



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL SUIT NO. 193 OF 2012

KAAYA L. ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

1. COMMISSIONER OF CUSTOMS & EXCISE

2. KENYA PORTS AUTHORITY

3. EVERGREEN SHIPPING LINE

4. UNICOM LIMITED.....DEFENDANTS

J U D G M E N T

Introduction and Background of the dispute

1. The Plaintiff, a Ugandan registered company, pleads that it imported some goods it calls, ground engaging tools, through the Port Of Mombasa in some two containers pleaded as No. EMCU 3672428 and EGHU 3061846 and arrived in Mombasa during the month of December 2011 under bill of lading no. 1421 55275113.

2. Container No. EMCU 3672428 was sold by the 1st Defendant on account of failure to enter and clear the same in accordance with the applicable law as an abandoned cargo.

3. The sale was admittedly advertised in Kenya Gazette Notice dated 11/5/2012 as Lot No. 0392/12 and sale conducted on 26/6/2012 to the 4th Defendant at USD 4558 while its actual value was USD 40, 000. The plaintiff blames the sale upon various wrongs alleged to have been committed by the four defendants. The first defendant is alleged to have failed to comply with the law in advertising the goods for sale, the second Defendant is accused for having selectively and procedurally separated the two containers to justify the sale, the 3rd Defendant is accused of failure to update its system in time and to inform the Plaintiff about the arrival of the goods which led to high storage charges levied by the 2nd defendant while the 4th Defendant is alleged to have conspired with the others to buy the goods.

4. It is pleaded that the goods were intended to be supplied to the Uganda National Roads Authority who, on learning of the sale raised concerns with the Kenyan authorities because the sale led to a delay in its plans a fact that would affect the otherwise good and friendly relationship between the two members of the East African Community. The said goods were imported by the Plaintiff with the help of and finance from Kenyan Commercial Bank Uganda Ltd which was granted on the strength of the tender and surety of the Uganda National Roads Authority. The Plaintiff contends that the container was hurriedly and selectively sold as the two arrived together under one bill of lading yet one was cleared and safely delivered by the Plaintiff's agent MARUNI PRODUCTS CO. LTD.

5. It was then added that when the sale was discovered by the said agents of the Plaintiff, the 2nd Defendant denied liability and blamed it upon the 1st Defendant as the 2nd Defendant showed by way of a letter that the containers were within its yard. It is then pleaded that the 2nd Defendant granted to the Plaintiff 50% waiver on storage charges under bills of lading Nos. 14225672318 and 142153275113 and the two unsold containers were released from the port and transited to destination.

6. On account of the matters pleaded the Plaintiff claims to have suffered severe loss and damage and held the defendants jointly and severally liable. The Plaintiffs sought against the Defendants jointly and severally judgment for:-

a. A permanent injunction restraining the 4th Defendant by themselves, servants and/or agents or through any person

whomsoever authorized or acting on their behalf or behest from using, selling or wasting away the goods described as:-

i. Grader Blades Part No. 5D-9558

ii. Bolts Part No. 3F-5108 and

iii. Nut Part No. 4K-0367 and any other goods consisting and/or being shipment in container No. EMCU 3672428.

b. The immediate restitution of the goods specified in prayer (a) herein above and/or in the alternative the defendants jointly and or severally be ordered to purchase the goods as outlined in prayer (a) above from USG PRODUCTS (F.E) PTE LTD in SINGAPORE, CHINA and have the same delivered to the Plaintiff's final destination point i.e. KAMPALA, UGANDA

c. Special damages due as proved at the hearing hereof.

d. Costs and interests.

7. Together with the plaint the Plaintiff filed witness statements by **Deborah Kingongo** and **Edward Fredrick Walusimbi** as well as a list of documents dated 24/10/2018 and a supplementary list of documents dated 24/11/2013. Also filed simultaneously with the plaint was an application under Certificate of Urgency seeking to restrain sale and for restitution of the suit cargo to the Plaintiff which was heard before **Judge Nzioka** and a restraining order granted stopping the sale and release pending the hearing and determination of the suit with the Court urging the parties to prosecute the suit on priority basis. However, the prayer for release was not granted.

8. The Plaintiff at trial relied on the two witnesses and produced the documents filed as exhibits. The Defendants also filed their respective defenses as well as witness statements and lists documents.

9. In its Statements of Defence dated 8/4/2012, the 1st Defendant admitted the arrival of the suit consignment as pleaded by the Plaintiff, save that it gave the exact date of arrival as 7/12/2011 and were put under customs control under **Section 16 of East African Community Customs Management Act (herein referred to as EACCMA)** for which reason the Plaintiff, as consignee, was under a legal duty to enter and clear them within 21 days. The Defendant then contended that the plaintiff failed to discharge its obligation under the law wherefore on 27/4/2012, the 2nd Defendant transferred the goods in the suit container to the 1st Defendant customs warehouse in Kilindini for want of entry and with further failure to remove the same within the 30 days as prescribed by law, the 1st Defendant gazettes the goods in the **Kenya Gazette Notice No. 6230** of 7/5/2012 as Lot no. 0392/12 for public auction, held the same auction and sold on 26/6/2012 to the 4th Defendant at Kshs. 700,000/=.

10. On 12/6/2018, it is pleaded that, the 2nd Defendant again transferred the other container to the 1st Defendant's customs warehouse for want of entry. It was then pleaded that the 1st Defendant was at the verge of slotting the said container for auction and that is when it was informed that the goods belonged to Uganda National Roads Authority for which reason the 1st Defendant invoked its statutory power under Section 42(2) of the Act and extended the time for removal of the goods and indeed the goods were recovered on 24/8/2012.

11. The allegations that the good were sold at an undervalue was denied owing to the fact that the highest bid was accepted and the plaintiff had by own declaration placed a value of Kshs. 2, 861,668/= upon the good and not the claimed Kshs. 3,400,000/=. That the defence equally denied service of a demand and asserted that if any was ever served, it was not in accordance with **Section 3(2) 9 of Kenya Revenue Authority Act** for which it was pleaded and asserted that the entire suit is fatally defective and a right was reserved to seek that it be struck out. With that, the 1st Defendant filed a witness statement by one **AQUILINO MWITHALII** and a list of 8 documents. The documents included those evidencing transfer to the customs warehouse, the bill of lading in question, the reconciliation of un-entered goods and a letter of inquiry from the Uganda National Roads Authority, copies of the payment authorization form and Customs Transit Entry dated 24/8/2012. The 1st Defendants further filed a supplementary list of two witnesses by **John Kiunge Cherutich** and **Davis Kiprop** and a supplementary list of documents containing valuation of goods to be sold by public auction.

For the 2nd Defendant

12. Statement of Defence was filed which essentially denied all the allegation by the Plaintiff and stressed the fact that the entire port area is a customs area for which no goods ever leave without the sanction of the 1st Defendant and that it had no part to play and indeed played no part in the auction of the Plaintiff's goods. It was pleaded that by law it was obligated to transfer the cargo when it was never entered within the prescribed time and that by April, it was only able to trace one container which it transferred and that as at 18/7/2013, the information it gave was in accordance with its computer entries but was subject to physical confirmation.

13. However, the same defence admits that the Plaintiff did apply for waiver of storage charges for the two containers which was granted and paid the port charges for the two containers. The Defendant however denied any part played in the sale of the suit container together with the process of allotment for sale and ascertaining the purchase price. Equally, the 2nd Defendant reserved the right to raise an objection that the suit offended the Kenya Ports Authority Act with regard to issuance of notices before action and reserved to raise the same to have the suit struck out.

14. The 2nd Defendant's Statement of Defence was supported by two witness statements by **Rose Nyalwal** and **Dzila B. Mwadzela** and a list of some 16 documents, including the bill of lading for the goods, evidence of transfer, container discharge tally and correspondence between the different parties in this litigation. One of the letters exhibited is from the plaintiff and explaining the delay to enter the goods and requesting for waiver of storage charges, for two containers. There was a supplementary list of document being an update history for the

container no. EMCU 3672428.

15. For the 3rd Defendant, there was filed a document called Replying Statement on 20/11/2012 which was substituted with a Statement of Defence dated 5/6/2015 filed on 10/6/2015. In that document the 3rd Defendant admits having been the shipping line but states that it had appointed one **Gulf Badr Group (K) Ltd** as its local country agent for all intents in this suit. It asserted that it did ship the cargo and off loaded same to the custody of the 2nd defendant who took custody thereof, pending clearance by the plaintiff as consignee and that it did transmit an electronic manifest which was made accessible through the 1st defendant's Simba system to licensed persons only.

16. It was pleaded that the contract of carriage by sea was governed by the conditions contained at the back of the bill of lading which excluded any liability on its part including any alleged failure to notify any party to the bill of lading. However, it was added that out of benevolence and not legal duty, it still did send three notices to the Plaintiff by registered post and none of the letters was ever returned. On the sale, the 3rd Defendant contended that it only came to learn about it from correspondence by the Plaintiff and maintained that it had no part to play or control over the 1st Defendant in its exercise of statutory powers. That document annexed correspondence addressed to the Plaintiff together with certificates of posting the same.

17. A defence for the 4th Defendant was filed on the 28/10/2016 together with 3 witness statements by **RASHMINKUMAR RAPADIA**, its General Manager and **WISDOM KIBET** its legal officer and **JAMES NJUGUNA** the accountant. The same Defendant also filed a bundle of some eleven documents dated 15/7/2013 on the 23/7/2013.

18. The position the 4th Defendant takes in the Statement of Defence and documents as explained in the witness statements is that the 4th Defendant did see a public auction notice published in the Gazette Notice dated 11/5/2012 detailing goods to be sold by public auction as unclaimed goods on the 26/6/2017 and it became interested to buy the goods then within a customs warehouse.

19. Pursuant to that interest, the 4th Defendant attended the auction placed a bid for Kshs. 387, 500/= which was accepted as the highest bid and a sale was clinched upon which the said Defendant proceeded on the same day and paid for the goods to the 1st Defendant by depositing of the sum into a bank account operated by the 1st Defendant at National Bank of Kenya. The Defendant took the stand that having paid for the goods and acquired title in the course of its business, it sold the same to a third party prior to the institution of the suit hence had no knowledge of the claim by the plaintiff as would affect its title to the goods and that it did act on its own and not as an agent to any of the parties but was rather an innocent purchaser for value without notice. For those reasons, the 4th Defendant prayed that the Plaintiff's suit against it be dismissed with costs as there was no fraud or collusion it could be accused of.

Evidence led by parties

20. Pleadings having closed and the parties leaving settled on four (4) agreed issues for determination by the court, they sought to prove their respective cases by calling the witnesses who had filed statement, who then produced the documents filed. For the plaintiff two witnesses, **Debora Kigongo** and **Edward Walumbisi** gave evidence, for the 1st Defendant three witnesses were called **David Kimuage**, **Cherutich David Kiprop** and **Aquilino Mwithahi**; the 2nd Defendant called one witness **Dzila Bweni Mwadzila**. For the 3rd Defendant **DW 5 MUNIR ABUBAKAR MWASUDA** gave evidence while on behalf of the 4th Defendant was given by one **BASHMAN KUMAR RAPADIA**.

Summary of the plaintiff's case.

21. The sum total of evidence by PW 1 and PW 2 was that having been awarded a tender by the Ugandan Roads Authority, the Plaintiff ordered for road construction machinery parts from Singapore which goods were shipped by the 3rd Defendant and landed at the 2nd Defendants premises in containers. It was the Plaintiff position that two containers arrived at the same time and under one bill of lading but while at the warehouse of the 1st Defendant, the same were separated leading to difficulty in locating same at the same time hence one was traced and cleared.

22. **PW 1** said she received the bill of lading in Kampala on the 25/5/2012, came to Mombasa to the offices of the 3rd Defendant who told them that one container had been auctioned by the 1st Defendant. It was stated that the Plaintiff then lodge a complainant with the 2nd Defendants officer about the public auction without notice and that the liaison officer responded the same day denying having sold the container as it had no authority to sell and that only the 1st Defendant could sell but after due notice. The 2nd Defendant letter produced as EXP 8, Letter dated 18/7/2012 said their system showed the containers were still at the port but further advised that they contacted the 1st Defendant immediately to stop the process of auction for it appeared that the consignment have not been paid due for had been treated as unaccustomed goods. The two cleared and shipped to the desired destination as the plaintiff pursued the 3rd container.

23. In the course of that pursuant the Plaintiff obtained documents, EXHP 9, to show that the container was sent to customs warehouse on 4/6/2012. This did not reach Ugandan Roads Authority (UNRA) who then engaged the 1st Defendant by correspondent culminating in the said Authority sending its legal officer, PW 1 to Nairobi for a follow up. Further follow up revealed that there was a notice published on the 11/5/2012 in which the suit goods were set for sale as for no. 0392/12 with their container number and the consignees address as Kampala Uganda and duly identified as ground engaging tools. The Plaintiff pointed out that the gazette was a Kenyan gazette EXHP 13, and not the East African Community Gazette which did not circulate in Uganda hence he was unaware of the notice till given by the 1st defendant after the sale.

24. The Plaintiff then came to learn that at the auction, the goods were sold at a price of Kshs.387,500 and the sum paid to the 1st Defendants account, yet she had bought the goods at USD 40,000 EXHP 18 was produced to prove that.

25. To fund the import of the good, the Plaintiff said they obtained a credit facility and produced EXH. P19 for that purpose. Due to have the goods rehearsed in time, the bank recalled the loan and demanded immediate payment from the Plaintiff.
26. The upshot of the entire evidence blames each of the Defendants for various breaches;
27. The 1st Defendant is blamed for failure to issue a notice in the East African Community gazette and for valuing and selling the goods as metal bars when the same were specialized equipment properly identified in the goods title as ground engaging tools. The 1st Defendant is equally blamed for failure to notify the persons disclosed in the bill of lading as notified parties.
28. Against the 2nd Defendant the blame was based on the fact that the containers having been imported under one bill of lading ought to have been stored together but they were instead separated, this leading to one being treated as uncustomed and sold when the rest were awaiting clearance.
29. Against the 3rd Defendant the Plaintiff faults it for having failed to notify it of the arrival of the goods.
30. Against the 4th Defendant the blame is that it colluded with the 1st Defendant to buy the goods as metal bars when the same were generalized heavy machinery parts known as ground engaging tools.
31. When cross-examined by the four Defendants, the Plaintiffs witness maintained their position of having been wronged and occasioned to suffer damage and loss. The failure to give a valid notice was maintained against the 1st Defendant. **PW 1** however conceded that she was not aware when the goods arrived because the Plaintiff had not received the bill of lading. **PW 1** in fact said once it received the bill of lading and learnt of the requirements of a clearance agent, she appointed one who had the two containers cleared in July 2012. She equally made reference to **Section 34 of the East African Community Customs Management Act** which mandate that goods be entered within 21 days of arrival and that failure to enter the goods entitle an authorized officer to remove some to a customs warehouse and that in that event the owner must pay rent.
32. **PW 1** was equally referred to Section 41 of the same Act which provides that goods moved into a customs warehouse, must be cleared within 30 days on default of which the commissioner may advertise the same for sale in the gazette of the partner states or in a newspaper of wide circulation. It was conceded that the good were never cleared as the law demands and that there was indeed a letter from **Gulf Rader** dated 13/2/2012 which advised that the bill of lading for the container had arrived and having not been entered, the goods risked being transferred to the neglected yard and later auctioned. There was a reminder dated 8/3/2012 but maintained that even with its own default, the 1st Defendant was wrong to have issued the notice on the Kenyan gazette. Lastly the witness made reference to **Section 42 EACCMA** which gives the commissioner powers to extend time for declaration of goods imported by government agencies.
33. When cross-examined by the 2nd Defendant, the witness confirmed that the documents on record reveal the goods arrived on 7/12/2013 and that the documents were delayed due to the Plaintiff banks failure to transfer the letter of credit in time to the supplier/manufacturer. When shown the 2nd Defendant's document, PW 1 noted that one container was transferred to a customs warehouse but without the seal and that exhibit P13, described the goods to the Plaintiff's satisfaction.
34. On cross examination by the 3rd Defendants, PW 1 admitted lack of knowledge on the terms of engagement between the Plaintiff and 3rd Defendant but when referred to clause 25(4) in the bill of lading she confirmed there being a term that the shipper's liability ceases upon discharge of the goods at the port of delivery. The witness however insisted that the 3rd Defendant was to blame for failure to notify the Plaintiff of the arrival of the goods. For the 4th Defendant PW 1 was cross-examined and the evidence obtained was that the said Defendant became known to the Plaintiff after the auction and that the Plaintiff was never party to the auction in which the goods were sold.
35. During re-examination, the witness sought to clarify the Plaintiff's claim to have been that the 3rd Defendant was sued as the carrier and that the 1st Defendant was blamed for having advertised ground engaging tools for sale but came up with a valuation describing the goods as metal bars. Against the 3rd Defendant it was said that being the transporter of the goods and appointed agent, the agent failed to do its work, the need to inform the Plaintiff about the arrival of the goods.
36. On the letters alleged to have been sent by **Gulf Badar** to the plaintiff by registered post, the witness said the same were never received. The evidence of PW 2 must have been intended to confirm that the goods were imported by the plaintiff for ultimate supply and delivery to UNRA and that from the contracts whose documents were produced only part was delivered and that such part delivery did not meet their purpose. He also confirmed having communicated with KRA on the sale of the goods (EXH P11) but had not received any response by the time he gave evidence. He even made a visit to the 1st Defendant's support services department and spoke to **Mr. Yego** who was at the time on his way out for a trip to Tanzania but requested that the witness goes back to Uganda and sends all the documents to enable him do a response.
37. An email was done to **Mr. Yego**, who acknowledged it but never gave a substantive response or explanation. On cross examination by the 2nd Defendant, the witness admitted that Uganda and Kenya were bound by the provisions of the **EACCMA** which mandated that goods be entered within 21 days or within such time allowed by an authorized officer. He was however unaware if the goods were made subject to Section 34 of the Act. Not much emerged from cross examination by the 1st, 3rd and 4th Defendants.

Evidence by the 1st defendant

38. Three witness gave evidence to counter the blame upon the 1st Defendant to have sold the goods unlawfully and efforts were made to shun that the auction was in compliance with **Section 34 & 42 of EACCMA** as all the notices were issued. DW 1, **John Kimuge** was an

officer in charge of **Kilindini Warehouse** whose duty involved reconciliation of manifest to deal with un-entered cargo and related work. He referred to the manifest appurtenant to this dispute and said it disclosed all the relevant details including the description of the goods, consignee and number of packages. He said that the suit container having not been entered it was captured in a reconciliation report as No. 83 and a related one as No. 82. He said that the manifest was registered in November even though the ship docked in December. He produced the reconciliation as EXH D 2 upon which he said the 2nd Defendant began the process of transfer. As evidence of transfer to customs warehouse the 2nd Defendant prepared a document headed **KPA GOODS SENT TO CUSTOMS WAREHOUSE** which gave details of the suit container to match with those in the manifest.

39. Upon transfer the goods were lotted for purposes of identification and the suit container given Lot No. 0392/12. After the lotting, the 1st Defendant is said to have complied with Section 42 **EACCMA** giving a period of 30 days to remove the goods before the same were gazetted on 11/5/2012. To him the gazette notice gave the accurate description of the goods marching the other documents and thereafter an auction was arranged and sale effected. Before the auction however a valuation is done by an officer from the Commissioner Officer Nairobi, which valuation report is not issued beforehand but minutes to the auction to avoid collusion. For the valuation to be done the container was opened to confirm true description of the goods.

40. The witness produced the pay slips EXH 6(1) & (2) over the same lot and gave evidence that the goods were sold at Kshs.700, 000/= and a valuation report as EXH P7. To the witness the second container was also transferred to customs warehouse on 12/7/2012 but the owners followed and had the same entered.

41. On cross-examination by the Plaintiff the witness said that the container was transferred to the warehouse without seals but that upon inspection a seal was placed. He said that the 1st Defendant would write to the 2nd Defendant to transfer the un-entered cargo but to this matter there was no such letter he had in Court. He then conceded that there was a difference in the description assigned to the goods in the Gazette Notice and other documents from that in the valuation report.

42. When cross-examined by the 3rd Defendant, the witness said that the notified parties were all disclosed in the manifest and therefore, the 1st Defendant was aware about their identities. Cross examination by the 2nd and 4th defendant did not yield much save that the witness confirmed to the 4th Defendant that having been privy to the auction, the law was fully complied with.

43. On re-examination, the witness said the law only allowed the 1st Defendant to give goods to the consignee or its agent or another having a disposition over the goods.

44. On the shipper seal not being there, two witnesses said that was the shipper's obligation and KPA not the 1st Defendant. He then reiterated that the law under **Section 42 (1) EACCMA** demanded that a notice circulation in the partner state.

45. When asked questions by the Court the witness said all copies of the manifest hard and soft, must be the same and that a hard copy is given to KRA just in case the Simba System fails and that the manifest reveals all the critical particulars of the good.

46. On the disclosure of a notified party in the manifest, the witness said that he did not know the purpose. He then conceded that had the 1st defendant known the interest of Ugandan Government Agency in the goods, they would have been treated differently. The second witness for the 1st Defendant was called as DW 3 having been away from Court on the previous day. He was the valuer who inspected the goods and prepared a valuation report. He relied on his witness statement dated 5/11/2014 and said that he came into contact with the goods after the same had been gazette for sale. He said that before valuation, he carried out a physical examination of the cargo. He said that for verification and valuation the container was opened but it only had customs seal and not shipper seal. He said he fixed the price based on physical examination because the goods had no transaction documents having not been entered. He said that he relied on Section 122 and 4th schedule of the **EACCMA** and that he relied on deductive method by which he got the value of similar items in the market and used such valued for his valuation. Using that method the witness said he arrived at a value of 500,000 whose 90% was 450,000/=. He then confirmed knowledge that the good fetched more than the values assigned.

47. On cross-examination by the Plaintiffs' Counsel he admitted that his description of the goods in the report did not match that in the gazette notice. He however said he valued the goods as a lot, did not remember the ship he visited to get the comparable prices and did not know that the items were 440 pieces.

48. On cross-examination by the said 3rd & 4th Defendants, the witness said the 2nd Defendant had no role in the valuation and sale of the goods. He further said that the verification does not take regard if a lot of goods cannot be used without the other lot. That the shipper was not present and lastly that the sale to 4th Defendant was pursuant to due process having been followed.

49. On re-examination, the witness observed that the container was not full as is normal but not a must. He however was unable to confirm if the goods sold to the 4th Defendant are the same he valued. And when asked by the Court, he said the purpose of valuation is to get a fair value but that ideal situation is to value per item.

50. For the 2nd Defendants, one **Dzolla Bweni Muadzila**, the senior operations officer, whose duty is the supervision of documents processing gave evidence. He said that documents are received on line and then reconciled with the **BAY PLAN** from the Shipping Line which was the details of the goods.

51. For goods not entered within 21 days, the witness said the document called "**goods sent to customs warehouse**" is prepared, the cargo loaded and taken to the customs warehouse where it is jointly inspected by 1st and 2nd defendant jointly to confirm that the goods inside the container match those in the manifest.

52. In relation to the suit cargo, a manifest was recalled from KRA on 29/11/2011 which was reconciled on 3/12/2011 while the goods were discharged on 11/12/2011 and were moved to the customs warehouse on 25/4/2012 and handed over to KRA on 27/4/2012. He confirmed that Exh. D3 reveal the container was received without seal and contended that an explanation could only come from KRA because KRA does not accept containers without seals. Upon hand over, the witness said the container gets into the hands and control of the 1st Defendant who places its security seal and that the 2nd Defendant ceases any relationship with the container and that the EXH P8 was the result of failure so execute an administrative action by KPA.

53. On cross-examination by the Plaintiff, the witness said that the manifest is approved by KRA and that exhibit P10 only shows the container movement and not the content. He said that the 2nd Defendant cannot accept container without the seal of the shipping line and that to transfer to customs warehouse the 2nd Defendant uses information in the manifest. He also said the document produced as EXH P8 said the container was still in the 2nd Defendant's yard when it had in fact been moved.

54. When cross-examined by the 1st Defendant the witness said the containers were transferred having over stayed from more than 21 days and that the two containers were in fact captured in this reconciliation and that the inspection and confirmation was done jointly between KPA and KRA. In answering questions by the 3rd Defendant the witness said actual date of transfer was 25/4/2012 and that he could not say when the shipper seal was broken. On re-examination, the witness said KPA was within mandate to transfer cargo.

55. DW 4, an in house-lawyer with the 1st Defendant gave evidence as being conversant with the provisions of **EACCMA** and whose duty was advice the 1st Defendant of customs on legal and technical matters including when to advise goods for auction. He reiterated the need for goods to be entered within 21 days and the appurtenant consequences in case of default and that the notices must be in the gazette of the partner states or a newspaper of wide circulation in such state. He confirmed having received a list of goods for auction and prepared the gazette notice published on the 4/5/2012 which identified goods as Lot No. 0392/12 and the description was ground engaging tools imported by the Plaintiff with a Ugandan postal address. He said no claim on the goods was made after gazette. He said the East Africa Gazette is only used where there is remission of duty and done by the Chairman of Council of Masters. He on cross-examination by Plaintiff, denied knowledge if Kenya Gazette circulates in Uganda.

56. According to him the phrase partner state refer to the state where the Commissioner is giving the notice. On behalf of the 3rd Defendant **MUNIR ABABAKAR MASUUD**, an employee of **Gulf Badr Ltd**, an agent of the 3rd Defendant gave evidence based on the witness statement dated 10/6/2015 which he adopted as his evidence in chief. He referred to the bill of lading No. 142153275113 which he said to have been the contract between the Plaintiff and the 3rd Defendant. He said that the cargo landed safely upon which the 3rd Defendant's objection over the cargo ended as was provided on the terms at the back in particular clause 25 thereof which ousts any obligation to notify any party.

57. He however said the shipping line has the obligation to inform the owner of the goods on the date of arrival but in this case out of benevolence and not obligation they wrote three letters dated 13/2/2012, 3/3/2012 and 4/4/2012 which he said were sent by registered post and then produced the letters and the certificate of posting as EXHDII and EXHD12.

58. He said they could not seek to clear the cargo because there was no authority added to the fact that they are not licensed as clearing agents. He said sometimes in July 2012 the consignee came to their offices to follow up on the cargo with the original documents upon which they computed the local charge payable and issued a release order in both hard and soft copies to enable them pursue the release of the goods.

59. He denied that their system failed but clarified that there was a bill of Lading which had two containers and processing the Delivery Order became difficult owing to the fact that one of the containers had been sold for which reason the delivery order could not march with KPA's within 24 hours forcing them to deliver a hard copy which then worked.

60. On cross-examination and being referred to his witness statement, he confirmed having said that KRA did not comply with **Section 42 EACCMA**. He also confirmed that there was a second anomaly that the container was transferred to the customs warehouse without the shipping line seal. He also said the reserve price was not correctly computed. To him the 3rd Defendant did not learn of the auction sale till **MARUNI PRODUCTS COMPANY** visited them with the news. He also said that they received container deposit from the plaintiff on 29/6/2012 when the cargo had been sold.

61. When cross-examined by the Plaintiff the witness said their duty as a shipping line agent is to liaise with both 1st and 2nd Defendant's and to direct KPA to release cargo to the owner. He was referred to **Section 26 EACCMA** which he confirmed provided that the law deemed cargo in the customs shed as being in the importing vessel and remain in the control of the shipping line as if the same had not been discharged. He then repeated the requirement of the law on entering the goods and the fact that an original bill of lading is mandatory to enter and that in default to enter, KRA is by law mandated to notify the importer to remove the goods or the same be sold by public auction but blamed the 1st Defendant for failure to comply with the law in that it did not give the notice in the East African Gazette and that publication in the Kenya Gazette did not suffice.

62. On cross-examination by the 2nd Defendant, the witness repeated that customs officer would not accept cargo without a seal and that there was no obligation on any of the Defendants to notify the Plaintiff on the arrival of the cargo. When the witness re-examined reiterated his position that they opted to notify the consignee only.

63. When asked questions by the Court, the witness said that KPA would not receive a container without a shipping lines seal unless an inspection is carried out and the container is resealed.

64. For the 4th Defendant one **BASHMINKUMAR RAPADIA** who adopted his witness statement dated 28/10/2016 which he adopted as

his evidence in chief and produced the list of documents as exhibits. The essence and totality of the evidence and exhibits produced is the assertion and averment that the Defendant responded to an advert for public auction, attended the auction and emerged the highest bidder from the goods then paid the purchase price, took possession and title and subsequently sold the same to a third party who is not party to these proceedings. It is then contended that it was an innocent purchaser without notice of the dispute of the goods and that being sold the same and parted with possession the injunction for return of the goods are not available as against it.

65. On cross examination by the Plaintiff the witness said that he attended the auction with his technical man who explain to him the difference between metal bars and ground engaging tools and that he attended the auction without the information in the valuation report regarding the reserve price thus offering Kshs 750, 000/= for the goods with the sole purpose to resell. He said that by the time of giving evidence he had sold the ground engaging tools but not the nuts.

66. On cross- examination by the 2nd Defendant, the witness said that he learnt of the goods through the advertised public notice and got the award on account of being the highest bidder. To him the 2nd defendant had not put to play at the auction and that the only payment made to the 2nd Defendant were port handling charges.

67. When cross-examined by the 3rd Defendant, the witness admitted being a regular bidder at the port and that the 4th defendant engages in the trade of general items. He said that when he viewed the goods they were parked in packages inside a container and only verified the same after the purchase and had not engaged with the shipping line at all. In re-examination the witness denied having received any complaint over the goods from the Plaintiff prior to the sale, which he never spoke to any of the Defendants beforehand and that by the time he sold the goods he had not learnt of the Plaintiff's complaint in the suit.

68. With the seven witnesses having given evidence the cases were closed and parties then filed written submissions as follows:-

- a. By the plaintiff are dated 14/6/2016 and filed the same day.
- b. By the 1st defendant dated 23/6/2017 and filed on 28/6/2017.
- c. By 2nd defendant dated 8/7/2016 and filed on 13/7/2016.
- d. By 3rd defendant dated 28/6/2016 and filed on 30/6/2016.
- e. By the 4th defendant dated 26/6/2017 and filed 28/6/2017.

69. This matter has indeed had a chequered career it was substantially heard by our **Sister Kasango J**, who took the entire Plaintiff case and had finished with DW 2 when the issue of the competence of one **Mr. MASUUD MUNIR** to act for the 3rd Defendant arose and all documents filed by the said person were ordered struck out. That led to an order on the 12/5/2015 that the matter starts *denovo*. That development led to this Court starting all over again and it would appear that owing to the developments parties did not agree on the issues for determination which then leaves it to the Court to isolate such issues.

70. Having read the pleading, filed and evidence led, and the fact that the importation and discharge of the goods at the 2nd defendants premises is not in dispute, the fact that the goods were not entered in time hence were sent or moved to customs warehouse is equally admitted or just common ground, the only issues that I think call for Court's determination are the following.

- i. The goods having been removed to the customs warehouse and having not been claimed or dealt with by the owner as the law demands, did the 1st defendant disposed the same in compliance with the law?**
- ii. If the above is answered in the negative, was the subsequent sale lawful.**
- iii. The goods having been transferred to the customs warehouse did the 2nd defendant return any control over them?**
- iv. Upon discharge of the goods with the 2nd defendant did the 3rd defendant retain any obligations over the goods towards the plaintiff?**
- v. Did the 4th defendant purchase the goods as a *bonafide* purchaser without notice or the sale was vitiated by collusion or fraud?**
- vi. Is the plaintiff entitled to the reliefs sought or any of them?**
- vii. What orders should be made as to costs.**

Did the 1st defendant comply with the law in conducting the auction of 25/6/2012?

71. Even though the voluminous evidence and submissions have been offered to Court in this matter, the process leading to the auction and

subsequent sale is essentially the fulcrum upon which this decision must turn. It is common ground and indubitable that the 1st Defendant can only exercise the power of sale of un-entered or unclaimed goods pursuant to the provisions of the law. That power is given to it under the revenue statutes and in particular the **EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT**. All parties agree that the applicable provision in Sections 34 & 42 of the Act. That Section provides:-

(1) Save as otherwise provided in the Customs laws, the whole of the cargo of an aircraft, vehicle or vessel which is unloaded or to be unloaded shall be entered by the owner within twenty one days after the commencement of discharge or in the case of vehicles on arrival or such further period as may be allowed by the proper officer, either for— (a) home consumption; (b) warehousing; (c) transshipment; (d) transit; or (e) export processing zones.

(2) Where any entry is delivered to the proper officer, the owner shall furnish with the entry full particulars supported by documentary evidence of the goods referred to in the entry.

(3) Entries for goods to be unloaded may be delivered to the proper officer for checking before the arrival at the port of discharge of the aircraft or vessel in which such goods are imported; and in such case the Commissioner may in his or her discretion permit any goods to be entered before the arrival of such aircraft or vessel or vehicle. (4) Where any goods remain un-entered within the period specified under subsection (1) then such goods shall, if the proper officer so requires, be removed by, or at the expense of, the agent of the aircraft or vessel in which such goods were imported to a Customs warehouse.

Section 42 provides:-

42. (1) Where any goods which have been deposited in a Customs warehouse are not lawfully removed within thirty days after deposit, then the Commissioner shall give notice by publication in the Gazette that unless such goods are removed within thirty days from the date of notice they shall be deemed to have been abandoned to Customs for sale by public auction and may be sold in such manner as the Commissioner may deem fit: Provided that any such goods which are of a perishable nature, or are animals, may be sold by the proper officer without notice, either by public auction or by private treaty, at any time after deposit in the Customs warehouse. (2) Notwithstanding subsection (1) the Commissioner may extend the period for the removal of goods imported by the Partner States' Governments, or diplomatic mission or aid agencies.

(3) Where any goods have been deposited in a Customs warehouse then they shall be subject to such rent and earlier charges as may be prescribed. (4) Where any goods are sold under this section, then the proceeds thereof shall be applied in the order set out below in the discharge of— (a) the duties, if any; (b) the expenses of removal and sale; (c) the rent and charges due to the Customs; (d) the port charges; and (e) the freight and any other charges. (5) Where, after the proceeds of any such sale have been applied in accordance with subsection (3), there is any balance, then such balance shall— (a) if the goods were prohibited goods, or restricted goods in relation to which there had been any contravention or where no application for such balance is made as provided in paragraph (b) be paid into the Customs revenue; (b) in any other case be paid to the owner of the goods if he or she makes application for the payment within one year of the date of the sale.

(6) Where any goods are offered for sale in accordance with this section and cannot be sold for a sum to pay all duties, expenses, rent, freight, and other charges, they may be destroyed or disposed of in such manner as the Commissioner may direct.

(7) Subject to any other written law restricted or prohibited goods maybe disposed of in the manner the Commissioner may deem fit. (8) Any officer having the custody of any goods in a Customs warehouse, or place of deposit deemed to be a Customs warehouse, may refuse delivery therefrom until he or she is satisfied that all duties, expenses, rent, freight and other charges due in respect of such goods have been paid.

72. I have said that the fact of failure to enter the goods is not under challenge. It does not change that the Plaintiff contention that there was non-delivery. I do not find any evidence of non-delivery because if that was the Plaintiff's case, there would not have been a claim against the 1st, 2nd and 4th Defendant. The Plaintiffs claim should have been limited to the 3rd Defendant as the party with which it had privity for the shipment and delivery to the agreed part of discharge.

73. I will thus find that indeed the goods were delivered because one of the Plaintiff's ground of attack upon the 3rd Defendant is that it failed to notify it of the arrival of the goods in Mombasa. That blame to this Court should not have arisen if there had been failure to deliver. In any event, there is evidence that the plaintiff was indeed notified of the arrival of the goods by three letter which were evidently served by registered post and no evidence was led on non-delivery. The law in this county has been settled that where a notice is asserted to have been sent by registered post with evidence of certificate of posting, the evidentiary burden of non-delivery shifts to the person so challenging^[1].

74. Here I do find that the notification by the 3rd Defendant that the goods had arrived and risked auction if not entered was duly given and the 3rd Defendant cannot be faulted for that reason.

75. Now on whether the auction and the process leading thereto was validly and lawfully conducted, the determination would rest with what the Court takes of the phrase **"the commissioner shall give notice by publication in the gazettes of the partner states or newspaper of wide publication in the partner states that unless such goods are removed within thirty days... they shall be deemed to have abandoned..."**.

76. While the Plaintiff contends that the phrase can only mean a gazette of the partner state the recipient of the notice is expected to receive the notice, the 1st defendant contended that the gazette must be the gazette in the partner state issuing the notice as the agency empower to administer and enforce the Act in the partner state.

77. To this Court the interpretation to be given to the provision must be purposive one. It must ask the question why the need to publish the notice demanding removal of the goods. To the Court the answer is to be found within the provision. It is so that the owner of the goods may remove them lest they be deemed abandoned and thus subject to sale by public auction. Accordingly I take the view and make a finding, that the amendment effected in 2011 by replacing the word *gazette* with the words **gazettes of the partner state or newspaper of wide circulation**, was to clarify and achieve the purpose of the notice. Let it reach the owner of the goods if it be known not to be in the partner state where the goods are kept in customs warehouse. If that was the intention then a publication in the *gazette* circulating not where the owner of the cargo resides, falls short of the intention of parliament and cannot be seen to have served the purpose. The question of efficacy of the notice published in the Kenya Gazette was put to the three witnesses by the 1st defendant and all confirmed that the *gazette* does not circulate in Uganda. That to this court is a tacit admission that the plaintiff could not have been expected to receive the notice.

78. Accordingly I do find that the notice issued by the 1st Defendant and published in the Kenya Gazette of 11/5/2012 was not the legal notice expected under the Act. Accordingly any sale conducted therewith was conducted by denial to the Plaintiff of the right the law accorded to it and cannot be said to have been a valid sale. I do therefore find that the sale by public auction conducted on the 25/6/2012 was not validly conducted and that having been so invalid it did occasion to the Plaintiff an illegitimate and unlawful deprivation of property from which the Plaintiff is entitled to be compensated.

79. Before I delve into the manner and extent of compensation, there are issues for determination of the extent of participation of the other defendants 2nd, 3rd & 4th in the now invalidated sale.

80. The net effect of the evidence led and in terms of the law under both **Kenya Ports Authority Act** and **East African Community Customs Management Act** and the contract of carriage between the plaintiff and the 3rd Defendant, I do find that once the goods were removed into the customs warehouse pursuant to **Section 34 EACCMA**, the 2nd Defendant ceased any control over the goods which was then by operation of the law ceded to the 1st Defendant for purposes of collection of taxes and duties but otherwise the goods are by that act of movement deemed delivered to the consignee[2] only subject to the payment of duties to the satisfaction of an officer having the custody of the goods. I do find that the 2nd Defendant had no part to play in the sale and therefore no wrong has been proved against it.

81. For the 3rd Defendant, it is the law that in a carriage by sea contracts, the bill of lading is the contract imposing duties and obligations between the carrier, shipper and consignee. That being the case that contract must be observed by the Court and given effect since the Court must respect parties' covenants. I have read the two bills of lading and the terms of engagement at the reverse and I do find that the obligation of the parties stood discharged and satisfied upon the offloading and discharge of the cargo at the port of Mombasa. That being the case and **Section 26 of the EACCMA**, the 3rd Defendant's obligation under the contract stood satisfied upon safe landing of the goods. I do say so because I consider the provisions of **Section 26 EACCMA** to deem the goods in the hands of the carrier for purposes of accountability of the whereabouts of the goods to facilitate collection of taxes and any duties to the carrier.

82. Back to the sale by public auction and the title to the 4th Defendant, it is noteworthy that the plaintiff claim against that 4th Defendant was that it did purchase the goods out of collusion with the other defendants. Collusion to this Court in order to deprive one of property is a serious allegation that cannot be just thrown at the Court without proof.

83. I do find that when a citizen of Kenya or indeed any other person sees an advert in the official Kenyan Gazette, not any other publication by private individual propelled with profit making at the forefront, one takes such publication without a second thought that the official government printer can be put in a scheme to commit any impropriety. In fact the Evidence Act deems any publication in the Gazette to be legitimate. For the reasons I do believe the 4th Defendant when it asserted, without rebuttal or challenge by befitting evidence. That the *gazette* was its only source of information and basis of interest in the intended public auction.

Section 85 and 86 of the Evidence Act which provides as follows.

85. The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.

Gazettes, newspapers and documents produced from proper custody

The court shall presume the genuineness of every document purporting to be—

86(1) (a) the London Gazette, the Edinburgh Gazette, or the official Gazette of any country in the Commonwealth;

(b) a newspaper or journal;

(c)

84. Accordingly, while I do find that there was no valid sale by the 1st Defendant, I find that the 4th Defendant was a *bonafide* and innocent purchaser for value without any notice as to any challenge on the right of the 1st Defendant to conduct the sale. Being such innocent purchase for value, it did acquire good title which cannot be invalidated slightly.[3]

85. The second reason, I find that the 4th Defendants title cannot be invalidated is the fact that evidence was led to the effect that the goods were bought by the 4th Defendant for purposes of resale and were indeed sold before the suit was heard by the Court to a third party. That

third party was never joined to these proceedings and to invalidate the 4th Defendant's title would be to invalidate the third party's title to the goods before the said third party is heard. That would run affront the principles of natural justice.

86. The third reason I do not consider it practical and efficacious to invalidate the 4th Defendant title to the goods is that being spare parts, if they were sold to a person who employed them to engage the grounds, as it was suggest, then they may not be the same tools for the purposes of restitution.

87. These foregoing determination lead me to find that the plaintiff's claim against the 2nd, 3rd and 4th Defendants cannot succeed but ought to be dismissed. That leaves the claim against the 1st Defendant which I have adjudged to be merited.

88. Having so found, what remedy does the Plaintiff deserve? This question must be looked at from the prism of the Plaintiffs claim and prayers made.

89. From the prayers sought I am in no doubt that I having upheld the 4th Defendant's title the Court cannot grant an injunction in terms of prayer (a) cannot issue.

90. I also take the view and form the opinion that even though the Plaintiff having sought the remedy of special damages, the intention to amend the Plaintiff and plead special damages in the sum of Kshs 19, 477,538 seem to have been aborted because the Notice of Motion dated 13/01/2015 and filed on the same has never prosecution nor withdrawn. I deem it abandoned.

91. The law remains that special damages must not only be specifically pleaded but must be equally strict proved. Here there was no specific pleading leave alone strict proof of any special damages. That leaves the Court with the prayer (b) which seeks restitution.

92. The evidence on the lost cargo that I find credible is that the goods loaded in container no **EMCU3672428** were all lost. The value of that cargo was proved to have been USD 40,000 in terms of exhibits P17 & P18. In coming to this conclusion, i have taken regard that the Plaintiff prays for *restitution in intergrum* whose purpose as a remedy is to place the Plaintiff as near as possible in the same position he would have been had there been no breach. The ideal position would have been for the Plaintiff to avail a packing list the goods lost together with a document from the **UNRA** to show how much they would have paid to the Plaintiff for the lost goods that however was not done in this case. That notwithstanding, I have found that the Plaintiff is entitled to restitution and instead of the delivery of the same description of the goods as sought by the Plaintiff to be sourced from outside Kenya, the Court having been told what it cost the Plaintiff to buy the goods settled for that value.

93. In coming to this determination I have sought the guidance from the decision by the Court of Appeal of Kenya in **Kenya Industrial Estates Limited v Lee Enterprises Limited**^[4] where the Court said... *Where, however, the goods are destroyed, the owner is entitled to **restitutio in integrum** and the normal measure of damages is the cost of replacement of the goods, that is, the market value at the time and place of destruction. The law is succinctly stated in paragraph 862, of **Halsbury's Laws of England 4th Edition. Re-issue Vol. 12 (1)** at page 327, thus:*

“The basic rule in case of damage to chattle is the cost of repair, but if it is unreasonable from a business point of view to repair the article or if the article is damaged beyond repair, then the basic measure is the cost of replacement in an available market. If there is no available market and it is reasonable to take steps to have a substitute made the cost of the substitute may provide the measure of damages; if there is no market and the making of a substitute is unreasonable, it would seem that the measure of damages is the value to the plaintiff at the time of loss”.

And further on ...

“If an article is repaired, but its value is still less than its pre-accident value, the difference may be recovered. No deduction may be made from damages if there is necessary betterment due to repair”

Those general principles of restitution would however be inappropriate if they produced an absurd result and the correct measure of damages will largely depend on the facts of each case. (**Bacon v. Cooper (Metals) Ltd.** [1982] 1 All ER 397.

94. The upshot is that I do enter judgment for the Plaintiff against the 1st Defendant in the sum of USD 40,000 with interest thereon from August 2012, being the date the Plaintiff was ready to take possession of the goods, till payment in full.

95. On costs the Plaintiff gets the costs of the suit against the 1st Defendant but having failed as against the said 2nd and 3rd Defendants for reasons that an analysis of the law would have advised against suing those defendant, the Plaintiff shall pay costs to those Defendants.

96. For the 4th Defendant however, I do note that even though he did contend and prove having brought at a public auction, the law on sale by public auction is that payment of at least 25% is made at the fall of the hammer. In this case however, even though PW 7 said that he made payment on the same day, 25/6/2012, the evidence of payment tendered 1st Defendant's Exhibit 6(1) show that payment authorization was made on 27/6/2012 and yet Plaintiff Exhibit 17 show the deposit was made on 26/6/2012.

97. For those anomalies and even though I have found the 4th Defendant to have been a purchaser for value without notice, I do find that the 4th Defendant bears own costs.

Dated and delivered at Mombasa on this 29th day of May 2019.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Daniel Murrithi vs Boniface Juma Mbata [2014] eKLR

[\[2\]](#) Francis Muriithi vs Patrick Kiarie Kagwanja & 3 Others [2005] eKLR

[\[3\]](#)

[\[4\]](#) [2009] eKLR