and the defence were pleaded way before the new constitution with its robust provisions including access to justice as a fundamental freedom and right, I also appreciate that the defendants counsel was cognizant of the current jurisprudence that failure to serve a notice before action cannot be the basis to defeat a suit.^[2]

Defendant act within the law with respect to the two trucks

51. The fact that the plaintiff's trucks were seized, impounded or taken away and deposited at a customs warehouse is in dispute but common ground. The dispute is whether or not the taking away, impounding or seizure and deposit into the custom warehouse was lawfully undertaken or not. The plaintiff contends that the action was unreasonable and unlawful because there was no justifiable ground to take the action the defendant took while the defendant takes the position that by virtue of its statutory duty to collect and account for revenue, import customs duty included, it was entitled to verify if the duty payable on the two trucks had been paid. It is also common ground that the two motor vehicles were indeed not registered in Kenya and it was not asserted or denied by the plaintiff that when DW 1 & DW 2 visited their premises they did not avail documents to evidence payment of duty.

52. Up to this level it important to note that under the Customs And Excise Act, the onus of proof of the origin or payment of proper duty is upon the person claiming or in possession of such goods[3]. That being the position of the law, and with the statutory duty upon the defendant to collect and account for taxes and duties, once they raised questions on payment of duty with the plaintiffs under-section 177 it was the duty of the plaintiff to show evidence of payment. Without such availing such evidence, I do find that the defendant was in-law entitled to take possession of the goods which were then uncustomed, prima facie, for deposit at the customs warehouse.

53. I therefore find that the fact that the plaintiff had within its premises and possession unregistered motor vehicle was a good reason enough and therefore a reasonable and probable cause, for the defendant to demand proof of payment of duty and on failure to produce evidence of payment, it was within the defendant's statutory right to take possession of the motor vehicles.

54. I therefore determine the third issue for determination to the effect that the defendants officers, DW 1 and DW 2, acted within their rights to take possessions of the motor vehicles for purposes of verifying if due duty had been paid.

Did the plaintiff suffer any loss or damage as a result of the defendant's actions

55. That the trucks were taken away on 11/4/2000 and cleared for release on the 18/5/2000 is also not in dispute. I may only wish to add that it took the defendant some 37 days or thereabout to carry out and complete their inquiry regarding payment of duty. Noting the date of the occurrence and taking judicial notice of how some of our public institutions used to work then, one must feel obligated to commend the defendant of a fast and expedient action even those days before fair administrative action became one of our obligatory value systems.

56. However, having so acted with splendid speed, the defendant through PW 2 placed a condition for the release of the trucks to the plaintiff. The justification or propriety of decision to make the release conditional to the payment of warehouse rent would be the fulcrum upon which the question of whether or not the plaintiff suffered any loss by continued detainer thereafter must be decided.

57. By definition under the Act, a customs warehouse is a place approved by the Commissioner for the deposit of un-entered, un-examined, detained or seized goods for the security thereof and or pending payment of duties thereof. Customs warehouse rent is however not defined but it must, from the definition above, mean the rent charged for the safe keeping of such goods as defined for the sake of security thereof or pending payment of the due duties.

58. In the case of the plaintiff's goods, the two trucks were not un-entered, detained or seized goods and were never deposited there for purposes of any established outstanding duty but for the purposes or verification if duty had been paid. In the words of the defendant in their own submissions, *the trucks were not seized impounded or detained but merely deposited pending determination of their duty payment status*. I therefore find that having not been kept there for purposes of the purpose customs warehousing there was no rent accruing upon them and it was therefore not reasonable or justifiable for the defendant to insist on customs warehouse rent being paid before release.

59. The second reason the said customs warehouse cannot be held to have been the justification to hold the goods after the 18/5/2000 is the fact that the same issue was brought before a court of competent jurisdiction pursuant to Section 205(2) of the Act and a determination on the same made on the 21/7/2000.

60. In that ruling, the trial court said:-

“This is a ruling into an application dated 3/7/2000 in which the applicants seek orders that the defendants by themselves, their servants agents or employees be restrained from selling, disposing or otherwise dealing or interfering with the plaintiff's vehicles ERF Truck Chassis No. 55978 and IVECO Truck Chassis No. 407372 until the hearing and final determination of a suit. It also prays for an order that the defendants do immediately restore and return plaintiffs truck unlawfully seized from their possession.

The facts clearly show that all the requisite duty was paid. After 3 years, the defendants seized and detained the goods claiming duty had not been paid and if paid, not in full. They carried out this investigations and valuation. They (Defendants) confirmed that indeed duty had been paid.

They now want to demand charges for storage for the period the trucks have been in the Customs Warehouses, failure to what they will Auction them. It is clear that the Defendants/Respondents are the ones who caused the trucks to be seized and detained. They are the ones who caused them to be removed from the plaintiff's warehouse to this warehouses.

They cannot expect to be paid the charges at all. In fact they are the ones to return or cause them to be returned to the plaintiff's warehouses at their expense.” (emphasis provided)

61. I have not seen any challenge on that finding by way of an appeal or review. It only means that a determination on the propriety of the warehouse rent demanded by the defendant remain intact as adjudged to have been unlawful. It is therefore a matter that cannot be re-opened for re-adjudication at this juncture. The matter is simply res judicata it having been so determined.

62. If it was unlawful and unwanted for the defendant to hold on to the trucks on account of unmerited warehouse rent then it follows that the said chattel was kept from the plaintiff in a tortious manner. That is what I understand to constitute the tort of detinue or just trespass to goods. The moment the defendant established that there was no duty payable on the trucks, the due duty having been paid, their right to have the property deposited at the warehouse ceased and any extra day the trucks remained so withheld, there was a wrong committed against the plaintiff for which wrong and therefore damage, the plaintiff is entered to damages for the detention. The damages for detention are at large and are awarded over and above the value of the goods, if yet to be returned or on their return, as well as any special loss which directly and naturally flows from the wrong[4].

63. In this case, the evidence by both sides including the plaintiffs own pleadings at paragraph 11 is that the Chattels were released on 2/8/2000 and therefore the court cannot order release or payment of the value thereof. The only remedy that is available for award is damages for detention. I take the view and do find that the vehicles having been unregistered and proved to have been mechanically unsound hence could not be driven but had to be towed, the same were not employed for generation of income and therefore no loss of use was proved by the plaintiff.

64. On the claim for value of the two trucks in the sum of Kshs.7,000,000/=, I do find that the same is not awardable for the following reasons. First, it was not proved when the debt due to General Tyres Sales Ltd was incurred so as to relate it to the detention by the defendant. Secondly, the loss due to attachment having been the result of a lawful court decree, it was not proved how the defendant can become liable to the plaintiff in a decree lawfully obtained. In effect find that the attachment and sale of the said chattels after release by the defendant was not the natural consequence of their detention for the period between 18/5/2000 and 2/8/2000.

65. Having found that the plaintiff is entitled to damages for detention, I have taken into account the fact that the chattels could not have been legally and gainfully employed prior to registration together with the fact that the same were released to the plaintiff prior to such registration and the fact that, I have found the demand for warehouse rent to have been wrongfully made, I do award to the plaintiff damages for detention in the sum of Kshs.1,000,000/=.

66. How about the claim of USD 480,600 [Kshs.40 370,400/=] claimed on account of loss of profits from the contract with Trans East Transport Limited? Loss of profits or user is a special damage claims the law demands must be specifically pleaded and strictly proved. Indeed the plaintiff gave particulars of what each truck would have earned per month in gross figures but that was all the plaintiff did. There was nothing more. In business like the one pleaded by the plaintiff there are obvious and necessary incidental expenses and overheads like fuel, levies and operating costs including staff salaries which naturally and obviously affect the net sum deemed profit. Even that profit is then subjected to taxation and it is not enough that the plaintiff would earn the sum quoted in accepted the letter of offer and its acceptance.

67. More importantly the vehicles had not been registered and I do take judicial notice that an unregistered motor vehicle would not have been licensed to be operated on the road to execute the contract pleaded.

68. The other reason this claim cannot be awarded is the fact that there was evidence by both sides that the plaintiff owned other vehicles and the contract disclosed in the correspondence between the plaintiff and Trans East Ltd envisaged deployment of 5 vehicles without specific reference to the two trucks. In fact the contract was initiated by the letter of offer and accepted while the two trucks remained with the defendant. In accepting the offer, the plaintiff was at that time not in possession of the trucks which in any event remained unregistered. The acceptance must have been made with full appreciation that the motor vehicles remained unregistered and not instantly available for deployment.

69. the contract aving been so conceived and clinched, the plaintiff had the option to deploy its other motor vehicles to perform the contract. No evidence was led why the detention of the two motor vehicles and their subsequent attachment was the only reason for failure to perform the contract. I hold that this claim was not proved even on the materials pleaded and I decline to award it.

70. Furthermore, even if the contract had been tied to the two trucks the plaintiff had a duty to mitigate own losses by deploying alternative trucks at its disposal.

71. Lastly, there was also the claim for legal expenses and incidental charges pleaded in the specific sum of Kshs.500,000/= Although not much details and evidence was availed in the pleadings and at trial, the only legal expenses one can envisage in the facts disclosed are the legal expenses for prosecuting this suit beginning at the Chief Magistrates Court before it was transferred here.

72. Those expenses is what I consider costs of the suit. Costs are never awarded as expenses but taxed at the conclusion of the case. If however there were other legal and related expenses met, which are claimable as special damages then the plaintiff failed to avail proof of the same and the same must fail.

73. In the end the plaintiff gets judgment for general damages for detention, not punitive or aggravated, in the sum of Kshs.1,000,000/= plus costs and interests. The interest on damages will be calculated from the date of this judgement till payment in full.

Dated and delivered at Mombasa on this 24th day of January 2019.

P.J.O. OTIENO

JUDGE

[1] **Mukisa Biscuit** Manufacturing Co. Ltd vs West End Distributors Ltd (1969)

[2] Kenya Bus Services Limited & Another Vs. Minister Of Transport & 2 Others [2012] eKLR

[3] Section 177 and 208 (b) cap 472

[4] Dharamshi vs Learsan[1974] EA 41

